INTERNET JURISDICTION and Choice of Law

Legal Practices in the EU, US and China

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The adoption of electronic commercial transactions has facilitated cross-border trade and business, but the complexity of determining the place of business and other connecting factors in cyberspace has challenged existing private international law. This comparison of the rules of Internet jurisdiction and choice of law as well as online dispute resolution (ODR) covers both B2B and B2C contracts in the EU, US and China. It highlights the achievements of the Brussels I and Rome I Regulation in the EU, evaluates the merits of the Hague Convention on Choice of Court Agreements at the international level and gives an insight into the current developments in CIDIP. The in-depth research allows for solutions to be proposed relating to the problems of legal uncertainty of Internet conflict of law and the validity and enforceability of ODR agreements and decisions.

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521199339

First published in print format 2010

ISBN-13 978-0-521-19933-9 Hardback

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PREFACE

Information technology generates cross-border electronic commercial transactions as geographical distance no longer remains an obstacle in communications among businesses and individuals in different countries. As a consequence, the place of business could be located in cyberspace. The concept of "the place of business" in cyberspace challenges the traditional regime of private international law, as traditionally it relies on physical factors such as the location of offices and the place of delivery of goods in determining which court will hear the case and which law will govern the dispute.

Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China takes a "solutions to obstacles" approach, examines the existing jurisdiction and choice of law rules and proposes the interpretation of those rules to the digital age. It discusses the need for the modernisation and harmonisation of private international law, compares current legislative frameworks in the EU, US and China, and suggests a series of ways to remove the obstacles to the determination of Internet jurisdiction and choice of law for cross-border electronic B2B and B2C contracts. In addition, it encourages countries to sign and ratify the Hague Convention on Choice of Court Agreements and to modernise their laws for adaptation to the information society in line with the international standard. Finally, it also recommends that online dispute resolution (ODR) should be one of the most efficient methods to resolve certain Internet-related cases and that its legal certainty should be enhanced at the international level.

ABBREVIATIONS

AAA	American Arbitration Association
ABA	American Bar Association
ACPA	Anticybersquatting Consumer Protection Act (US)
ADNDRC	Asian Domain Name Dispute Resolution Centre
ADR	Alternative Dispute Resolution
AFA	Arbitration Fairness Act (US)
B2B	business-to-business
B2C	business-to-consumer
CIDIP	Inter-American Specialized Conference on Private International Law
CIETAC	China International Economic and Trade Arbitration Commission
CIF	Cost-Insurance-Freight
CNNIC	China Internet Network Information Center
CISG	United Nations Convention on Contracts for the International Sale of Goods
CLC	Contract Law of the People's Republic of China
EAA	Arbitration Act (UK)
EC	European Community
ECJ	European Court of Justice
E-SIGN	Electronic Signatures in Global and National Commerce Act (US)
EU	European Union
EuroISPA	European Internet Services Providers Association
FAA	Federal Arbitration Act (US)
FOB	Free-on-Board
HKIAC	Hong Kong International Arbitration Centre
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
IP	Intellectual property
IT	Information Technology
OAS	Organization of American States
ODR	Online dispute resolution
OECD	Organisation for Economic Co-operation and Development
PRC	People's Republic of China

SLA	Secretariat for Legal Affairs
SMEs	small and medium-sized enterprises
UCC	Uniform Commercial Code
UCITA	Uniform Computer Information Transactions Act (US)
UDRP	Uniform Domain Name Dispute Resolution Policy
UFMJRA	Uniform Foreign Money Judgments Recognition Act (US)
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
US	United States of America
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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PART I

Introduction

1

Introduction

1.1 What are electronic commercial transactions?

The combination of Internet services, webpage designs and computing devices has generated a new generation of commerce: electronic commerce. It is reflected in any form of business transactions in which the parties interact electronically rather than by physical exchanges. It can be carried out by an electronic ordering of tangible goods that are delivered physically using traditional channels such as postal services or commercial couriers. Alternatively, it can be completed directly online by electronic ordering, payment and delivery of intangible goods and services such as computer software, entertainment content, or information services.[1] Electronic commercial transactions are one of the main components of electronic commerce which are conducted by private individuals and commercial entities without country boundaries.

1.1.1 Concepts and features

The concept of electronic commercial transactions is formed mainly of three components: electronic means, commerce and transactions. Electronic means is the method and channel of selling and buying. Commerce is the core nature and content of the activities. Transaction is the purpose and outcome of the activities or performance.

The establishment of an electronic commercial transaction presupposes the existence of a business transaction but creates a more efficient business environment through the use of electronic means.

There are two main types of electronic commercial transactions: business-to-business (B2B) and business-to-consumer (B2C). B2B describes trade between different businesses or entities. It can be completed by performance against payment or performance against

[1] A European Initiative in Electronic Commerce, COM (97) 157 at I (7).

performance.[2] B2C, also known as online retailing or online shopping, involves the sale of goods or services to individual customers for their own use. In other words, B2B transactions involve the provision of goods or services to other businesses, while B2C transactions involve the sale of goods or services to consumers.

Whatever the form or type of electronic commercial transaction, they generally share two key features: high speed and the absence of territorial boundaries. Businesses can form contracts with entities in different jurisdictions without ever touching a pen or shaking hands. Due to the fact that national boundaries are so easily crossed, international electronic contracting faces a patchwork of legal regimes. How to ensure that an electronic contract is valid and enforceable is not only one of the most important elements but also one of the most fundamental components of electronic commercial transactions. How to ensure that disputes resulting from electronic cross-border commercial transactions can be resolved fairly and efficiently is one of the most complicated issues to the facilitation of electronic commercial transactions.

1.1.2 Benefits: economic and social impacts

The invention of electronic commercial transactions changes the essence of the social habits of business entities and individuals. Instead of travelling a long distance to visit a shop or a factory, business entities and individuals can place orders online and pay for the products using different computing devices with Internet access. Nowadays, the Internet access can even be wireless. Intangible goods can be downloaded onto the buyer's computer immediately without physical delivery. Tangible goods will be delivered to the buyer's door or large trading containers will be shipped to the port of named destination. Shortening the distance between seller and buyer and simplifying the process of shopping or trading brings about a profound impact on the global economy and society.

Electronic commerce moves the traditional commercial social environment from an industrial economy where machines dominated productivity, to an information-based economy where intellectual content is the dominant source of value added and there are no geographic boundaries. In particular it provides small and medium-sized enterprises

[2] Rosner (2004), p. 483. An example of performance against performance can be when one party supplies statistical data in exchange for the results of market research.

(SMEs) with lower market entry costs and the ability or possibility to extend geographic reach to a much larger market. It will undoubtedly improve economic efficiency, competitiveness and profitability. This is reflected in the statistics of e-trade from the world's biggest economic players, the US, EU and China.

In the **US**, the US Department of Commerce E-Stats Report, released on 28 May 2009, states that manufacturers and merchant wholesalers (so called "B2B") accounted for most e-commerce (93%). E-commerce accounted for US $1,856 billion of manufacturing shipments in 2007, up from US $1,567 billion in 2006, an annual increase of 18.4%. US merchant wholesalers' e-commerce sales increased 2.7% annually from 2006 to 2007. E-commerce retail sales reached almost US $127 billion in 2007, an annual gain of 18.4%.[3] In the **EU**, the number of Internet users increased by 218.1% from 2000 to 2008, culminating in a total that represents 61.4% of the total EU population and 18.8% of the world usage.[4] The percentage of individuals who had ordered goods or services over the Internet for private use rose significantly, from 22% to 34% between 2004 and 2008.[5] In **China**, the 23rd Statistical Survey Report on the Internet Development of January 2009 estimated that the number of users of online shopping in China had reached 74 million, with 60% growth compared with the previous year.[6] In the Chinese market, third-party platforms providing electronic payment (e-payment) services generated total transaction values of 130.77 billion yuan (US$19.15 billion) in the second quarter of 2009, a hike of 19.7% on the previous quarter and of 142.2% on the previous year.[7]

Year after year, electronic commercial transactions continue to flourish as the internationalisation and globalisation of the economy increases and production driven by electronic commerce in the modern society

[3] E-Stats, US Census Bureau, US Department of Commerce, 28 May 2009, available at www.census.gov/eos/www/2007/2007reportfinal.pdf (last visited on 29 June 2009).

[4] Internet World Stats (updated on 31 March 2009).

[5] Eurostat: Information Society Statistics (2009), reported by the Commission Staff Working Document Report on cross-border e-commerce in the EU, Commission of the European Communities, Brussels, 5.3.2009, SEC(2009) 283 final, available at ec.europa.eu/consumers/strategy/docs/com_staff_wp2009_en.pdf (last visited on 29 June 2009).

[6] 23rd Statistical Survey Report on the Internet Development in China (July 2005), China Internet Network Information Center (CNNIC), available at www.cnnic.cn/uploadfiles/pdf/2009/3/23/153540.pdf (last visited on 29 June 2009).

[7] China Internet Network Information Centre (CNNIC), Weekly News (23 September 2009), available at www.marketreportchina.com/market/article/content/3376/200909/209353.html (last visited on 30 September 2009).

generates potential opportunities for the free movement and development of goods, services, money, people, technology, information and communication.

1.1.3 Technical and legal barriers

New opportunities are always paralleled by new challenges in any form of technology, economy and society. Information technology (IT) brings the benefits of efficient cross-border commercial transactions but challenges the essence of the traditional laws and the knowledge and technique of traditional law makers and practitioners. Legislators, judges, lawyers and practitioners need genuine insight into the operation of this new and rapidly expanding industry with sufficient cross-disciplinary knowledge, experience and skills. It imposes constraints on the availability of experts, in particular in the field of private international law. In the paper-based world, connecting factors, such as the place of domicile, the place of business and the place of performance, are used to determine jurisdiction and choice of law. When contracts are concluded and performed by electronic means, those factors become vague. The determination of private international law in cyberspace requires legal experts to have special knowledge about IT systems and to interpret new and existing legal concepts for the online environment.

Various technological levels in different countries might also cause inconsistency in the level of protection of electronic communications and thus challenge the reliability of the electronic evidential documents. An electronic jurisdiction and choice of law agreement is valid or not depending on the security and reliability of the IT system and the requirements of the law of the country. Thus, legal certainty is of concern for transactions carried out electronically, for example:

(1) Is an electronic conflict-of-rule agreement valid and enforceable?
(2) Which court has jurisdiction?
(3) Whose law applies in case of a breach of the contract?

Users' confidence in online commercial transactions will be diminished if the standard of judicial judgments for the breach of an electronic contract is uncertain. Thus, rules of private international law need to be modernised so as to enhance the legal certainty of jurisdiction and governing law to contracts concluded via the Internet. The information society turns a new page and requires private international law to deal with contemporary issues.

1.2 What is contemporary private international law?

Private international law, also known as "conflict of laws", is the body of law that aspires to provide solutions to international or interstate legal disputes between persons or entities other than countries or states as such. It deals with the resolution of disputes involving foreign elements. "Private international law" is the term used in continental countries, and by some writers in England, while "conflict of laws" is the term primarily used in the United States, Canada and more recently in England.[8] Private international law usually consists of three main topics: (1) jurisdiction; (2) choice of law and (3) recognition and enforcement of judgments.

Jurisdiction is to determine which court has the competence to hear a case. Choice of law, also known as "applicable law", is to determine whose law governs a case. Jurisdiction is concerned with the adjudicative process. Choice of law is concerned with the substantive law. Jurisdiction and applicable law are determined by the conflict of rules.[9] Harmonisation of conflict of laws is important to facilitate legal certainty in cross-border commercial transactions because of the diversity of substantive and procedural laws and legal cultures in different countries.

However, the process of harmonisation of private international law is one of the most complicated issues in the legal world. The application of private international law on the Internet will make it even more complex. When the contract of sale of goods is formed by electronic means but involves physical delivery of goods, its validity may only bring new challenges to the existing substantive laws. However, it may remain in the same traditional situation as to the application of private international law. When digital goods are delivered online without physical delivery (known as "download"), the place of delivery is no longer physical; thus it is much more difficult to ascertain the place of delivery online than offline. It may affect the traditional principles of determining jurisdiction and require the interpretation or even amendment of the existing conflict of rules so as to adapt to the contemporary information society.

Contemporary private international law, therefore, shall be understood as the modernisation of the traditional private international law to remove the legal obstacles resulting from the modern technology and new society. One mission of the contemporary private international law is to enhance the conflict-of-law rule for electronic contracts in civil and

[8] Scoles, Hay, Borchers and Symeonides (2000), pp. 1–2. [9] Ibid.

commercial matters and facilitate the growth of electronic commerce. To this end, international organisations, regions and countries have been working towards the modernisation of private international law.

1.2.1 Global regimes

The Hague Conference on Private International Law is a global inter-governmental organisation working and adopting international conventions on all aspects of conflict of rules. Some of the conventions emanating from the Hague Conference are unsuccessful as not many countries have signed and ratified them including the big international economic players, i.e. the EU, US and China. However, signatory and ratification of any international convention normally takes a long time as there are always conflicting interests among countries. Although some international conventions have not been signed and ratified by the majority of countries, the rules in those international conventions provide valuable references or examples for national and regional legislation as well as academic research.

The most recent and up-to-date international convention adopted by the Hague Conference is the Convention of 30 June 2005 on Choice of Court Agreements (hereafter "the Choice of Court Convention").[10] It "marked a significant step in the work currently underway to promote party autonomy in international contracts on an international scale".[11] The "technique-neutral" approach is of importance to enhance the validity of electronic exclusive choice of court agreements as it recognises the exclusive agreements "in writing or by any other means of communication which renders information accessible so as to be usable for subsequent reference".[12]

Currently, the Hague Conference on Private International Law is working on a new instrument – the Choice of Law in International Contracts – because the Choice of Court Convention does not settle

[10] Hague Convention on Choice of Court Agreements, concluded 30 June 2005, available at www.hcch.net/index_en.php?act=conventions.text&cid=98 (last visited on 16 August 2009).

[11] "Feasibility Study of the Choice of Law in International Contracts: Report on Work Carried Out and Suggested Work Programme for the Development of a Future Instrument", Note prepared by the Permanent Bureau, Preliminary Document No 7 of March 2009, The Hague Conference on Private International Law, available at www.hcch.net/upload/wop/genaff2009pd07e.pdf (last visited on 30 September 2009).

[12] Article 3 of the Hague Convention on Choice of Court Agreements.

the issue of the choice of the applicable law in international contracts.[13] The Working Group in the Hague Conference is looking at the legislative experiences of applicable law for contractual obligations of the European Community (EC) and Inter-American Specialized Conference on Private International Law (CIDIP). It also benefits from the expertise of the United Nations Commission on International Trade Law (UNCITRAL) and the International Institute for the Unification of Private Law (UNIDROIT). In addition, it has consulted with the International Chamber of Commerce (ICC) and other organisations. The Hague Conference deems that the admissibility of party autonomy is a challenge for legal predictability in contractual relations at the international level. It aims to promote party autonomy in international contracts and its application in practice in the field of international commerce. In the author's view, it will help modernise the conflict-of-law rules for adaptation to the information society as electronic contracts often consist of "international" and "commercial" character, which is in line with the scope and content of the proposed instrument on the choice of law in international contracts.

Meanwhile, UNCITRAL has also contributed great efforts in the modernisation and harmonisation of rules of international business. The United Nations Convention on the Use of Electronic Communications in International Contracts 2005[14] complements the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG).[15] It manifestly increases the legal certainty of the validity of international electronic contracts and helps in predicting the location of the parties in cyberspace,[16] which will be most useful for the determination of jurisdiction and choice of law for contracts concluded online.

[13] "Feasibility Study of the Choice of Law in International Contracts: Report on Work Carried Out and Suggested Work Programme for the Development of a Future Instrument", Note prepared by the Permanent Bureau, Preliminary Document No. 7 of March 2009, The Hague Conference on Private International Law, available at www.hcch.net/upload/wop/genaff2009pd07e.pdf (last visited on 30 September 2009).

[14] UN Convention on the Use of Electronic Communications in International Contracts, 9 December 2005, A/RES/60/21, UNCITRAL, available at daccessdds.un.org/doc/UNDOC/GEN/N05/488/80/PDF/N0548880.pdf?OpenElement (last visited on 30 September 2009).

[15] UN Convention on Contracts for the International Sale of Goods ("CISG"), 11 April 1980, UNCITRAL, available at www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf (last visited on 30 September 2009).

[16] Article 6 of the UN Convention on the Use of Electronic Communications in International Contracts 2005.

Moreover, the "Rotterdam Rules" – the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008[17] – adopted by the UNCITRAL are one of the most impressive pieces of international substantive law and include phrases that acknowledge the existence of "electronic documents" (i.e. "electronic transport documents") throughout almost every provision. The Rotterdam Rules can be deemed to be one of the greatest steps towards the modernisation and harmonisation of international business in a specialised field.

1.2.2 Other regimes

European Union

In the EU, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation")[18] aims to harmonise the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States. The Brussels I Regulation was reviewed by the European Commission in April 2009.[19] The review aimed to modernise the rules of jurisdiction.

In June 2008, the European Community adopted Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation")[20]

[17] UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules") 2 February 2009, A/RES/63/122, available at www.uncitral.org/pdf/english/workinggroups/wg_3/res122e.pdf (last visited on 16 September 2009).

[18] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), OJ *L 012*, 16.01.2000 P. 1–23, available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:HTML (last visited on 16 September 2009).

[19] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 21.4.2009, COM(2009) 174 final, Commission of the European Communities, available at www.ipex.eu/ipex/cms/home/Documents/doc_COM20090174FIN (last visited on 16 September 2009).

[20] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation"), OJ *L 177*, 04.07.2008 P. 6–16, available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:01:EN:HTML (last visited on 16 September 2009).

which will replace the Rome Convention after it has entered into force in December 2009. In general terms, the Rome I Regulation consolidates the principle of party autonomy and, in the absence of choice by the parties, provides rules that are more specific and tailored for information technology. In particular, the Rome I Regulation establishes consistency with the Brussels I Regulation in terms of the language it uses, in particular in the provision of the choice-of-law rules for consumer contracts.

United States

In the US, there is no national codification of private international law. The Second Restatement of Conflict of Law and the Uniform Commercial Code (UCC) has very general rules on jurisdiction and choice of law. However, there is a large amount of advanced cases and judicial judgments on disputes concerning electronic commercial transactions in the US. The principles of conflict-of-law rules employed in the cases and decided by the judges provide valuable approaches and references to international, other regional and national legislation. The famous Internet jurisdiction and choice of law approaches include "minimum contacts",[21] "a sliding scale"[22] and "targeting approach".[23]

Currently, the Seventh Conference of the Inter-American Specialized Conference on Private International Law (CIDIP VII) is working on the harmonisation of conflict-of-law rules for consumer contracts and dispute resolution rules for consumer protection. They are: the Draft Model Law of Jurisdiction and Applicable Law for Consumer Contracts[24] and the Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims.[25] The projects will be a good step towards a predictable, fair, efficient and harmonised legal framework for resolving disputes relating to cross-border consumer contracts.

[21] *International Shoe Co*, v. *Washington*, 326 US 310, 320, 66 S.Ct, 160, 90 L.Ed, 104.
[22] *Zippo Mfg Co* v. *Zippo Dot Com, Inc*, 952 F. Supp. 1119 (W. D. Pa. 1997), 1124.
[23] *ALS Scan* v. *Digital Service Consultants Inc*, 293 F. 3d 707 (4th Circuit 2002).
[24] Draft of Proposal for a Model Law of Jurisdiction and Applicable Law for Consumer Contracts, by Canada for CIDIP VII, in May 2008, available at www.oas.org/dil/Draft_of_proposal_for_a_Model_Law_on_Jurisdiction_and_Applicable_Law_for_Consumer_Contracts_Canada.pdf (last visited on 20 September 2009).
[25] Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims, CIDIP VII, draft / borrador 15 August 2008, available at www.oas.org/dil/Legislative_Guidelines_for_Inter-American_Law_on_Availability_of_Consumer_Dispute_Resolution_Annex_B_United_States.pdf (last visited on 26 September 2009).

China

Similar to the US, there is no national codification of private international law in China. In its absence, the jurisdiction provisions in national laws provide the general conflict-of-law rules. For example, the Contract Law of the People's Republic of China and the Civil Procedure Law of the People's Republic of China provide conflict rules for foreign-related contractual obligations in civil and commercial matters.

Although Hong Kong and Macao are part of China, disputes with Hong Kong or Macao are considered to be with foreign elements. Currently, there are two arrangements relating to the recognition and enforcement of the decisions of civil and commercial cases between mainland China and Hong Kong as well as between mainland China and Macao. They are: "the Arrangement between the Mainland and the Hong Kong Special Administrative Region on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction" of 2008 (hereinafter "the China and Hong Kong Arrangement"),[26] and "the Arrangement between the Mainland and Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments" of 2006.[27] Those two arrangements play a significant role in facilitating judicial certainty and in stimulating trade and cooperation between China and its special administrative regions. In particular, the arrangement between mainland China and Hong Kong is deemed to be a most up-to-date and modern version of conflict-of-law rules in China as it recognises the validity of electronic jurisdiction clauses. The arrangements provide a constructive example for the codification of private international law in China and put forward a clear reference for the working group of the Chinese Society of Private International Law. The working group can learn from the experiences of the two arrangements and modernise the draft Model Law of Private International Law of the People's Republic of China to enhance the legal certainty of international disputes in civil and commercial contracts and increase confidence in a fair and reasonable solution for foreign-related cases.

This book aims to provide exclusive research and practical experience in the field of Internet jurisdiction and choice of law; and to propose

[26] No. 9 [2008] of the Supreme People's Court in the People's Republic of China, available at www.chinacourt.org/flwk/show.php?file_id=128128 (last visited on 16 August 2009).

[27] No. 2 [2006] of the Supreme People's Court in the People's Republic of China, available at www.chinalawedu.com/new/1300_12_/2009_5_19_ma0553575556191590024161.shtml (last visited on 16 September 2009).

solutions to obstacles presented by traditional conflict-of-law rules and their adaptation to modern technology and society.

Part II of the book focuses on the jurisdiction rules in electronic contracts. First, it discusses the merits of the Choice of Court Convention[28] and its importance to the modernisation and harmonisation of private international law in terms of the "party autonomy" principle in a choice of court clause or agreement. It provides an in-depth analysis and evaluation of the benefits of the signatory and ratification of the convention, in particular by the big international economic players. It examines the possible solutions to bring about harmony between the Choice of Court Convention and the current legal regimes in the EU, US and China. Second, it examines general, special and exclusive jurisdiction issues under the Brussels I Regulation, US case law and Chinese national laws, and attempts to find solutions to remove obstacles to the determination of Internet jurisdiction in B2B and B2C/consumer contracts. By analysing the jurisdictional approaches from the EU, US and China for B2B and B2C/consumer contractual obligations, it explains the differences between them, and conjointly considers how the common law system affects the civil law system with regard to Internet jurisdiction in China, and finally reaches a conclusion as to whether there is need to propose specific jurisdiction rules for online contracts or whether they can simply apply the general jurisdiction rules that are used in ordinary contracts.

Part III of the book focuses on the choice-of-law rules for electronic contracts. It analyses the validity of the applicable law in cases of choice and the rules in the absence of choice for contractual obligations in both B2B and B2C/consumer contracts. It highlights the improvement made by the Rome I Regulation compared with the Rome Convention and criticises issues in the Rome I Regulation which still need to be developed further. It is suggested that the legislative experiences and the advanced rules of the Rome I Regulation could serve as a pioneer template for the codification of private international law in the US and China.

Part IV of the book, but not the least, deals with online dispute resolution (ODR), which has been argued to be one of the most suitable and efficient channels to remove some obstacles of Internet jurisdiction and choice of law in judicial proceedings and to enhance trust and confidence in doing business online. It is notable that, in the information society, contracts, transport documents and payments for international

[28] Convention of 30 June 2005 on Choice of Court Agreements, Hague Conference on Private International Law.

trade are communicated, generated and issued by electronic means. Resolving disputes online seems to be logical to the access to digital evidence and the avoidance of cross-border travel. However, there are barriers to promoting ODR globally because of the lack of an international harmonised standard for ODR service practices and the incompatibility of the level of ODR legal and technological experts as well as facilities in different countries. This book will recommend a series of solutions to generate a strategic plan for the facilitation of online dispute resolution at the international level.

PART II

Jurisdiction

2

Jurisdiction in electronic contracting

2.1 Overview of jurisdiction

When commercial transactions are conducted over the Internet rather than in the physical market place, travel or transportation seems to be irrelevant, so the foreign location where transactions might take place will not become a difficult factor for sellers and buyers. On the Internet, merchants can order goods from different countries without a physical visit, while consumers can also buy personal products from foreign sellers at home. The process of international trade and business becomes much simpler than before so that the number of cross-border transactions is continually increasing. Cross-border disputes in electronic commercial transactions are much more frequent and more complicated to deal with than those in the paper-based environment as the location of transactions for determining hearing courts or applicable laws is very difficult to predict and ascertain. Often, online contracting is not executed in one particular place. Moreover, businesses fear that electronic contracts may not be enforceable in a court of law due to different legislation in different countries. Therefore, issues of private international law arise.

2.1.1 Definitions and principles

Jurisdiction means the geographic area of the legal authority (i.e. courts) that will have powers to hear and judge cases. International jurisdiction issues occur when a dispute is international. "International" means the contracting parties are of different nationalities or do not reside in the same country. Sometimes, it also refers to situations where the subject matter of the disputes has a foreign aspect. Under such circumstances, several courts may have jurisdiction to hear the same case. The rules of international jurisdiction need to be applied to

determine the country whose courts are competent to adjudicate in a given dispute.[1]

2.1.2 *Differences between common law and civil law systems*

The understanding of conflict of laws is different between civil law and common law systems. In civil law systems, private international law deals primarily with choice of law problems, although, for historical and other reasons, it often encompasses the law of nationality and citizenship as well as rules regulating the condition of aliens. The law to be applied to a case ordinarily has little to do with a court's jurisdiction, except coincidentally, as in cases dealing with local land or immovable goods. In common law systems, jurisdiction and applicable law are also distinct, but as a practical matter they are often intertwined, and especially given recent developments, choice-of-law theories in the US favour the application of the local law.[2] Furthermore, the common law uses "domicile" as a personal connecting factor, whereas the civil law tradition prefers nationality.[3] Under the common law, the court decides a new case according to former decisions, while under the civil law former decisions do not affect current decisions, which enables judges to have different views when applying written laws or rules to a particular case. Moreover, *forum non conveniens* is applied in the common law countries. Generally, *forum non conveniens* allows a court to have jurisdiction to stay (suspend) or dismiss the proceedings if another court would be a more appropriate forum, that is, the court could exercise its discretionary power to grant a stay or dismissal of jurisdiction depending on all relevant facts in a particular case.[4] Thus, in the common law system, courts have discretionary powers, which allow judges to decide whether to take on certain e-commerce cases and to exercise the power of judicial review.

2.1.3 *Characteristics of Internet jurisdiction*

Questions regarding appropriate jurisdiction arise with every cross-border e-commerce transaction.[5] Nations want to be able to ensure the

[1] "Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation", Brussels, 14.1.2003, COM (2002) 654 final, presented by the Commission of the European Communities, Annex 1.
[2] Scoles, Hay, Borchers and Symeonides (2000), p. 4.
[3] McClean and Beevers (2005), p. 4. [4] Hartley and Dogauchi (2007), p. 45.
[5] Aciman and Vo-Verde (2002).

protection of local businesses. However, jurisdiction over e-commerce transactions is particularly important in effecting this protection.[6]

The conflicting interest between sellers and buyers generates the problem: sellers do not want to be sued abroad and buyers prefer to seek solutions near home. If there is no agreement on jurisdiction, then the lack of this uniformity means that e-business companies face the possibility of being subject to any foreign legal jurisdictions in which their web sites can be accessed.[7] In practice, the most effective way to resolve Internet private international law problems is to use choice of jurisdiction and choice of law clauses in electronic contracts as a means of agreeing to a common jurisdiction and choice of law, rather than leaving it to the uncertainties of geographically-oriented conflict-of-laws regimes. However, most of the cases are not so straightforward.

Currently, there are no specific rules in the model laws and conventions dealing with Internet jurisdiction. The UNCITRAL Model Law on Electronic Commerce and the UN Convention on the Use of Electronic Communications in International Contracts (hereafter "the UN Convention on Electronic Contracts") do not contain any jurisdiction provisions, but the general provisions are valuable for analysing parties' location in cyberspace, and are thus helpful for determining Internet jurisdiction and choice of law The UN Convention on Electronic Contracts provides an interpretation of connecting facts such as the time and place of dispatch and receipt of data messages or electronic communication[8] and the location of the parties.[9] It refers to the location of the parties as well as to "the place of business", "the closest relationship to the relevant contract, the underlying transaction or the principal place of business", or "habitual residence".

2.2 Choice of court agreements: the Hague Convention 2005

The issue of choice of court agreements is one, but an important, aspect in the regime of jurisdiction. Currently at the international level, a

[6] Geist (2001a). [7] Chen (Spring 2004), p. 423.

[8] Article 15 of the UNCITRAL Model Law on Electronic Commerce, on the report of the Sixth Committee (A/51/628) 16 December 1996, available at www.lexmercatoria.org (last visited 16 August 2007); and Article 10 of the UN Convention on the Use of Electronic Communications in International Contracts (hereafter "UN Convention on Electronic Contracts") 9 December 2005, A/RES/60/21, UNCITRAL available at www.uncitral.org (last visited on 16 August 2009).

[9] Article 6 of the UN Convention on the Use of Electronic Communications in International Contracts 2005.

multilateral treaty – the Hague Convention on Choice of Court Agreements 2005[10] (hereafter called "Choice of Court Convention") – governs this issue. The Choice of Court Convention is part of the draft Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters[11] (hereafter called "the Draft Jurisdiction Convention"). The Draft Jurisdiction Convention was considered to be an ambitious project. It was comprehensive but too controversial; thus, after years of debate, the Hague Conference proposed that the Draft Jurisdiction Convention be scaled down to address only choice of court agreements between businesses, leaving many of the broader jurisdictional and enforcement provisions on the cutting room floor.[12] On 30 June 2005, all of the Member States approved it as the Hague Convention on Choice of Court Agreements.[13]

The Choice of Court Convention has parallel functional similarity to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) ("New York Convention"). The difference lies in the characteristic forum between a choice of court agreement and an arbitration agreement. When parties choose a public forum, they will usually include a choice of court agreement. When parties prefer a private forum, an arbitration agreement may be concluded. The Choice of Court Convention is a more modern and up-to-date international instrument than the New York Convention in the sense that the Choice of Court Convention recognises the validity of an electronic choice of court agreement.

Can the adoption of the Choice of Court Convention resolve issues as specified in the scenarios below?

(1) *A seller ("X") is Chinese and lives in London, but "X" has a trading company whose head office is in Germany. A buyer ("Y") is Spanish and lives in Dublin but "Y" establishes a factory in New York. Can "X" and "Y" choose the Rotterdam district court to hear their case when disputes arise?*
(2) *If the buyer ("Y")'s company was established and situated in Paris instead and "Y" entered into a contract for sale of goods by automated*

[10] Hague Convention on Choice of Court Agreements, concluded 30 June 2005, available at www.hcch.net/index_en.php?act=conventions.text&cid=98 (last visited on 16 August 2009).
[11] Available at www.cptech.org/ecom/jurisdiction/hague.html (last visited on 16 August 2009).
[12] Dogauchi and Hartley (2004).
[13] Hague Convention on Choice of Court Agreements.

electronic system while "Y" was travelling to the United States, which court should hear the case when disputes occur?

The above scenarios reflect three considerations: First, what is a valid exclusive choice of court clause? Second, how can the place of business be determined when transactions are conducted online with foreign factors? Third, which law will govern the choice of court clause?

This section will seek answers to the above scenarios by first, discussing the aim and scope of the Choice of Court Convention; second, analysing its core principles and third, recommending the signing and ratifying of the Convention.

2.2.1 Scope: electronic choice of court agreements

The Choice of Court Convention lays down uniform rules for the enforcement of international choice of court clauses.[14] Aiming to "promote international trade and investment through enhanced judicial cooperation,"[15] the Convention applies solely to "international cases of exclusive choice of court agreements concluded in civil or commercial matters".[16] That is, it applies only to business-to-business (B2B) transactions.[17] It excludes application to consumer agreements.[18] However, it does not indicate whether it also excludes a wide range of small and not-for-profit businesses. Article 2(2) further excludes its application to the carriage of passengers and goods, claims for personal injury brought by or on behalf of national persons and other matters. Moreover, Article 10 makes clear that a ruling on a matter excluded under Article 2(2) shall not be recognised and enforced under this Convention.

The general scope of the Choice of Court Convention outlined in Article 1 reflects its applicability to the digital age, as the "international" feature of the Convention strongly supports global cross-border electronic transactions. In addition, recognition and application of choice of court clauses concluded electronically can be also found in another two articles of the Choice of Court Convention. As Article 3(c) expressly states, an exclusive choice of court agreement must be concluded or documented "in writing; or by any other means of communication, which renders information accessible so as to be usable for subsequent reference". The wording of this provision was inspired by Article 6(1) of

[14] "Recent International Agreement" (January 2006), 931.
[15] Paragraph 1 of the Hague Convention on Choice of Court Agreements.
[16] Ibid., Article 1(1). [17] Ibid., Article 2(1). [18] Ibid., Article 2(1).

the UNCITRAL Model Law on Electronic Commerce 1996. The terminology "by any other means of communication" should be deemed to include any electronic means, although this article could be made clearer by providing that "any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'".[19] The consideration of electronic communications is also implied in Article 13 of the Choice of Court Convention. For example, Article 13(1)(b) provides that "the party seeking recognition or applying for enforcement shall produce the exclusive choice of court agreement, a certified copy thereof, or other evidence of its existence". The wording "or other evidence of its existence" was included mainly for agreements concluded electronically.[20]

2.2.2 Definition: exclusive choice of court agreements

The definition of "exclusive choice of court agreements" in the Choice of Court Convention, laid down in Article 3, provides that

> a) exclusive choice of court means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts; b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise.

This article provides that the Choice of Court Convention only applies to choice of court agreements in favour of Contracting States, which can apply to both past and future disputes.[21] It contains five requirements: first, the agreement between two or more parties must exist; second, the form requirement must be satisfied; third, the agreement must designate courts of one state, or one or more specific courts in one state excluding all other courts; fourth, the designated court or courts must be in a Contracting State; and finally, the designated courts must be connected to a particular legal relationship.[22]

[19] Article 23(2) of Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), OJ L 012, 16.01.2001, p. 1, available at europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf (last visited on 13 November 2009).
[20] Hartley and Dogauchi (2007), p. 62. [21] Ibid., p. 24. [22] Ibid., pp. 38–9.

In accordance with the above five requirements, there are three possibilities defining exclusive choice of court agreements: it can refer to the courts of a Contracting State (e.g. the courts of the United States); it can refer to a specific court in a Contracting State (e.g. the Federal District Court of California); and it can also refer to two or more specific courts in the same Contracting State (e.g. either the Federal District Court of California or the Federal District Court of New York). However, if two courts in different Contracting States were selected, for example, the courts of the United States and the courts of the United Kingdom, the choice of court agreement would not be considered exclusive under the Choice of Court Convention.[23]

In general, there are four basic rules under the Choice of Court Convention. First, the chosen court must hear the case when proceedings are brought before it,[24] that is, a court designated in an exclusive choice of court agreement "shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another state".[25] Second, any court not designated in the exclusive forum selection agreement must refuse jurisdiction.[26] Third, state parties must recognise and enforce judgments resulting from an exclusive choice of court agreement.[27] Fourth, an optional provision allows states to declare that they will recognise and enforce judgments rendered by courts of other Contracting States designated in non-exclusive choice of court agreements.[28]

2.2.3 Core principles: jurisdiction and obligations

The Choice of Court Convention deals with the courts in cases of choice and in the absence of choice. For instance, while Article 5 of the Choice of Court Convention serves to inform the chosen court how to respond to an exclusive choice of court agreement, Article 6 provides the rule applicable to courts that are not chosen.

Jurisdiction of the chosen court

Article 5 sets out the basic rule that the court chosen by the parties in an exclusive choice of court agreement "shall have jurisdiction". Article 5(1) states that "the courts of a Contracting State designated in an exclusive

[23] Ibid., p. 40. [24] Ibid., p. 22.
[25] Article 5(2) of the Hague Convention on Choice of Court Agreements.
[26] Ibid., Article 6. [27] Ibid., Article 8. [28] Ibid., Article 22.

choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is *null and void* under the law of that state". The "null and void" condition is the only exemption to the rule that the chosen court must hear the case. The question of whether the agreement is null and void is determined under the law of the state of the chosen court. It only applies to substantive grounds of invalidity such as fraud, mistake, misrepresentation, duress and lack of capacity.[29]

Article 5(2) reinforces the obligation laid down in Article 5(1), providing that "a court that has jurisdiction under paragraph 1 shall not decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State". "A court of another State" in Article 5(2) should be deemed to be a court of another territorial unit where appropriate.[30] It means that if the parties choose "the courts of England", "the courts of Scotland" have no jurisdiction because England will be regarded as the relevant territorial unit whilst Scotland will be another "State" for this purpose. However, if the parties choose "the courts of the United Kingdom", both "the courts of England" and "the courts of Scotland" can hear the case because "State" here refers to the United Kingdom.[31]

Furthermore, Article 5(3) provides that "the preceding paragraphs shall not affect rules: a) on jurisdiction related to subject matter or to the value of the claim; b) on the internal allocation of jurisdiction among the courts of a Contracting State. However, where the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of parties." This article does make clear that the Convention rules govern only international jurisdiction, and private parties cannot create a subject matter jurisdiction that does not otherwise exist in a national legal system. Also, the Convention states clearly the rules on internal allocation of jurisdiction in Contracting States. The jurisdiction related to subject matter or the value of the claim cannot be affected by a choice of court agreement. So what will happen if parties conclude a choice of court agreement in favour of a family court, while their dispute relates to an international sale? A specialised family court would lack subject-matter jurisdiction to hear an action of breach of contract; thus even if the parties designated such a court, it would not be forced by the Convention to hear the case.

[29] Hartley and Dogauchi (2007), p. 44. [30] Ibid. [31] Ibid.

Obligation of a court not chosen

Article 6 provides that "[a] court in a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies" unless one of the five following exceptions occurs: 1) null and void agreement under the law of the chosen court; 2) party incapacity; 3) manifest injustice or manifestly contrary to public policy; 4) uncontrollable factors; and 5) the chosen court has decided not to hear the case.

Three conditions are contained in Article 6: first, the choice of court agreement must be exclusive; second, the chosen court must be in a Contracting State; and lastly, the parties to the proceedings must be bound by the choice of court agreement.[32] Assume that A, who is resident in California, sells goods to B, who is resident in London. B then resells goods to C who is resident in Shanghai. The contract between A and B contains a choice of court clause in favour of the courts of California, whilst the contract between B and C contains no choice of court clause. Under these circumstances, B can sue A in California if necessary. C can sue B and A at the same time in London if disputes arise, because there is no choice of court agreement between A and C. But if C only sues B in London, B will not be able to join A as a third party, because the choice of court agreement is only binding between A and B.[33] If so, subject to Article 6 of the Choice of Court Convention, the court in London would have to suspend or dismiss any proceedings that A brings against B. The "null and void" rule is the reverse of the exception to the obligation of the chosen court to assume jurisdiction in Article 5(1). If indeed the chosen court is not obliged to assume jurisdiction, then other courts should not be obliged to decline jurisdiction. Thus, Article 6 is established for the purpose of ensuring that "the court seized and the chosen court give consistent judgments on the validity of the choice of court agreements".[34]

2.2.4 Signatory, ratification and implementation

Implementation of the Choice of Court Convention will be beneficial to the removal of the uncertainties of the enforcement of legal rights and obligations in international trade. It may also reduce the cost of cross-border enforcement procedures and the risk of such uncertainties arising

[32] Ibid., p. 47. [33] Ibid. [34] Ibid., p. 48.

from national judicial corruption as well as incompetence of professional services. However, it is notable that it takes a long time for countries to sign, ratify and implement a convention.

One of the merits of the Choice of Court Convention is that it clearly expresses its relationship with other international instruments. As explained in the Explanatory Report 2007:

> If there is a conflict of rules with regard to jurisdiction, the Brussels I Regulation will prevail over the Convention where none of the parties is resident in a Contracting State that is not a Member of the European Community. Where one or more of the parties is resident in a Contracting State that is not a Member State of the European Community, the Convention will prevail.[35]

Thus, for example, if a US company and a German company choose the Rotterdam district court, the Choice of Court Convention will prevail, whilst if a French company and a German company choose the Rotterdam district court, the Brussels I Regulation will prevail.[36]

However, one of the difficulties of applying this Choice of Court Convention is due to the different legal culture in different states. For example, in the stricter civil law system, the court first seized hears the case while courts later seized decline to hear it.[37] A choice of court agreement is presumed to be exclusive in some states, but non-exclusive in others. In the EU, if a clause between a party domiciled in New York and a party domiciled in Germany states "(a) The High Court in London shall have jurisdiction over any dispute arising under this contract", or "(b) The High Court in London shall have exclusive jurisdiction to adjudicate any dispute arising under this contract", it will have the result that a German court will decline jurisdiction.[38] In contrast, in the US, a neutral agreement, i.e. clause (a) above will generally be regarded as non-exclusive. Thus if one of the parties brings an action in a US court, that court might examine its jurisdiction. It will not necessarily decline jurisdiction merely because the forum clause appointed a court in London.

[35] Ibid., pp. 25–6. [36] Ibid, p. 27.

[37] Article 4(1) of the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgment Arbitration Awards and Authentic Instruments (Paris 1899) and Article 6(1) of the Convention between Belgium and the Netherlands on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgements, Arbitration Awards and Authentic Instruments (Brussels 1925).

[38] Article 23 (1) of the Brussels I Regulation.

Another possible reason for the reluctance of countries to sign and ratify the Choice of Court Convention may be their consideration about the uncertainty of the applicable boundaries of the nature of B2B and B2C automated electronic contracts. In practice, sometimes, contracts are treated as consumer contracts as consumers usually have no practical opportunity to decide whether or not to enter into an agreement with an exclusive choice of court clause. In face-to-face international trade negotiation (B2B contracts), parties generally have a chance to negotiate the exclusive choice of court clause. In an automated electronic commercial transactions system, B2B contracting parties might face the same issue as consumers in that the exclusive choice of court clause could have been automatically inserted in the click-wrap or shrink-wrap agreements. The validity of automated exclusive choice of court agreements is, therefore, challenged. In other words, it is debatable whether the Choice of Court Convention covers and recognises exclusive choice of court agreements in automated or non-negotiated contracts such as shrink-wrap or click-wrap agreements.

At the international level, the UN Convention on Electronic Contracts generally recognises the validity of electronic contracts including emails, click-wrap and shrink-wrap agreements. In the US, the *ProCD, Inc* v. *Zeidenberg*[39] case ruled that the shrink-wrap agreements were valid and enforceable because the defendant Zeidenberg did read the terms and click acceptance to the licence, which could be regarded as giving the consent to the terms. If Zeidenberg rejected the terms, he would have returned the product. Accordingly, click-wrap agreements should also be also valid and enforceable. Generally, the vendor or trader is required to make the contract terms available for the buyer to view. Such availability must be clear and not hidden.[40] In the EU, the EC Directive on Electronic Commerce also confirms the valid form of electronic contracts. In China, the China Electronic Signatures Law covers the same ground with respect to the validity of electronic contracts as the EU, US and international convention. So an exclusive choice of court agreement included in an electronic contract shall be deemed to be valid. However, none of the legislation clarifies whether, when an exclusive choice of court clause is concluded as an independent electronic document rather than as part of a B2B contract for the supply of goods and services, such document is valid and enforceable.

[39] 86 F. 3d 1447 (7th Circuit 1996).
[40] *Caspi* v. *Microsoft Network LLC.*, 732 A. 2d 528 (NJ Superior Ct., 2 July 1999).

With regard to the above concerns about the ambiguous clauses specified in the Choice of Court Convention, countries can make their own decisions and exclude matters by means of a declaration specifying what it wants to exclude or redefine the matters clearly and precisely when signing or ratifying the Choice of Court Convention. Where this is done, the Convention will not apply with regard to that matter in the state making the declaration, as Article 21 of the Choice of Court Convention provides:

1. Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.
2. With regard to that matter, the Convention shall not apply –
   a) in the Contracting State that made the declaration;
   b) in other Contracting States, where an exclusive choice of court agreement designates the courts, or one or more specific courts, of the State that made the declaration.

According to the above declaration clause, a contracting state is allowed to decide the matters to which it will apply the Convention. Where a state makes such a declaration, other states will not be required to apply the Convention with regard to the matter in question where the chosen court is in the state making the declaration. The declaration shall be "no broader than necessary", which means that states must have good reason to make their declarations.

The provisions allowing for declarations will encourage countries to sign and ratify the Convention, but at the same time, the future of the Choice of Court Convention will still depend on whether the big economic players of the world such as the EU, the US and China sign and ratify it.[41]

United States

In the US, in 2006, the American Bar Association (ABA) urged the Government to sign, ratify and implement the Choice of Court Convention for the reasons that it would make contracting parties more willing to designate litigation instead of arbitration, and meet the need in transnational transactions for enforceable choice of court

[41] Kruger (2006), 447, p. 455.

agreements.[42] On 19 January 2009, the US eventually signed the Choice of Court Convention.[43] It was the Convention's first signatory. It seems that the US is trying to take a lead and encourage other states to agree with the new harmonisation regime.[44]

Such a convention will be beneficial to the US for its facilitation of international trade, as, in practice, it is very difficult to ensure the chosen court will hear the case even if there is a choice of court clause in the contract. For example, a US company purchases new-module cars from a European manufacturer choosing an export contract specifying "FOB Hamburg". The US company uses an electronic purchase order to place its orders inserting a choice of court clause stating that US courts will hear the case. The foreign manufacturer responds with an electronic invoice and then the US company issues an electronic letter of credit to pay for the goods. When the European-made cars arrive, the US company finds that they are right-hand drive (i.e. the steering wheel is on the right) and are not fit for purpose in the US market. In this case, the electronic choice of court clause shall be valid according to the Choice of Court Convention. It greatly increases the legal certainty as otherwise different countries might have different explanations about the validity of a choice of court clause and its obligations.

Enforcement of a US judgment in a foreign country is also complex and has a very low success rate, and vice versa. If a US litigant seeks recognition and enforcement of the judgment in the courts of Germany, it will be very complex and there is no guarantee of success, because there is no bilateral treaty or multilateral international convention in force between the US and any other country on the reciprocal recognition and enforcement of judgments.[45] Some countries require reciprocity but have

[42] American Bar Association Recommendation adopted by the House of Delegates, 7–8 August 2006, that the American Bar Association urges the United States government promptly to sign, ratify and implement the Hague Convention on Choice of Court Agreements, available at abanet.org/intlaw/policy/investment/hcca0806.pdf (last visited on 19 August 2009).

[43] Status table of the Hague Convention of 30 June 2005 on Choice of Court Agreements, available at www.hcch.net/index_en.php?act=conventions.status&cid=98 (last visited on 16 August 2009).

[44] US Signs Hague Choice of Courts Convention, 22 January 2009, Opinio Juris, available at opiniojuris.org/2009/01/22/us-signs-hague-choice-of-courts-convention/ (last visited on 16 August 2009).

[45] Enforcement of Judgments, the US Department of State, available at http://travel.state.gov/law/info/judicial/judicial_691.html (last visited on 17 August 2009).

difficulty with determining this as approximately half the US states have no statute on this subject.[46] This will affect trade between the EU and US.

China is also a big trading partner of the US. In 2008, US FOB export trade to China was US$71.5 billion whilst US FOB import trade from China was US$337.8 billion.[47] There are trade disputes between China and the US, but, again, judicial judgments from one state are very difficult to have recognised and enforced in the other state. Thus, in practice, international trade parties usually choose arbitration as a method to settle their disputes due to the predictability of recognition and enforcement of arbitral awards under the New York Convention. In US–China judicial practice, there is a landmark case recently that shows a rare occasion when the US court recognised and enforced a Chinese court judgment, although it is not a commercial case. On 22 July 2009, the United States District Court for the Central District of California issued a judgment to enforce a Chinese judgment against a US corporate defendant under the California Uniform Foreign Money Judgments Recognition Act (UFMJRA).[48] The case involved the enforcement of US$6.5 million. According to the California UFMJRA, a foreign judgment is "enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit".

The US's signatory, ratification and implementation of the Hague Convention on Choice of Court Agreements will create certainty of recognition and enforcement of foreign judgments in civil or commercial matters between the US and other countries if the other main trading countries also become parties to the Choice of Court Convention.

European Union

After the signature of the US, on 1 April 2009, the European Union also signed the Choice of Court Convention.[49] This is considered to be positive for promoting the trade relationship between the EU and US. The process of signature by the European Community (EC) is relatively long. Back in 2007, the EC already recommended that the Choice of Court Convention would benefit European business as an important instrument and a strategic alternative, which "has the potential to accomplish

[46] Trooboff (2001).

[47] US–China Trade Statistics and China's World Trade Statistics, the US and China Business Council, available at www.uschina.org/statistics/tradetable.html (last visited on 20 August 2009).

[48] *Hubei Gezhouba Sanlian Industrial Co Ltd & Hubei Pinghu Cruise Co Ltd* v. *Robinson Helicopter Company Inc.*, 2:06-cv-01798-FMC-SSx, 22 July 2009.

[49] Status table of the Hague Convention of 30 June 2005 on Choice of Court Agreements.

for court judgments what the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards does for arbitral awards".[50] On 6 December 2007, a "Study to inform an Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements by the European Community" was prepared by GHK Consulting at the request of the European Community.[51]

The Choice of Court Convention is suitable for the judicial development plan of the European Community as the EC is "working towards the establishment of a common judicial area based on the principle of mutual recognition of judicial decisions".[52] The Council Decision of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements emphasises that the Choice of Court Convention will "make a valuable contribution to promoting party autonomy in international commercial transactions and increasing the predictability of judicial solutions in such transactions".[53] The European Community is competent to sign the Choice of Court Convention as the representative of its Member States subject to the conditions of the "Regional Economic Integration Organisations" specified in Article 29 of the Choice of Court Convention, which states that "a Regional Economic Integration Organisation which is constituted solely by sovereign States and has competence over some or all of the matters governed by this Convention may similarly sign, accept, approve or accede to this Convention. The Regional Economic Integration Organisation shall in that case have the rights and obligations of a Contracting State, to the extent that the Organisation has competence over matters governed by this Convention."[54] Currently, the UK and Ireland are taking part in the adoption and application of the Council

[50] Examination by the European Community of Existing Hague Conventions – Note drawn up by the Secretary General of the Hague Conference on Private International Law, p. 6, available at www.hcch.net/upload/wop/genaff_note-ec.pdf (last visited on 19 August 2007).

[51] Study to Inform an Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements by the European Community, available at ec.europa.eu/dgs/justice_home/evaluation/docs/final_report_071207.pdf (last visited on 20 September 2009).

[52] Recital 1 of the Council Decision of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements (2009/397/EC), OJ L 133/1, 29.05.2009.

[53] Ibid., Recital 2.

[54] Article 29 of the Hague Convention on Choice of Court Agreements.

Decision on signing the Choice of Court Convention, but not Denmark.[55]

The Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereafter "Brussels I Regulation")[56] continues to examine or assess the application and compatibility of the Choice of Court Convention. It is accompanied by the Green Paper on the Review of the Brussels I Regulation, which makes some suggestions on possible ways forward.[57] The relationship between the Choice of Court Convention and the Brussels I Regulation will be discussed in chapter 3.

China

In China, there is also debate by the governmental legislative organisations and academics on whether China should sign and ratify the Choice of Court Convention. Although they have not reached any consensus, in practice the Choice of Court Convention has been referenced in some recent Chinese legislation; for example, "the Arrangement between the Mainland and the Hong Kong Special Administrative Region on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction" (hereafter "the China and Hong Kong Arrangement").[58] The China and Hong Kong Arrangement was signed by the Supreme People's Court and the Hong Kong Special Administrative Region in 2006 and came into force on 1 August 2008. It is deemed to be one of the valuable remarks that helps the Chinese government to research whether the Choice of Court

[55] Recital 6 and 7 of the Council Decision of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements (2009/397/EC), OJ L 133/1, 29.05.2009.

[56] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 21.4.2009, COM(2009) 174 final, Commission of the European Communities, available at www.ipex.eu/ipex/cms/home/Documents/doc_COM20090174FIN.

[57] Green Paper on the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2009) 175 final, Brussels, 21.4.2009, Commission of the European Communities, available at www.ipex.eu/ipex/cms/home/Documents/doc_COM20090175FIN.

[58] No.9 [2008] of the Supreme People's Court in the People's Republic of China, available at www.chinacourt.org/flwk/show.php?file_id=128128 (last visited on 16 August 2009).

Convention is suitable for its signatory and ratification. The formation requirements of exclusive choice of court agreements in Article 3 of the China and Hong Kong Arrangement are similar to those in the Choice of Court Convention as it explicitly explains the requirement of "in writing". It is stated that contracts can concluded by electronic means including telegraph, fax, electronic data exchanges and emails. The China and Hong Kong Arrangement is more precise than the Choice of Court Convention in that it allows an exclusive choice of court agreement to be contained in one single document or several documents. It further clarifies that an exclusive choice of court agreement is an independent agreement to the relevant contracts. Thus, the amendment, revocation or termination of the contracts will not affect the validity of the exclusive choice of court agreement, unless the parties agree otherwise.

Compared with the Choice of Court Convention, the China and Hong Kong Arrangement has its unique Chinese judicial characteristics, which can be found in Article 5 and 8 of the Arrangement. Article 5(2) of the China and Hong Kong Arrangement provides that if the defendant has its residence, habitual residence or possessions in both the mainland and Hong Kong, the plaintiff has the right to file a lawsuit with the courts of both mainland China and Hong Kong at the same time. The total compensation or value of the judgments by both courts should not exceed the disputed value/money of the case itself. It is fundamentally different from the purpose of the Choice of Court Convention, which avoids two or more courts in different jurisdictions hearing the same case so as to reduce the conflict of interest and increase the fairness.

With regard to the recognition and enforcement of the judgment specified in Article 8 of the China and Hong Kong Arrangement, the applicant must follow the law of the requested place of action. Such application shall be made within two years from the last date of the time within which legal action must be taken. This is also a typical Chinese "timing period" rule, which is different from the international Convention as the Choice of Court Convention has not set restrictive limits on the period of the application of recognition and enforcement.

In the author's opinion, the decision as to whether China will sign and ratify the Choice of Court Convention will be made after a judgment about whether it will sufficiently benefit and protect the rights of citizens of the People's Republic of China while equally protecting the rights of foreigners. The Choice of Court Convention is based on the principles of "certainty of jurisdiction" and "enforceability of judgment", which

ensures the appropriate court will hear the case. However, with regard to the rights of defence of defendants or weaker parties, the Convention employs indirect or lower-level protection.

It is suggested that as far as the core subject matters covered by the Choice of Court Convention are consistent with ones under the Chinese Civil Procedure Law, and as far as the formal requirements of an exclusive choice of court agreement in the Choice of Court Convention are compatible with Chinese laws, China can sign and ratify the convention.[59] However, at the same time, China can make declarations to exclude or condition some specific matters which conflict with its domestic laws.

In summary, the process of signature and ratification of a convention can be very long. After almost four years since the conclusion of the Choice of Court Convention, there are only two countries or regions (US and EU) that have signed it and there is only one state, Mexico, that has indicated its consent to be bound. Although the Choice of Court Convention is unlikely to fit every country's specific cultural and economic needs, countries who wish to contribute to the improvement of legal certainty for cross-border commercial transactions and the facilitation of international trade ought to sign and ratify the Convention but make full use of the exemption clause (Article 21 of the Choice of Court Convention), declaring the exclusion of clauses that are not fit for its individual judicial culture or rules and including special clauses that help to protect the rights of citizens and promote the development of its economy.

[59] Tu (Spring 2007), 347.

3

EU rules applied in cyber jurisdiction

3.1 Overview of the EU jurisdiction rules

In the EU, the EC Directive on Electronic Commerce neither establishes additional rules on private international law nor deals with the jurisdiction of courts.[1] Since the EC Directive on Electronic commerce does not cover Internet jurisdiction, the Brussels I Regulation,[2] which is based on the old Brussels Convention,[3] performs its role in the absence of the relevant legislation. The Brussels I Regulation is directly applicable throughout the participating member states. Moreover, the Brussels I Regulation applies in the new member states as part of the *acquis communautaire*,[4] thus the Brussels I Regulation extended to the ten new EU member states[5] on their accession in 2004,[6] and to two more EU member states in 2006.[7]

The Report on the Application of the Brussels I Regulation by the European Commission on 21 April 2009 considered the Brussels I Regulation to be:

[1] Recital 23 and Article 1(4) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce ("EC Directive on Electronic Commerce") 05 L 178, 17.07.2000, pp. 1–16.

[2] Council Regulation (EC) No. 44/2007 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), OJ L 012, 16.01.2001, p. 1, available at europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf (last visited on 13 November 2005).

[3] Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (consolidated version), OJ C 027, 26.01.1998 pp. 1–27, europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:41998A0126:EN:HTML (last visited on 13 November 2009).

[4] Hill (2005), p. 51.

[5] Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia; from 1 July 2007 the same rule applies to Denmark as well.

[6] Annex II of the Treaty of Accession sets out a number of technical amendments to the Brussels I Regulation: [2003] OJ L 12/1.

[7] Bulgaria and Romania, Council Regulation (EC) No. 1791/2006 of 20 November 2006, OJ L 363, 20.12.2006.

> a highly successful instrument, which has facilitated cross-border litigation through an efficient system of judicial cooperation based on comprehensive jurisdiction rules, coordination of parallel proceedings, and circulation of judgments. The system of judicial cooperation laid down in the Regulation has successfully adapted to the changing institutional environment (from intergovernmental cooperation to an instrument of European integration) and to new challenges of modern commercial life.[8]

The Brussels I Regulation plays a very significant role in harmonising judicial cooperation between member states and its achievement in facilitating cross-border litigation cannot be undermined. With the new challenges of modern commercial life, in particular new judicial issues on Internet-related cases, it is debatable whether the Brussels I Regulation remains sufficient to enhance the efficiency of cross-border jurisdiction.

The Green Paper, issued on 21 April 2009, accompanies the Commission's Report to launch a broad consultation with eight questions on the review of the Brussels I Regulation.[9] The questions are concerned with the following subjects.

Question 1: the abolition of intermediate measures to recognise and enforce foreign judgments (*exequatur*);
Question 2: the operation of the Regulation in the international legal order;
Question 3: choice of court agreements;
Question 4: industrial property;
Question 5: *lis pendens*[10] and related actions;
Question 6: provisional measures;
Question 7: the interface between the Regulation and arbitration; and
Question 8: other issues, including consumer contracts.

The main function of the questions is to collect opinions on how to remove obstacles to a free circulation of judgments, enhance certainty of

[8] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 21.4.2009, COM(2009) 174 final, Commission of the European Communities, available at www.ipex.eu/ipex/cms/home/Documents/doc_COM20090174FIN (last visited on 18 June 2009).

[9] Green Paper on the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters COM(2009) 175 final, Brussels, 21.4. 2009, Commission of the European Communities, available at www.ipex.eu/ipex/cms/home/Documents/doc_COM20090175FIN (last visited on 18 June 2009).

[10] *Lis pendens*: a pending lawsuit.

cross-border jurisdiction relating to one of the parties domiciled in a third country rather than a member state and avoid parallel proceedings in different member states. Question 2, 3 and 5 are connected and interact, especially Question 2 and 3 with regard to international jurisdiction issues. Although the concerns raised in the review of the Brussels I Regulation do not directly target the uncertainty of determining Internet jurisdiction, Internet jurisdiction is a cross-border issue as such; thus, ensuring the smooth operation in the international legal order will reflect on the facilitation of Internet jurisdiction.

Article 23(2) of the Brussels I Regulation is the only rule that explicitly acknowledges agreements made via electronic means, stating that "any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing". It means that a contract stored in a computer as a secured word document (i.e. a read-only document or document with entry password), or concluded by email or a click-wrap agreement falls within the scope of Article 23(2) of the Brussels I Regulation.

The Brussels I Regulation only applies jurisdiction "in civil and commercial matters".[11] It is further provided that four matters – family law, bankruptcy and insolvency, social security and arbitration[12] – are excluded from the regime's scope. There are three types of jurisdiction in the Brussels I Regulation: general jurisdiction, special jurisdiction and exclusive jurisdiction. The Brussels I Regulation contains the general jurisdiction rule that defendants who are domiciled in one of the Contracting States shall be sued at the place of their domiciles.[13] One of the key objectives of the Brussels regime is the harmonisation of jurisdictional bases in cases involving proceedings brought against defendants domiciled in the states concerned.[14]

3.2 Choice of court clauses/exclusive jurisdiction agreements

Any well-drafted contract that has factual links with more than one country will contain a choice of jurisdiction or court clause. This is often referred to as an "exclusive" clause, providing that all disputes between the parties arising out of the contract must be referred to a named court or the courts of a named country.[15] At the international level, the Choice of Court Convention governs exclusive choice of court agreements,

[11] Article 1(1) of the Brussels I Regulation. [12] Ibid., Article 1(2). [13] Ibid., Article 2.
[14] Hill (2005), p. 71. [15] McClean and Beevers (2005), p. 87.

whereas, in the EU, Article 23 of the Brussels I Regulations sets out the requirements of the application of choice of court clauses or exclusive jurisdiction agreements.

Article 23 of the Brussels I Regulation provides:

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; or (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".
3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.
4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.
5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 23 authorises parties to enter into an agreement designating the court or courts to determine such disputes. Article 23(1) applies when at least the parties, one or more of whom is domiciled in a member state, have agreed that the courts of a member state are to have jurisdiction over disputes arising in connection with a particular legal relationship. Parties can choose courts or specific courts of a country. For example, Company

A (in Italy) and Company B (in Germany) have agreed a jurisdiction clause "disputes must be referred to the courts of Germany" in their electronic contracts of sale. Under these circumstances, German courts are designated to have jurisdiction over A and B's disputes. However, if later on A and B made another distribution contract without a jurisdiction clause (the sales contracts and the distribution agreement are different legal relationships), then the original jurisdiction clause in the sale contract does not confer jurisdiction with regard to a dispute arising under the distribution contract.[16] If the jurisdiction clause includes a choice of a particular court, Article 23 operates to confer jurisdiction on that court, but not on other courts in the same country. However, party "A" and party "B" can also choose the other courts, for instance the French court instead of the Italian or German courts, to hear the case, because Article 23 does not "require any objective connection between the parties or the subject matter of the dispute and the territory of the court chosen".[17]

In terms of the validity of the agreement, party "A" and party "B" can also conclude a further exclusive jurisdiction agreement varying the earlier agreement, because Article 23 is based on the principle of party autonomy and it does not prevent parties from changing their decisions.[18] Moreover, the rules on the validity of arbitration agreements have been influential on the validity of the jurisdiction agreements. In the case of *Fiona Trust & Holding Corp* v. *Privalov*, the judge ruled that, if only the signature of the main contract is forged, the arbitration agreement incorporated in the main contract is valid.[19] So it is suggested that "the jurisdiction agreement can only be invalid on a ground which relates to the jurisdiction agreement itself and not merely as a consequence of the invalidity of the main agreement".[20]

Furthermore, Article 23(3) includes an exemption for parties, none of whom is domiciled in a member state. In this situation, the chosen courts have discretion to determine the existence and exercise of their jurisdiction in accordance with their own law.[21] The courts of the other member states shall have no jurisdiction over the disputes unless the chosen court or courts have declined jurisdiction.

[16] *WH Martin Ltd* v. *Feldbinder Spezialfahzeugwerke GmbH* [1998] ILPr 794.
[17] *Castelletti* v. *Trummpy* [1999] ECR I-1597.
[18] *Sinochem* v. *Mobil* [2000] 1 Lloyd's Rep 670.
[19] *Fiona Trust & Holding Corp* v. *Privalov* [2007] EWCA Civ 414(HL), [2007] 4 All ER 95 [17].
[20] Merrett (2009), pp. 545–64, p. 546.
[21] *Sinochem* v. *Mobil* [2000] 1 Lloyd's Rep 670.

The scope of applicability of the Brussels I Regulation is not affected by the signatory and ratification of the Convention on Choice of Court Agreements, as it is provided by Article 26(6) of the Choice of Court Convention that:

> This Convention shall not affect the application of the rules of a Regional Economic Integration Organisation that is a Party to this Convention, whether adopted before or after this Convention –
> a) where none of the parties is resident in a Contracting State that is not a Member State of the Regional Economic Integration Organisation;
> b) as concerns the recognition or enforcement of judgments as between Member States of the Regional Economic Integration Organisation.

Suppose that both parties are domiciled in the EU; the Brussels I Regulation will prevail over the Choice of Court Convention. Or, if both parties are domiciled in the EU, or at least one of them is domiciled in the EU and they choose a European court to hear the case, the Brussels I Regulation may also be applicable according to the rule of party autonomy. As indicated in the Report on the Application of the Brussels I Regulation, the Choice of Court Convention will apply in all cases where at least one of the parties resides in a Contracting State other than an EU Member State, whereas the Brussels I Regulation applies where at least one party is domiciled in a Member State.[22] However, if one party is domiciled in a Member State, and the other party is domiciled in a third state which is also a Contracting State of the Hague Convention, both pieces of legislation may apply.

Suppose that the EU and Brazil are Contracting States to the Choice of Court Convention. If an EU domiciled party, e.g. Germany, and a party that is domiciled in a non-EU State, e.g. Brazil, choose an Austrian court in their choice of court clause. According to Article 26 of the Choice of Court Convention, the Austrian court is entitled to hear the case under both Article 5 of the Choice of Court Convention and Article 23 of the Brussels I Regulation. If the Brazilian company responds by bringing proceedings against the German company before a German court, the German court shall dismiss the case under both Article 6 of the Choice of Court Convention and Article 23 of the Brussels I Regulation.

[22] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Suppose that the US and Brazil are Contracting States to the Choice of Court Convention. If a US company and a Brazilian company, both non-domiciled in the EU, choose the Rotterdam court in their choice of court agreement, the Rotterdam court shall hear the case under Article 5 of the Choice of Court Convention. Under these circumstances, the Choice of Court Convention shall prevail over the Brussels I Regulation. At the same time, Article 23(3) of the Brussels I Regulation will not be affected.

With respect to the question of parallel proceedings, the Choice of Court Convention does not include a direct rule on *lis pendens* ("*Lis pendens* rule requires that where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the Court first seized shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seized is established").[23] So the court designated by the choice of court agreement may proceed notwithstanding parallel proceedings being brought elsewhere.[24] The Green Paper on the Review of the Brussels I Regulation proposes several solutions to enhance the effectiveness of choice of court agreements in the Community.[25] It includes the debate over maintaining or excluding the *lis pendens* rule, or introducing a standard choice of court clause. In the author's opinion, the *lis pendens* rule in the Brussels I Regulation ought to be excluded so as to be in line with the international standard in the Choice of Court Convention. Excluding the application of the *lis pendens* rule will strengthen the legal certainty and efficiency of jurisdiction agreements. Parties will not waste time pursuing the wrong proceedings and neither will courts wrongfully seize the case. It is suggested that any uncertainty surrounding the validity of the agreement could be addressed by prescribing a standard choice of court clause, which could at the same time expedite the decision on the jurisdiction question by the courts.[26] This should be deemed to be one of the most comprehensive solutions as it will create consistency in the standard of court proceedings.

With regard to the recognition and enforcement of judgments, the Brussels I Regulation will prevail over the Choice of Court Convention "where the court that granted the judgment and the court in which recognition is sought are both located in the European Community".[27]

[23] Ibid. [24] Ibid.

[25] Green Paper on the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[26] Ibid. [27] Hartley and Dogauchi (2007), p. 27.

If the recognition or enforcement of the judgment of the EU member state court is sought in a non-EU member state that is a Contracting State to the Choice of Court Convention, such recognition or enforcement will fall under the Choice of Court Convention.

In e-contracting cases, to insert a choice of jurisdiction clause in the standard terms and conditions on the website can avoid further ambiguity about which court has jurisdiction when disputes arise. For example, the website owner can incorporate a choice of jurisdiction clause into an interactive click-wrap agreement to which the buyer can assent by clicking the "I agree" button before purchase.[28] However, such terms and conditions must be available to read and download or reproduce as it is essential that there is a consensus between the parties in agreements concluded automatically over the Internet.

In the case of *Estasis Salotti* v. *RUWA*,[29] the ECJ held that the German court had no jurisdiction by virtue of a German jurisdiction clause contained in the claimant's standard terms and conditions as Article 17 of the Brussels Convention (now Article 23 of the Brussels I Regulation) is fulfilled "only if the contract signed by both parties contains an express reference to those general conditions". The key legal judgment raised in this case is that if the terms and conditions were printed on the back of the contract, such terms and conditions shall only be valid if they were referred to or incorporated into the contract itself signed by both parties so as to establish the evidence of consensus between contracting parties.

It will be even harder to prove or guarantee consensus between the contracting parties in contracts formed over the Internet, as, in a split second, someone might click the "I accept" or "I agree" button on the website by mistake without carefully reading the terms and conditions. To minimise such risk, in the EU, Article 10(1)(b) of the EC Directive on Electronic Commerce[30] requires that the concluded contract should be filed by the service providers, and it must be accessible. Furthermore, Article 10(3) requires that "contract terms and general conditions provided to the recipient must be made available in a way that allows him to store and reproduce them". However, the EC Directive on Electronic Commerce does not provide the solution for determining the consequences of a failure to provide the stipulated information. It is

[28] Fawcett, Harris and Bridge (2005), p. 511.
[29] *Estasis Salotti v RUWA*, Case 24/76, [1976] ECR 1831.
[30] See above n. 1.

notable that the EC Directive on Electronic Commerce foresees the legal complexity of proving validity of a click-wrap agreement. The provision concerning the availability of the contract terms provides legal reference but still cannot guarantee the consensus of contracting parties in the process of forming the contract. However, at the international level, the UN Convention on the Use of Electronic Communications in International Contracts (hereafter "the UN Convention on Electronic Contracts") does not impose any requirement for contracting parties to make available the contractual terms in any particular manner nor does it impose any consequence for failure to perform the duty, although Article 13 of the UN Convention on Electronic Contracts preserves the application of domestic law that may require a party to make available to the other party the electronic communications containing the contractual terms.[31]

With regard to errors in an exclusive jurisdiction agreement, is there any room in Article 23 for allegations of fraud, misrepresentation, duress or mistake of such agreement?[32]

In traditional English contract law, once the acceptance is sent, the contract is formed. If the acceptance is sent with material or non-material alterations, it enters into a battle of forms situation. In most other European countries, issues such as fraud, duress, mistake or frustration would be encompassed in a general requirement of good faith.[33]

In the electronic communications environment, the validity of an electronic contract shall be treated in the same way as a paper contract. However, due to the unique features of information technology, the measure and rule of correction of errors in electronic communications may be different. For example, Article 11(2) of the EC Directive on Electronic Commerce provides that "Member states shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means allowing him to identify and correct input errors, prior to the placing of the order."At the international level, the UN Convention provides a more precise provision which states that the offer may be amended if the person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he

[31] Wei and Suling (2006), p. 116, pp. 126–7. [32] Merrett (2009), pp. 545–64, p. 546.
[33] Ibid., p. 559.

or she made an error in electronic communication.[34] This presumption is based on two conditions: One is the timing – "notifying the other party as soon as possible" – and the other is the indication of the error in electronic communication.

The validity of the amendment of errors in electronic exclusive jurisdiction agreements shall be in line with the rules on the effectiveness of electronic contracts as well as errors in electronic communications. The formality requirements of electronic exclusive jurisdiction agreements depends on the customs or formal practices of the international trade parties. The terms and conditions included in the click-wrap agreement are treated similarly to those on the back of the traditional bill of lading. In the case of *Tilly Russ and Ernest Russ* v. *NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout* (known as the "*Tilly Russ* case"), the ECJ held that a jurisdiction clause contained in the printed conditions on a bill of lading satisfies the conditions laid down by Article 17 of the Brussels Convention (now Article 23 of the Brussels I Regulation):

> If the agreement of both parties to the conditions containing that clause has been expressed in writing; or
>
> If the jurisdiction clause has been the subject-matter of a prior oral agreement between the parties expressly relating to that clause, in which case the bill of lading, signed by the carrier, must be regarded as confirmation in writing of the oral agreement; or
>
> If the bill of lading comes within the framework of a continuing business relationship between the parties, in so far as it is thereby established that the relationship is governed by general conditions containing the jurisdiction clause;
>
> As regards the relationship between the carrier and a third party holding the bill of lading, the conditions laid down by Article 17 of the Convention are satisfied if the jurisdiction clause has been adjudged valid as between the carrier and the shipper and if, by virtue of the relevant national law, the third party, upon acquiring the bill of lading, succeeded to the shipper's rights and obligations.[35]

[34] Article 14 of the UN Convention on the use of Electronic International Contracts, ("UN Convention on Electronic Contracts") Communications in 9 December 2005, A/RES/60/21, UNCITRAL, available at daccessdds.un.org/doc/UNDOC/GEN/NO5/48880.pdf?Open Element (last visited on 30 September 2009).

[35] *Tilly Russ and Ernest Russ* v *NV Haven- & Vervoerbedrijf Nova and NV Goeminne Hout*, Judgment of the Court of 19 June 1984, Case 71/83.

3.3 General jurisdiction

To determine general jurisdiction some personal connecting factors must be taken into account, such as residence, ordinary residence, habitual residence and domicile. "Residence" is a slippery concept, and its meaning can range from very impermanent living arrangements to connections that approximate to or equal domicile.[36] If someone becomes resident in a country, the link of residence may remain during brief periods of absence.[37] In order to acquire a habitual residence, a person must take up lawful[38] residence in the relevant country and live there for a period to demonstrate that the residence has become habitual.[39] The basic rule of general jurisdiction requires a link between the defendant and the chosen court, for example the habitual residence of the defendant and not of the claimant, because the claimant decides whether and when to file legal proceedings and this advantage would enable him/her to select the most favourable forum.[40]

3.3.1 Bases of jurisdiction applicable to domiciled defendants

Under Article 2 of the Brussels I Regulation, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that state. Furthermore, domicile rules within the Brussels I Regulation govern the domicile of individuals[41] and domicile of corporations.[42] With contracts made over the Internet, it can be difficult to determine where the party is domiciled, even though the plaintiff can identify the party and locate the transaction.[43] Article 59(1) of the Brussels I Regulation provides that, as regards natural persons, in order to determine whether a party is domiciled in a particular member state, the court shall apply the law of that state. Article 60(1) lays down that for the purposes of the Brussels I Regulation a company or other legal person or association of natural or legal persons is domiciled at the place where it has (1) its statutory seat or (2) its central administration or

[36] Reese and Green (1953).
[37] *Sinclair* v. *Sinclair* [1968] 189 cited by McClean and Beevers (2005), p. 20.
[38] *Mark* v. *Mark* [2004] EWCA Civ. 168; [2004] 3 WLR 641.
[39] *Nessa* v. *Chief Adjudication Officer* [1999] 1 WLR 1937.
[40] McClean and Beevers (2005), pp. 59–60.
[41] Article 2 and Article 59 of the Brussels I Regulation.
[42] Article 60 of the Brussels I Regulation.
[43] Fawcett, Harris and Bridge (2005), p. 511.

(3) its principal place of business. Although Article 60 envisages the possibility that a company's central administration and its principal place of business may be located at different places, it will often be the case that they overlap, especially in relation to small organisations.[44] On the Internet, since the decision to enter into the e-transaction might be made following discussion via video conferencing between senior officers who reside in different states, it has become more difficult to ascertain the location of the central administration.[45] According to the UN Convention on the Use of Electronic Communications in International Contracts (hereafter "the UN Convention on Electronic Contracts"), "the location of the parties"[46] is defined as "a party's place of business".[47] If a natural person does not have a place of business, the person's habitual residence should be deemed to be a factor to determine jurisdiction.[48] The UNCITRAL Model Law on Electronic Commerce is the same as the UN Convention, providing that "if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence".[49] In my view, the person's habitual residence on the Internet should be treated the same as the traditional offline rule that general jurisdiction should be connected to the habitual residence of the defendant but not the claimant.

Furthermore, according to the UN Convention on Electronic Contracts, if a party does not indicate his place of business and has more than one place of business, then the place of business is that which has the closest relationship to the relevant contract.[50] The closest connecting factors are those that occur before or at the conclusion of the contract.[51] In the author's opinion, these factors are no different from those in the offline world, which should also relate to statutory seat, central administration or principal place of business. As a person or legal person doing electronic commerce, his/her statutory seat, central administration or principal place of business can be checked by the claimant, and the result can be found according to certain connecting factors such as the registration of the defendant's

[44] *King* v. *Crown Energy Trading AG* [2003] ILPr 489.
[45] Fawcett, Harris and Bridge (2005), p. 511.
[46] Article 6 of the UN Convention on Electronic Contracts. [47] Ibid., Article 6(1).
[48] Ibid.,Article 6(3); Article 15(4)(b) of the UNCITRAL Model Law on Electronic Commerce, on the report of the Sixth Committee (A/5/628), 16 December 1996, available at www.lexmercatoria.org (last visited on 16 August 2007).
[49] Ibid., Article 15(4)(b). [50] Article 6(2) of the UN Convention on Electronic Contracts.
[51] Ibid.

business, licences, electronic payments and places of delivery of goods or services. This leads to the issue considered in section 3.4: special jurisdiction.

3.3.2 Bases of jurisdiction applicable to non-domiciled defendants

Article 4 of the Brussels I Regulation provides that "if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 22 and 23, be determined by the law of that Member State". The wording of the provision makes it clear that the basic rule in Article 4 is subject to the provisions of Article 22 concerning exclusive jurisdiction regardless of the domicile of the parties, which refers to subject matters such as immovable property, corporations, public registers, intellectual property and enforcement of judgments.[52] Moreover, Article 4 also expressly states that the basic rule is subject to Article 23, the provision dealing with jurisdiction agreements between parties one or more of whom is domiciled in a member state. Furthermore, Article 59(2) of the Brussels I Regulation provides that, "if a party is not domiciled in the Member State whose courts are seized of the matter, then, in order to determine whether the party is domiciled in another Member State, the court is to apply the law of that Member State".

3.4 Special jurisdiction

3.4.1 B2B contracts

Article 5 of the Brussels I Regulation derogates from the general principle contained in Article 2, which gives the claimant the opportunity to proceed against the defendant in a member state in which the defendant is not domiciled. Under this provision, there are seven matters, one of which, Article 5(1), deals with matters relating to a contract. This general rule does not apply to insurance, consumer and employment contracts.[53]

[52] Article 22 of the Brussels I Regulation.

[53] Articles 8–14 of the Brussels I Regulation govern insurance; Articles 15–17 are about consumer contracts; Articles 18–21 are about employment contracts.

Article 5(1) provides that:

> A person domiciled in a Member State may, in another Member State, be sued:
> (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
> (b) for the purposes of the rule that jurisdiction in matters relating to a contract is allocated to the courts for the place of performance of the obligation in question, the place is:
> - in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered;
> - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided.

How to ascertain "the place of performance of the obligation in question"[54] is the focal point of how to determine special jurisdiction. The place of performance, according to Article 5(1)(b), is the place of delivery of goods (or where they should have been delivered), or the place where the services were provided (or should have been provided). Since the place of delivery is a close linking factor to determine special jurisdiction, an electronic contract is no different from a paper-based contract when the contract itself involves physical delivery of goods. The difficulty in applying Article 5(1) lies in the issue of whether multiple places of delivery are within the scope of the Article 5(1).

Unfortunately, Article 5(1)(b) does not expressly address the situation where, as regards a contract for the sale of goods, there is more than one place of delivery or, in relation to a contract of services, there is more than one place of performance. Problems with regard to multiple places of delivery of goods or provision of services[55] can be divided into two categories: one is different obligations have different places of delivery, and the other is the relevant obligation has several places of delivery.

In the first category, there are two possibilities: first, there is the case of disputes concerning more than one obligation. Article 5(1) allocates jurisdiction to the courts for each place of performance with regard to the dispute arising out of the obligation, which should have been performed at that place.[56] Second, there are cases that involve more than one

[54] "The obligation in question" means that which is relied upon as the basis for the claim, explained by McClean and Beevers (2005), p. 72.
[55] Hill (2005), p. 135.
[56] *Leathertex Divisione Sintetici SpA* v. *Bodetex BVBA* (case C-420/97), [1999] ECR I-6747.

obligation but with one principal obligation; here the courts for the place of performance of the principal obligation have jurisdiction over the whole claim.[57]

In the second category, there are also two possibilities: first, as is noted by the most recent case *Color Drack GmbH* v. *Lexx International Vertriebs GmbH*,[58] there is a query about "whether the first indent of Article 5(1)(b) of the Brussels I Regulation applied in the case of a contract for the sale of goods involving several places of delivery within a single Member State",[59] and if so, "whether the plaintiff could sue in the court for the place of delivery of its choice"[60] among all places of deliveries. The Court ruled that the applicability of the first indent of Article 5(1)(b) where there are several places of delivery within a single member state complies with the regulation's objective of predictability and proximity underlying the rules of special jurisdiction in matters relating to a contract,[61] because the defendant should expect, when a dispute arises, that he may be sued in a court of a member state other than the one where he is domiciled. Although the defendant might not know exactly which court the plaintiff may sue him in, he would certainly know that any court which the plaintiff might choose would be situated in a member state of performance of the obligation. As to the question whether the plaintiff can sue in a court of its own choice under Article 5 (1)(b), the Court ruled that for the purposes of application of the provision, the place of delivery must have the closest linking factor between the contract and the court, and "in such a case, the point of closest linking factor will, as a general rule, be at the place of the principal delivery, which must be determined on the basis of economic criteria".[62] If all places of delivery are "without distinction", and "have the same degree of closeness to the facts in the dispute",[63] the plaintiff could sue in the court of the place of delivery of its choice.

This leads to the second consideration: if the places of delivery were in different member states, will Article 5(1)(b) still apply? Where the relevant obligation has been, or is to be, performed in a number of places in different member states, following the Advocate General (AG)'s opinion, article 5(1)(b) does not apply to this situation as the objective of foreseeability of the Brussels I Regulation could not be achieved,[64] that

[57] *Shenavai* v. *Kreischer* (Case 266/85), [1987] ECR 239.
[58] *Color Drack GmbH* v. *Lexx International Vertriebs GmbH* (Case C-386/05), [2007] I. L. Pr. 35.
[59] Ibid., p. 456. [60] Ibid., p. 456. [61] Ibid., p. 479. [62] Ibid., p. 480. [63] Ibid., p. 473.
[64] Ibid., p. 472.

is a single place of performance for the obligation in question could not be identified for the purpose of this provision.[65] Therefore, the claimant should turn to Article 2 of the Brussels I Regulation, according to which the court with jurisdiction is that of the domicile of the defendant.

According to the above problems, some solutions can be suggested. If English jurisdiction is involved in a case where jurisdiction is not allocated by Article 5(1)(b) of the Brussels I Regulation and the place of performance is disputed, the court must, first, decide by reference to English choice of law rules which law is applicable to the contractual obligation in question and, then, determine the place of performance by reference to the applicable law. If the place of payment is not stipulated, the creditor's principal place of business should be regarded as the place of performance. The rules on special jurisdiction for B2B contracts are summarised in figure 1 below.

Lastly, in assessing the interpretation of Article 5(1)(b), it should be remembered that it expressly starts with the words "unless otherwise agreed". The place of performance may be "displaced" by an agreement between the parties. If there are various places of delivery, parties may specify by agreement among themselves which of the various places of delivery is to be chosen as the criterion of jurisdiction.[66] This concession to party autonomy has been confirmed by the European Court of Justice's case law. In *Zelger* v. *Salinitri*,[67] the European Court of Justice held that, if the place of performance of a contractual obligation has been specified by the parties in a clause which is valid according to the law applicable to the contract, the court for that place has jurisdiction in relation to disputes relating to that obligation under Article 5(1). Also, under Article 5(1)(b) of the Regulation, jurisdiction is awarded to the courts for the place of delivery of goods or provision of services "under the contract". The place to be taken into account is, therefore, the contractually agreed place of performance as distinguished from the actual place of performance. This will provide the buyer of goods or the recipient of services with certainty and predictability as to where proceedings can be brought.[68] For example, where Country A's defendant expressly agrees to perform contractual services in Country B, then

[65] *Besix SA* v. *Wasserreinigungsbau Alfred Kretzschmar GmbH & Co KG (Wabag)* (Case C-256/00), [2002] ECR I-1699.

[66] *Color Drack GmbH v. Lexx International Vertriebs GmbH* (Case C-386/05), [2007] I. L. Pr. 35, p. 472.

[67] Case 56/79 [1980] ECR 89.

[68] Takahashi (2002), p. 536.

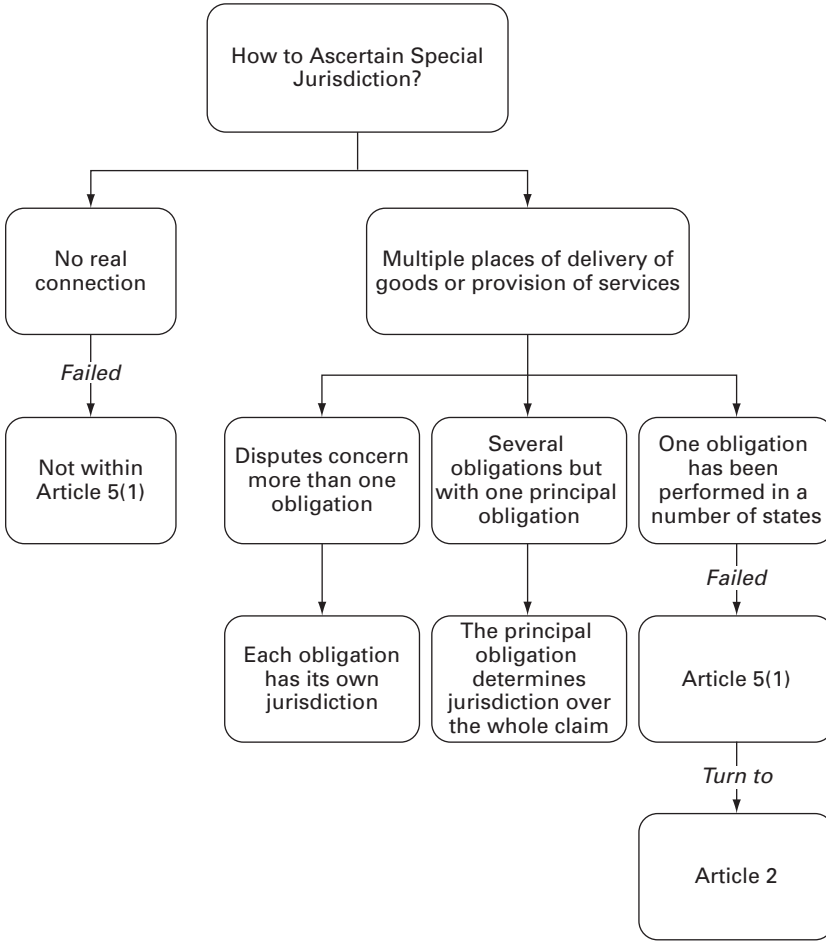

Figure 1 Ascertaining special jurisdiction

Country B's court has jurisdiction in relation to disputes arising out of the contract as long as the parties' agreement is valid according to the applicable law.

But problems may arise when the hearing court has no substantial connection with the reality of the contract.[69] That is, under some circumstances a person might retain a domicile in a state with which he no longer has a strong connection.[70] Another possibility is that two

[69] Hill (2005), p. 134.
[70] Scoles, Hay, Borchers and Symeonides (2000), p. 337.

contracting parties may choose a third country which is not related to their personal factors or places of business. In *Mainschiffahrts-Genossenschaft eG (MSG)* v. *Les Gravières Rhénanes*,[71] the European Court of Justice ruled that the general principle – that an agreed place of performance determines jurisdiction under Article 5(1) as long as the agreement is valid according to the applicable law – does not apply if the agreed place of performance has "no actual connection with the real subject-matter of the contract".[72] So, if the parties solely establish that the courts of a particular place have jurisdiction, it will not fall within Article 5(1), but it can be effective only if the agreement satisfies the requirement of Article 23 of the Brussels I Regulation.

In B2B electronic contracting disputes, can Article 5(1) still apply? If so, how can Article 5(1) be employed to resolve Internet jurisdiction disputes? To answer these questions, it will be first necessary to determine whether an electronic contract is for the sale of goods or the provisions of services. Next, a distinction will need to be made between physical goods and digitised goods, physical services and digitised services, and physical performance and digitised performance. This will make it possible to determine the differences and similarities concerning the place of performance between online and offline contracting.

First, is there a contract for the sale of goods, the provision of services or neither? Generally, goods can be ordinary goods with physical delivery and digital goods with performance over the Internet, such as digital books and online journals as well as software programs. With regard to software programs, there is academic authority in favour of the proposition that software transferred online constitutes "goods" for the purposes of the United Nations Convention on Contracts for the International Sale of Goods (CISG).[73] However, carriage of goods by sea, the provision of financial services, providing Internet access to recipients or designing a website for a company should all be categorised as services. In addition, programming software that meets the buyer's specific needs should be regarded as providing services. Sometimes, in a complex software development project, a piece of software program can be broken down into self-contained sections so that when there is payment by instalments on completion of milestones, payment will be due from the buyer on completion of each milestone within the framework of a software

[71] Case C-106/95 [1997] ECR I-911. [72] Case C-106/95 [1997] ECR I-944, para. 33.
[73] Fawcett, Harris and Bridge (2005), p. 514.

development contract.[74] In this way, different milestones may be categorised as goods or services.

Second, how to distinguish digitised goods from other products. Digitised products are intangible. Intangible property is, by its nature, not physically located in a particular state. However, the fact that a party has downloaded digitised products onto his computer, so that they are located on his hard drive, does not mean that the relevant *situs* is the place where the computer is presently located. Rather, we must consider the more complex question of where the digitised products were located at the time of the purported dealing with them.[75]

Third, what can be the place of performance of the obligation in question in cyberspace? As discussed before, between businesses the place of delivery is usually included in the contract of sale.[76] However, it becomes complicated when parties do not indicate the place of delivery in their contract, because it might involve multiple places of delivery and services might also be provided by the seller's agencies. Furthermore, it is even more complex when the transaction involves the delivery of digitised goods. There are a number of places where electronic transactions are processed which therefore might be argued to be the place of performance; for example, the place of dispatch and receipt, the place where the seller has a specified personal connecting factor and the place where the recipient (i.e. the buyer) has a specified personal connection.

The place of dispatch/uploading

The first possibility for the place of performance is the place where the information was dispatched, that is, where the information was uploaded on the web server. But it can be difficult to identify which particular computer constitutes the place of dispatch. Article 10(3) of the UN Convention on Electronic Contracts provides that "an electronic communication is deemed to be dispatched at the place where the originator has its place of business". In practice, a seller is likely to select the location of its server based on a number of criteria, including the cost and space and speed of the service, and the convenience and freedom offered in the state where it is located.[77] The place where the seller's server is located when it uploads the product is suggestive of the place of performance since it is the place where the seller takes the first substantial steps to make the digitised products available. It has a more realistic claim to be

[74] Burnett and Klinger (2005), p. 74. [75] Fawcett, Harris and Bridge (2005), p. 1301.
[76] Deveci (2006), p. 43. [77] Fawcett, Harris and Bridge (2005), p. 1306.

the *situs* than the artificial residence of one of the parties.[78] However, it is difficult to describe the location of the seller when he begins the process of uploading at the *situs* at the time of transfer to the recipient. In addition, it may be impossible for the recipient to determine the location of the seller at the time that it uploads the product and be contrary both to his expectations and the expectations of third parties if that law is applied.[79] Thus, it is much more in favour of the seller if the place of dispatch is considered as the place of performance.

The place of receipt/downloading

The second possibility for the place of performance is the place where the information was received by the recipient, that is, the place where the information was downloaded onto the computer of the recipient. The place of downloading has a strong case for being treated as a *situs*.[80] It is arguably most appropriate to say that transfer occurs in the state where the digitised product is downloaded.[81] But if a digital product is attached in an email from the seller, should the place of business be the place where the recipient's mailbox is situated? Another concern arises when the recipient agrees to purchase digital coded information over the Internet. This is something which the recipient pays for by a yearly subscription (e.g. an online journal or magazine) and can use as much as he wants over the year. The recipient may download the information at various times in various member states as he moves around Europe downloading it on a laptop. Moreover, it is possible that when there are two recipients, one downloads it in China, the other downloads it in the US. Under these circumstances whose court will hear the case? Since it is difficult to identify a single place of receipt under these circumstances, the place of receipt should be deemed to be the place of the recipient's habitual residence or place of business, according to Article 10(3) of the UN Convention on Electronic Contracts which provides that "an electronic communication is received at the place where the addressee has its place of business".

The place where either the seller or recipient has a closest connecting factor

Either the seller or the recipient's place of business, principal place of business, central administration, statutory seat or habitual residence has

[78] Ibid, p. 1305. [79] Ibid, p. 1305. [80] Ibid., p. 1304.
[81] Article 5(1)(b) of the Brussels I Regulation.

more promise as a connecting factor. It is supported by Article 60 of the Brussels I Regulation, Recital 19 and Article 2 of the EC Directive on Electronic Commerce referring to the place of establishment, Article 31 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), which recognises the place of business as a connecting factor, Article 15(4) of the UNCITRAL Model Law on Electronic Commerce and Articles 6 and 10 of the UN Convention on Electronic Contracts concerning the closest relationship to the relevant contract.

So where is the place of performance in cases of electronic transactions? From the author's perspective, on the basis of the above analysis, a solution based on a closest connecting factor to the place of performance in cyberspace is to be preferred to one based on the place of dispatch or receipt, or the place to which online business activities are directed.

When selling physical or digitised goods over the Internet with physical delivery, the place of performance in question should be the place of delivery of goods (or the place where the goods should have been delivered). When signing contracts for physical services over the Internet, the place of performance should be the place where the services were provided or should have been provided. The place of physical delivery of goods and services may not just be related to the recipient, but sometimes the location of the seller (or where the seller is not a service provider, the place of the seller's service provider). For example, in accordance with the practice of the international sale of goods under the «Incoterms 2000», "Ex Works" means that the seller delivers when he places the goods at the disposal of the buyer at the seller's premises or another named place (i.e. works, factory, warehouse, etc.) not cleared for export and not loaded on any collecting vehicle.[82] Similarly, in the case of a free-on-board sale ("FOB"), delivery takes place at the port of loading, which is usually in the seller's country. In the case of a cost-insurance-freight sale ("CIF"), delivery of the relevant documents (especially the bill of lading) amounts to symbolic or constructive delivery of the goods.[83] Therefore, under these particular circumstances, the relevant place will be where the documents were or should have been tendered rather than where the goods were located at the time of the tender. Furthermore, in the case of the provision of services, the place of performance is where services were provided or should have been

[82] International Chamber of Commerce, «Incoterms 2000» available at www.iccwbo.org/incoterms/preambles/pdf/EXW.pdf (last visited on 12 January 2009).

[83] Ibid.

provided. That place can be in the country of the seller (service provider) or recipient.

When selling digitised goods with delivery over the Internet, such as the seller selling the software and the buyer/recipient downloading it onto his computer or via instantaneous electronic transfer, the place of performance in question should be the recipient's place of business or domicile, that is the place where the goods are delivered should be regarded as being where the recipient has its place of business or is domiciled.

But why should the place of performance be the place of business or domicile rather than the place of downloading? Because the buyer/recipient can order and download his digitised products while away, at a place unconnected with his domicile or place of business. If the law allows the buyer to sue at the place of downloading, the buyer might go to that place with the intention of choosing a favourable jurisdiction. Although according to Article 5(1)(b), the place of performance in question is the place where the goods were delivered or should have been delivered, thus the recipient's place of downloading should be logically deemed to be the place of delivery, it conflicts with Article 6 (4)(a) of the UN Convention on Electronic Contracts, which provides that "a location is not a place of business merely because that is where equipment and technology supporting an information system used by a party in connection with the performance of a contract are located". However, the place of performance in Article 5(1)(a) of the Brussels I Regulation as a factor to determine jurisdiction is compatible with the rule of the UN Convention on Electronic Contracts which was mentioned earlier, that special jurisdiction should be determined by the place which has "the closest relationship to the relevant contract".[84] In the author's opinion, in cases of digitised goods with performance over the Internet, the interpretation of "the place of performance should be regarded as the place where goods were delivered or should have been delivered" under Article 5(1)(b) of the Brussels I Regulation should be:

> The place of performance should be at a recipient's place of business indicated by the party. If the party has not indicated a place of business, or has more than one place of business, then the place of business should be the one with the closest relationship to the relevant contract or where the recipient's principal place of business is situated. The place to which online business activities are directed shall be considered to be most

[84] Article 6(2) of the UN Convention.

> closely connected with the contract. If there is no place of business, the place of performance shall be at a recipient's domicile.

It is possible that the seller may be resident and have his business in State A, while the actual uploading activities may happen in State C and the recipient may download the digitised products when away from his/her residence or principal place of business. As discussed earlier in this section, there is a possibility that a software development contract with several milestones may be transferred individually in different countries to the buyers. Under these circumstances, the principal place of business of the recipient should be the appropriate *situs*[85] as the place of performance of contract.

3.4.2 B2C/consumer contracts

In the EU, Articles 15–17 of the Brussels I Regulation govern the jurisdiction rules for consumer contracts. The rule for general jurisdiction in Articles 15–17 of the Brussels I Regulation is identical to that in Articles 13–15 of the Brussels Convention, but it is not exactly the same with regard to special jurisdiction.

The concept of "the consumer" has been explicitly defined in Article 13 of Section 4 of the Brussels Convention (now Article 15 of the Brussels I Regulation) as a person for a purpose which can be regarded as being outside his trade or profession. In the case of *Shearson Lehmann Hutton Inc* v. *TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*,[86] the ECJ held that "It is important to note, in the first place, that the first paragraph of Article 13 of the Convention defines the consumer as a person acting 'for a purpose which can be regarded as being outside his trade or profession' and provides that the various types of contracts listed in that article, and to which the provisions of Section 4 of Title II of the Convention apply, must have been concluded by the consumer." Article 15(1) of the Brussels I Regulation does not directly provide the definition of consumer but includes a similar concept of consumer contracts as "in matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession". In the case of *Johann Gruber* v. *Bay Wa*

[85] Fawcett, Harris and Bridge (2005), p. 1302.

[86] *Shearson Lehmann Hutton Inc* v. *TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*, Judgment of the Court of 19 January 1993, Case C-89/91.

AG,[87] the ECJ held that the rules of jurisdiction laid down by the Brussels Convention (now Brussels I Regulation) must be interpreted in the following way:

- a person who concludes a contract for goods intended for purposes which are in part within and in part outside his trade or profession may not rely on the special rules of jurisdiction laid down in Articles 13 to 15 of the Convention, unless the trade or professional purpose is so limited as to be negligible in the overall context of the supply, the fact that the private element is predominant being irrelevant in that respect;
- it is for the court seized to decide whether the contract at issue was concluded in order to satisfy, to a non-negligible extent, needs of the business of the person concerned or whether, on the contrary, the trade or professional purpose was negligible;
- to that end, that court must take account of all the relevant factual evidence objectively contained in the file. On the other hand, it must not take account of facts or circumstances of which the other party to the contract may have been aware when the contract was concluded, unless the person who claims the capacity of consumer behaved in such a way as to give the other party to the contract the legitimate impression that he was acting for the purposes of his business.

According to Articles 15–17 of the Brussels I Regulation, the general jurisdiction rule of consumer contracts (B2C) is similar to that of B2B contracts in the sense that the domicile rule is employed as a general jurisdiction rule in both types of contracts. In other words, consumers can choose to bring proceedings against their contracting party either in the courts of the member state in which that other party is domiciled, or in the courts of the place where the consumer himself is domiciled. The difference in the general rules between B2B and B2C contracts is that for B2B contracts, defendants (sellers or buyers) domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state, whereas, for B2C contracts in case of proceedings against consumers, jurisdiction shall be determined by the consumer's domicile, so that proceedings may only be brought in the courts of the member state in which the consumer is domiciled, as provided by Article 16 of the Brussels I Regulation:

[87] *Johann Gruber* v. *Bay Wa AG*, Judgment of the Court (Second Chamber) of 20 January 2005, Case C-464/01.

1. A consumer may bring proceedings against the other party to a contract either in the courts of the member state in which that party is domiciled or in the courts for the place where the consumer is domiciled.
2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

The interpretation of the general jurisdiction rules for B2C contracts concluded by electronic means shall be in line with that for electronic B2B contracts in terms of the determination of the location of the parties in cyberspace.

The rule of special jurisdiction for consumer contracts in Articles 15–17 of the Brussels I Regulation has some significant changes to Articles 13–15 of the Brussels Convention as it creates a "pursuing and directing" approach. Articles 15–16 of the Brussels I Regulation provide direct jurisdiction rules to protect consumer's rights, whilst Article 17 serves as a guarantor in the case of businesses trying to exclude the effect of Articles 15–16 by inserting a jurisdiction clause into consumer contracts.

The concept of the "pursuing and directing" approach is specified in Article 15(1). It provides that:

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:
   (a) it is a contract for the sale of goods on instalment credit terms; or
   (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
   (c) in all other cases, the contract has been concluded with a person who *pursues* commercial or professional activities in the Member State of the consumer's domicile or, by any means, *directs* such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

As explicitly indicated in Article 15(1)(a) and (b), consumer contracts include contracts for the sale of goods on instalment credit terms and contracts for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods.

Article 15(1)(c) of the Brussels I Regulation particularly brings in a new approach of "pursuing or directing activities" for determining

appropriate jurisdiction in consumer contracts. Under the approach, there are two criteria to determine the place of jurisdiction in consumer contracts: first, the seller should pursue or direct commercial or professional activities in the member state; second, such member state shall be the place of the consumer's domicile. If such activities occur in several member states, the place of the consumer's domicile shall be in one of those Member States. Article 15(2) further provides that "where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State".

The modern "pursuing or directing approach" of jurisdiction in consumer contracts in the Brussels I Regulation is the principal innovation when compared with the Brussels Convention. It particularly caters for the information society and increases the certainty of electronic consumer contracts. When will the online commercial activities be regarded as the seller's having pursued or directed his/her activities to the member state of the consumer's domicile?

With the development of the new forms of electronic marketing techniques, the concept of "pursuing or directing activities" could be widely interpreted as websites or online sellers targeting activities, providing an online shopping platform, and offering goods or services to consumers in the member state of the consumer's domicile, or a number of member states including that member state. The Commission has explained that the extended concept of "pursuing or directing activities" is designed to include consumer contracts concluded via "interactive websites accessible in the State of the consumer's domicile".[88] In addition, in the case of *Gabriel*,[89] the Court held that the concepts of advertising and specific invitation addressed in the Brussels Convention "cover all forms of advertising carried out in the Contracting State in which the consumer is domiciled, whether disseminated generally by the press, radio, television, cinema or any other medium, or addressed directly, for example by means

[88] Proposal for a council Repulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Com 1999/348, 99/0154), on 14 July 1999, available at eur-lex.europa.eu/LexUri Serv/LexUri Serv.do? uri=COM: 1999: 0348: FIN:EN:PDF (last visited on 12 January 2010).

[89] *Rudolf Gabriel*, Judgment of the Court (Sixth Chamber) of 11 July 2002, C-96/00, p. 44 available at euro-lex.europa.eu/LexUri Serv/Lex Uri Serv.do? uri=CELEX: 62000J0096: EN:HTML.

of catalogues sent specifically to that State, as well as commercial offers made to the consumer in person, in particular by an agent or door-to-door salesman".

In respect of the difference between the concept of "pursuing" and "directing", it is argued that while the concept of pursuing activities in the member state of the consumer's domicile may require some physical presence in that State, the concept of directing activities does not.[90] In the author's opinion, both "pursuing" and "directing" activities do not require any physical presence as electronic contracts can be performed without physical presence. For example, if an online trader sells digital magazines to consumers in a member state, a consumer can order any edition of the digital magazines by clicking the "order" button and the product will be delivered online against the electronic payment. Such method of delivery is known as downloading. The whole process of selling and buying is done without any physical presence. It increases the possibility of consumers' purchasing goods or requesting service from a foreign country. Cross-border consumer contracts have become more and more common than before the digital age. However, the newly-developed forms of marketing techniques are challenging the legal certainty of cross-border consumer contracts. Recently, the ECJ has received questions in this area for preliminary rulings.

In the case of *Hotel Alpenhof GesmbH* v. *Oliver Heller*,[91] the Oberster Gerichtshof (Austria) has referred the following question to the ECJ for a preliminary ruling:

> *Is the fact that a website of the party with whom a consumer has concluded a contract can be consulted on the internet sufficient to justify a finding that an activity is being "directed", within the terms of Article 15(1)(c) of Regulation (EC) No 44/2001 ("the Brussels I Regulation")?*

In the author's opinion, one particular consumer transaction on the Internet should not constitute a "directing" activity of the website of the seller. As most of the commercial websites can be accessed everywhere in the world, Internet vendors cannot prevent foreign buyers from purchasing goods. Sometimes, websites will explicitly announce a warning notice on the front page, such as "Our products are only for the US market; if you are a foreign customer, you may bear your own risk of the non-delivery of products." A

[90] Cachia (2009), pp. 476–90, p. 483.

[91] *Hotel Alpenhof GesmbH* v. *Oliver Heller*, Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 24 April 2009, C-144/09.

"directing" activity should be counted as a "continual connecting" business to the member state with financial benefits. The Commission and Council have also indicated that the currency or language of the website are irrelevant factors.[92] It shows some consistency with the determination of the location of the parties over the Internet under the UN Convention on Electronic Contracts. Article 6 of the UN Convention on Electronic Contracts provides that:

1. For the purposes of this Convention, a party's place of business is presumed to be the location indicated by that party, unless another party demonstrates that the party making the indication does not have a place of business at that location.
2. If a party has not indicated a place of business and has more than one place of business, then the place of business for the purposes of this Convention is that which has the closest relationship to the relevant contract, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.
3. If a natural person does not have a place of business, reference is to be made to the person's habitual residence.
4. A location is not a place of business merely because that is: (a) where equipment and technology supporting an information system used by a party in connection with the formation of a contract are located; or (b) where the information system may be accessed by other parties.
5. The sole fact that a party makes use of a domain name or electronic mail address connected to a specific country does not create a presumption that its place of business is located in that country.

It is notable that domain name, electronic mail, IT system, currency and language do not have direct financial effects. A directing activity shall seek financial benefits through specific products in particular markets. In other words, sellers will use certain strategic sale plans and resources to target certain markets in the Member State.

In the case of *Peter Pammer* v. *Reederei Karl Schlüter GmbH & Co KG*,[93] the Oberster Gerichtshof (Austria) has also referred the following questions to the ECJ for a preliminary ruling:

[92] Joint Statement of the Commission and the Council on Arts 15 and 73 of the Regulation available at ec.europa.eu/civiljustice/homepage/homepage_ec_en_declaration.pdf (last visited on 12 September 2009).

[93] *Peter Pammer* v. *Reederei Karl Schlüter GmbH & Co KG*, Reference for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 24 December 2008, C-585/08.

- *Does a 'voyage by freighter' constitute package travel for the purposes of Article 15(3) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters?*
- *Is the fact that an agent's website can be consulted on the internet sufficient to justify a finding that activities are being 'directed' within the terms of Article 15(1)(c) of Regulation No 44/2001?*

First, it concerns whether package travel providing for a combination of travel and accommodation is within the scope of Article 15(3) of the Brussels I Regulation. It is notable that the concept or wording of "package travel" does not appear in the provision of consumer contracts (Articles 15–17) of the Brussels I Regulation. Although the Brussels I Regulation does not regulate or define the coverage of package travel, Article 15(4)(b) of the Rome I Regulation covers the issue, stating that "Paragraphs 1 and 2 of Article 15 shall not apply to a contract of carriage other than a contract relating to *package travel* within the meaning of Council Directive 90/ 314/EEC of 13 June 1990 on *package travel, package holidays and package tours*." Therefore, the Rome I Regulation generally recognises a contract of "package travel" as a consumer contract. In the author's view, in line with the Rome I Regulation, a contract of "package travel" should be deemed to be a consumer contract under Article 15(3) the Brussels I Regulation. As a consumer contract, the jurisdiction will accordingly be determined by a "pursuing or directing" approach under Article 15(1)(c).

With regard to the second question, in the author's view, an agent's website that can be consulted on the Internet should be sufficient to justify a finding that activities are being "directed" within the terms of Article 15(1)(c) of the Brussels I Regulation. The word "consult" in this context should be understood as "seek information from". The concept of the "agent" should be deemed to be within the scope of Article 15(2) of the Brussels I Regulation that "where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State". In the author's view, if an agent's website has a web advertisement for package travel purposefully targeting the consumer's member state and the consumer formed a contract of package travel as a result of the agent's web marketing intention, such contract shall be considered to be a consumer contract in which the agent directs such

activities to that member state or to several states including that member state.

3.5 Exclusive jurisdiction

Article 22 of the Brussels I Regulation covers disputes that are subject to exclusive jurisdiction according to subject matters. It sets out a number of mandatory and exclusive rules of jurisdiction regardless of domicile or agreements between the parties for certain proceedings relating to immovable property,[94] certain proceedings concerning the formation and dissolution of companies and the decisions of their organs,[95] certain proceedings concerning entries in public registers,[96] certain proceedings concerning intellectual property[97] and proceedings concerning the enforcement of judgments.[98] Thus, for example, the courts of the member state in which the property is situated shall have exclusive jurisdiction over disputes concerning property or tenancy.[99] The courts of the corporate seat shall hear cases of disputes governed by company law.[100] Accordingly, the courts of the country where the register is kept, the courts of the country of the registration of intellectual property rights and the courts of the country of enforcement will hear specific subject matters.[101] Currently, the European Commission Green Paper on Review of the Brussels I Regulation raises the consideration of whether it might be appropriate to extend the scope of exclusive jurisdiction in company law (Article 22(2)) to additional matters related to the internal organisation and decision-making in a company.[102]

In the author's view, whatever the extension of the scope of exclusive jurisdiction, the effect of electronic agreements brought in courts will not be affected. In other words, if the parties deal with the above subject matter in an agreement by electronic means, Article 22 should be applied without prejudice.[103]

[94] Article 22(1) of the Brussels I Regulation. [95] Ibid., Article 22(2).
[96] Ibid., Article 22(3). [97] Ibid., Article 22(4). [98] Ibid., Article 22(5).
[99] Ibid., Article 22(1). [100] Ibid., Article 22(2). [101] Ibid., Article 22(3)–(5).
[102] Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[103] Please note that part of this chapter is a reprint and update of the author's journal paper : Wang (2008).

4

US jurisdiction tests employed in e-contracting disputes

4.1 Overview of the US jurisdiction tests

> The global community must address complex issues involving choice of law and jurisdiction – how to decide where a virtual transaction takes place.[1]

Perhaps due to the fact that US companies are at the forefront of Internet technology, litigation regarding e-commerce in the US is more advanced than anywhere else in the world. Similar to the general and special jurisdiction under the EU Brussels regime, US law has two types of jurisdiction: general and specific. General jurisdiction is jurisdiction over the defendant for any cause of action, whether or not related to the defendant's contacts with the forum state; whereas specific jurisdiction applies when the underlying claims arise out of, or are directly related to, a defendant's contacts with the forum state.[2]

The above notion comes from the famous case *International Shoe Co* v. *Washington*,[3] which indicated that the minimum contacts test has both a general and a specific component.[4] What is meant by "minimum contacts"? It is a requirement that must be satisfied before a defendant can be sued in a particular state. In order for the suit to go forward in the chosen state, the defendant must have some connection with that state. For example, advertising in or having business offices within a state may provide minimum contacts between a company and the state.

4.2 General jurisdiction

"General jurisdiction", which is related to the concepts of "residence", "domicile" and "nationality" as discussed in the previous EU chapter, is the most basic and certain form of exercising physical power. The US general

[1] Nimmer (2001), 40. [2] Chik (Spring 2002), p. 243, pp. 248–9. [3] 326 U.S. 310 (1945).
[4] Scoles, Hay, Borchers and Symeonides (2000), p. 344.

jurisdiction rules resemble Articles 2 and 59 of the Brussels I Regulation. The term "general jurisdiction", as it is used in the US, is broader than that under the Brussels regime. It refers to assertions of territorial jurisdiction that do not depend upon the character of the dispute between the parties under the US require.[5] It provides a fairly generous conception of general jurisdiction, whereas the Brussels regime regulates jurisdiction in civil and commercial matters as between domiciliaries in European countries.[6]

Under the most commonly employed minimum contacts test, general jurisdiction is usually premised on "continuous and systematic" contacts between the defendant and the forum so as to make the defendant amenable to jurisdiction without regard to the character of the dispute between the parties.[7] It is clear that if the contacts that are unrelated to the dispute ("unrelated contacts") meet the threshold of being "continuous and systematic", the defendant is amenable to general jurisdiction based upon its contacts with the state.

The most difficult issue in relation to general jurisdiction is the amount of unrelated contacts needed to subject a defendant to *in personam* jurisdiction,[8] that is, the defendant has some continuing physical presence in the forum, usually in the form of offices. There is a question whether "mere" residence, as opposed to domicile or nationality, can be a sufficient connection for the exercise of general jurisdiction over an individual defendant.[9] The Second Restatement states that a defendant's residence is sufficient for the exercise of general jurisdiction "unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable".[10]

4.3 Specific jurisdiction

As discussed in the last section, general jurisdiction results from a party's continuous, systematic and ongoing ties to a certain forum.[11] However, specific jurisdiction turns upon the character of the dispute ("related contacts"). That is, if the contact is related to the cause of action, such contact-related jurisdiction is specific jurisdiction, because (unlike general jurisdiction) it is dependent upon the character of the dispute.[12]

[5] Ibid., p. 329. [6] Ibid., p. 330.
[7] *International Shoe Co* v. *Washington*, 326 U.S. at 320, 66 S.Ct. at 160, 90 L.Ed. at 104.
[8] Scoles, Hay, Borchers and Symeonides (2000), p. 348. [9] Ibid., p. 338.
[10] Restatement, Second, Conflict of Laws §30 (1971).
[11] *Helicopteros Nacionales de Colombia, SA* v. *Hall*, 466 U.S. 408 (1984).
[12] Scoles, Hay, Borchers and Symeonides (2000), p. 344.

4.3.1 B2B contracts

Specific jurisdiction is often used when a party's contacts do not fulfil the general jurisdiction criteria, and permits the court to assert jurisdiction over parties to a dispute arising from the parties' contacts with the state involved.[13] This is similar to Articles 5 and 6 of the Brussels I Regulation, although under the Brussels regime it is called "special jurisdiction". The term "specific" jurisdiction is descriptive because it is jurisdiction that is specific to the dispute. Due to the requirement that the contacts are "related" to the dispute, those contacts may well suffice for jurisdiction in the lawsuit at hand, but may not in another lawsuit relating to the defendant's activities in another country.[14] Thus, determining whether specific jurisdiction exists in a particular case depends upon two separate considerations. The first is whether the contacts are "related" to the dispute. The second, assuming that the contacts are so related, is whether the contacts are "constitutionally sufficient".[15]

For the last few years, US courts, both state and federal, have been wrestling with the problematic issue of personal jurisdiction in the context of Internet-related activities. In deciding these cases, US courts have been reluctant to view the mere general availability of a web site as a "minimum contact" sufficient to establish specific personal jurisdiction over a non-resident defendant, at least in the absence of other contacts with the forum state.[16] Whether a defendant can be subject to specific jurisdiction in contract cases depends on the entire course of dealing, including "prior negotiation and contemplated future consequences" establishing that "the defendant purposefully established minimum contacts with the forum".[17]

In practice, when trying to determine whether it has personal jurisdiction over a non-resident defendant, the US court will use a two-step test. First, the court will examine the state's long-arm statute in order to determine whether there is a statutory basis for allowing that plaintiff to sue the defendant in that forum. In the second step, the court looks for some acts or activities by which the defendant has purposefully availed himself or herself of the privilege of conducting business in that state to such an extent that the defendant should reasonably anticipate being sued there.[18] The second step, that is the concepts of "purposefully" and "reasonableness", plays a large role in the jurisdiction calculus.

[13] *Asahi Metal Ind. Co. v. Superior Court*, 480 U.S. 102 (1987). [14] Maloney (1993).
[15] Scoles, Hay, Borchers and Symeonides (2000), p. 300. [16] Smith (2002), p. 347.
[17] *Burger King Corp* v. *Rudzewicz*, 471 U.S. 479, 105 S.Ct. 2185, 85 L. Ed. 2d 528 (1985).
[18] *World Wide Volkswagen* v. *Woodson*, 444 U.S. 286 (1980).

Two additional factors can also be used to examine specific jurisdiction: whether the exercise of jurisdiction is consistent with the requirements of "minimum contacts" and "fair play and substantial justice". These can be determined first by whether the non-resident defendant has purposefully directed his activities at or carried out some transaction with the forum or a resident thereof, or performed some act by which he purposefully availed himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws; second, by whether the claim arises out of or relates to the defendant's forum-related activities; and third, by whether the exercise of jurisdiction is reasonable.[19]

In the *Zippo* case, the Western Pennsylvania District Court expanded on the *International Shoe* "minimum contacts test" by stating that personal jurisdiction for e-commerce companies should be dealt with on a "sliding scale".[20] That is, the "minimum contacts" test sets forth the due process requirements that a defendant, not present in the forum, must meet in order to be subjected to personal jurisdiction: "He must have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'."[21] *Zippo Mfg Co* v. *Zippo Dot Com Inc*[22] is emerging as the seminal case on whether an Internet website provides the minimum contacts necessary to establish jurisdiction. *Zippo* introduced a sliding scale to analyse the contacts of potential defendants created by Internet websites. In determining the constitutionality of exercising jurisdiction, the *Zippo* court focused on the "nature and quality of commercial activity that an entity conducts over the Internet".[23]

The sliding scale approach can be divided into three categories which are represented in Figure 2: first, active websites. The defendant enters into contracts with residents of a foreign jurisdiction that involve the repeated transmission of computer files over the Internet;[24] that is to say that, in order to justify jurisdiction, a company will have to show that it "clearly does business over the Internet", such as "entering into contracts with residents of a foreign jurisdiction that involve the knowing and

[19] *Ballard* v. *Savage*, 65 F. 3d 1495, 1498 (9th Circuit 1995).
[20] See *Zippo Mfg Co v. Zippo Dot Com, Inc*, 952 F. Supp. 1119 (W. D. Pa. 1997), at 1124.
[21] *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).
[22] See *Zippo Mfg Co* v. *Zippo Dot Com, Inc*, 952 F. Supp. 1119 (W. D. Pa. 1997).
[23] Ibid., at 1124.
[24] *CompuServe Inc* v. *Patterson*, 89 F. 3d. 1267 (6th Circuit 1996).

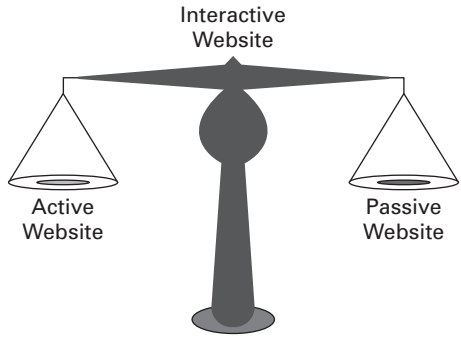

Figure 2 The Sliding Scale

repeated transmission of computer files".[25] These are grounds for the exercise of personal jurisdiction.

Second, passive websites. Passive websites merely provide information to a person visiting the site. They may be accessed by Internet browsers, but do not allow interaction between the host of the website and a visitor to the site. Passive websites do not conduct business, offer goods for sale or enable a person visiting the website to order merchandise, services or files. The defendant has simply posted information on a passive Internet website which is accessible to users in foreign jurisdictions. This is not a ground for the exercise of personal jurisdiction.

Third, interactive websites. Interactive websites make up the middle of the sliding scale where a user can exchange information with the host computers. In this middle part of the scale, jurisdiction should be determined by the "level of interactivity and commercial nature of the exchange of information that occurs on their web site".[26] Factors such as online contracting (found on most e-commerce sites) can show a high level of interaction leading to the exercise of jurisdiction. This is the crucial point of the sliding scale analysis. If the activities occurring on a defendant's website lean more towards the passive side of the scale, personal jurisdiction will not be applied. If, however, the activity slides toward the active side of the scale, personal jurisdiction will be likely to be upheld.[27]

[25] Cunard and Coplan (2001).
[26] See *Zippo Mfg Co*. v. *Zippo Dot Com, Inc*, 952 F. Supp. 1119 (W. D. Pa. 1997), at 1124; see also *Maritz Inc* v. *Cybergold Inc* 947 F. Supp. 1328 (E.D. Mo. 1996).
[27] See *Zippo Mfg Co* v. *Zippo Dot Com, Inc*, 952 F. Supp. 1119 (W. D. Pa. 1997), at 1124.

The *Zippo* sliding scale is one of the most developed doctrines of US jurisdiction, which encourages inquiry into the level of interactivity of a website. However, to avoid too many websites falling in the middle of the scale, one would have expected the court to provide a rough definition of "interactivity", but it did not.[28] Moreover, the *Zippo* test, with its emphasis on the level of interactivity inherent to a website, has become less relevant given that almost all commercial sites now are "at least highly interactive, if not integral to the marketing of the website owners".[29]

In accordance with jurisdictional developments abroad, US courts have further developed an alternative approach to determining jurisdiction in e-commerce cases: an "effects" test, based on the Supreme Court's decision in *Calder* v. *Jones*.[30] It permits states to exercise jurisdiction when the defendants intentionally harm forum residents. In applying this "effects" test to Internet cases, US courts focus on the actual effects the website has in the forum state rather than trying to examine the characteristics of the website or web presence to determine the level of contact the site has with the forum state.[31] However, an "effects" test will more easily apply to injuries in tort to individuals where injury is localised or intent can be inferred than to e-commerce cases involving corporations,[32] because determining where a larger, multi-forum corporation is "harmed" is a difficult prospect.[33] The court noted that the "effects" test does not "apply with the same force" to a corporation as it does to an individual because a corporation "does not suffer harm in a particular geographic location in the same sense that an individual does".[34]

Questioning the utility of the *Zippo* and "effects" tests, some US courts have focused on whether there was "something more" needed for the exercise of jurisdiction in e-commerce cases. Courts further introduced the "targeting test".[35] The requirement of the "targeting test" is satisfied "when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the

[28] Boone (Spring 2006), p. 241, p. 258. [29] Rice (2004), p. 11, p. 52.

[30] *Calder* v. *Jones*, 465 U.S. 783 (1984). In *Calder*, a California resident brought a suit in the California Superior Court against Florida residents who allegedly wrote libellous matter about her in a prominent national publication. In holding that jurisdiction was proper, the Court found "the brunt of the harm, in terms both of respondent's emotional distress and the injury to her professional reputation, was suffered in California".

[31] Boone (Spring 2006), p. 241, p. 260. [32] Ibid., p. 261.

[33] Rice and Gladstone (2003), p. 601, p. 629.

[34] *Cybersell, Inc* v. *Cybersell, Inc*, 130 F. 3d 414, 420 (9th Circuit 1997).

[35] *Bancroft & Masters, Inc* v. *Augusta Nat'l Inc*, 223 F. 3d 1082, 1087 (9th Circuit 2000).

forum state".[36] It has been argued that the targeting-based test is a better approach for the courts to employ than the sliding scale test in *Zippo* when determining jurisdiction in cases involving Internet-based contacts. The targeting test, unlike the *Zippo* test, places greater emphasis on identifying "the intentions of the parties and the steps taken to either enter or avoid a particular jurisdiction".[37] Further, the advocates of the targeting test view it as a better and fairer approach for determining whether the defendant reasonably anticipated being hauled into a foreign court to answer for his or her activities in the foreign forum state.[38] This determination is central to the due process analysis articulated by the US Supreme Court in *World-Wide Volkswagen*: "[T]he defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there. The Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."[39]

Two approaches have been developed by scholars and the courts which combine these considerations. The first one is called "network-mediated contacts": "new considerations such as a Web site's 'interactivity' and 'target audience' are the essential concepts courts use to determine whether to treat virtual contacts as minimum contacts".[40] Most courts have employed some variation of the sliding-scale framework developed in the *Zippo* case and have incorporated a "targeting" or "express aiming" requirement, seemingly inspired by the "effects" test the Supreme Court developed in *Calder v. Jones*.[41] The Ninth Circuit was one of the first circuit courts to address the issue of personal jurisdiction based on network-mediated contacts in *Cybersell, Inc. v. Cybersell, Inc.*[42] In *Cybersell*, it indicated that websites that simply advertise or solicit sales could not support an assertion of personal jurisdiction without "something more" to indicate that the defendant purposefully directed his activity in a substantial way to the forum state. Because the defendant's website in *Cybersell* was "an essentially passive home page", the court concluded: "We cannot see how from that fact alone it can be inferred that the defendant deliberately directed its merchandising

[36] Ibid. [37] Geist (2001b). [38] Ibid.
[39] *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297 (1980).
[40] Spencer (2006), p. 71, p. 72. [41] Ibid., p. 74.
[42] 130 F. 3d 414, 419–20 (9th Circuit 1997).

efforts toward forum residents."[43] Thus, it indicated that for a website to serve as the basis for personal jurisdiction, it would have to be specifically targeted at the forum states.[44]

The other is a targeting test approach: "For the court, deliberate action, rather than the more problematic notions of interactivity and 'effects', is important to E-commerce jurisdictional development."[45] The targeting or "deliberate action requirement" of *Cybersell* "should apply irrespective of whether the defendant's website is passive or highly interactive".[46] That is, the targeting approach requires the existence of "deliberate action" aimed at the forum state consisting of "transactions between the defendant and residents of the forum or conduct of the defendant purposefully directed at residents of the forum state".[47] In doing so, the court effectively rejected the *Zippo* approach because *Zippo* does not require deliberate action for a finding of personal jurisdiction.

However, the common view of the above arguments is a new criterion: courts have required additional indicia of state-specific "targeting" before they permit a finding of "purposeful availment". That is the new factor: the overall target audience of Internet activity.[48] This framework is drawn from *Asahi Metal Industry Co. v. Superior Court of California*,[49] which was favoured by Justice O'Connor and three other justices.[50] The "targeting" approach is applicable to both contract and tort, but, in tort, jurisdiction is extended to cover the place where there is harm effected.

So how can we ascertain the "targeting" approach in contract? Firstly, it is based on the intention of the defendant: the defendant must "direct" electronic activity into the forum state. Unlike the *Zippo* approach, "a targeting analysis seeks to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction".[51] It requires that a defendant specifically aims its online activities at a forum to come under the jurisdiction of that state.[52] This will give courts a solid conceptual basis: a "deliberate or intended action" from which to tackle sophisticated cases and produce consistent results.[53] Second, the

[43] 130 F. 3d 414, 419 (9th Circuit 1997). [44] 130 F. 3d 414, 419–20 (9th Circuit 1997).
[45] Boone (Spring 2006), p. 234, p. 263. [46] Traynor and Pirri (2002), p. 93, p. 119.
[47] *Millennium Enterprises, Inc.* v. *Millennium Music, LP*, 33 F. Supp. 2d 907, 921 (D. Or. 1999).
[48] Spencer (2006), p. 71, p. 75. [49] 480 U.S. 102 (1987).
[50] Boone (Spring 2006), p. 241, p. 244. [51] Berman (2002), p. 311, p. 418.
[52] Aciman and Vo-Verde (2002), p. 16, p. 19, and also *ALS Scan, Inc* v. *Digital Service Consultants, Inc*, 293 F. 3d 707, 714 (4th Circuit 2002).
[53] Boone (Spring 2006), p. 241, p. 266.

defendant must intend to engage in business or other interactions ("something more") in the forum state. Third, the defendant must engage in an activity that created a potential cause of action under the forum state's law with regard to a person in the forum state.

In accordance with the three measurements above, the "targeting" approach gives more legal certainty over determining Internet jurisdiction. It is suggested that this approach, as well as providing consistency and legal certainty, does not totally preclude the "American propensity toward individualized justice".[54]

4.3.2 B2C/consumer contracts

In the US, the principles of Internet jurisdiction in consumer contracts (B2C) are identical to those of B2B contracts. Lawsuits arising from electronic consumer contracts are often related to domain name disputes: "if a company uses a domain which is identical to the name or trademark of a company, an Internet user may inadvertently access an unintended company. Thereafter, the Internet user may not realize that the advertisement is actually from an unintended company, or the Internet user may erroneously assume that the source of information is the intended company. As a result, confusion in the marketplace could develop."[55]

Identical to the Internet jurisdiction doctrine in B2B contracts, the US courts employ the four approaches to determine or examine the jurisdiction of B2C contracts: (1) "minimum contacts" from the *International Shoe*[56] case; (2) "a sliding scale – active, interactive or passive websites" from the *Zippo*[57] case; (3) "an effects test" from *Calder* v. *Jones*;[58] and (4) "a targeting test" from both the *Bancroft*[59] and *ALS Scan*[60] cases. The methodology of adopting such approaches in B2C contract cases is similar to that used in B2B contracts cases discussed above in terms of the substantial factors considered when seeking personal jurisdiction. The common point in the cases on consumer contracts is that consumers (as plaintiffs) seek to establish personal jurisdiction and raise proceedings in their own jurisdiction, and, accordingly, the courts will have to

[54] Ibid., p. 274.
[55] *Inset Systems, Inc* v. *Instruction Set, Inc*, 937 F. Supp. 161 (D. Conn. 1996).
[56] 326 US 310 (1945). [57] 952 F. Supp. 1119 (W. D. Pa. 1997). [58] 465 U.S. 783 (1984).
[59] *Bancroft & Masters, Inc* v. *Augusta Nat'l Inc*, 223 F. 3d 1082, 1087 (9th Circuit 2000).
[60] *ALS Scan* v. *Digital Service Consultants Inc*, 293 F. 3d 707 (4th Circuit 2002).

find a substantial connection to the forum and examine how such a substantial connection is achieved.

The targeting test in consumer contracts requires that the business purposefully targeted its activities via its website to the place where the consumer is domiciled or resident at the time the parties entered into a contract with each other. This does not mean that the consumer has to be present in that jurisdiction when the contract is entered into. For example, in the case of *Inset Systems, Inc* v. *Instruction Set, Inc*[61] the court pronounced:

> [I]n the present case, Instruction has directed its advertising activities via the Internet and its toll-free number toward not only the state of Connecticut, but to all states. The Internet as well as toll-free numbers are designed to communicate with people and their businesses in every state. Advertisement on the Internet can reach as many as 10,000 Internet users within Connecticut alone. Further, once posted on the Internet, unlike television and radio advertising, the advertisement is available continuously to any Internet user. ISI has therefore, purposefully availed itself of the privilege of doing business within Connecticut. The court concludes that since ISI purposefully directed its advertising activities toward this state on a continuing basis since March, 1995, it could reasonably anticipate the possibility of being hauled into court here.[62]

From the court judgment above, the assertion of jurisdiction is based on a continuous advertisement on the website which is considered as purposefully directing its advertising activities toward the state (Connecticut) on a continuous basis. Thus, the court stated that the defendant could reasonably have anticipated being hauled into court in Connecticut. However, it is also notable that at the same time the court acknowledged that *Instruction Set* did not maintain an office in Connecticut, nor did it have a sales force or employees in the state. It raises the concern that the mere continuous advertisement on the website was sufficient for this court to establish jurisdiction. In the author's view, to develop a clearer framework for Internet jurisdiction, the court should have relied on the fact that *Instruction Set* continuously sells products and provides services directly to consumers in Connecticut via its purposefully targeted web advertisement.

Due to the complexities of ascertaining Internet jurisdiction for cross-border consumer contracts, and the various ways of interpreting the

[61] *Inset Systems, Inc* v. *Instruction Set, Inc*, 937 F. Supp. 161 (D. Conn. 1996).
[62] 937 F. Supp. 161, at 165.

Internet jurisdiction approaches from the courts, it is important to enhance the legal certainty by harmonising consumer private international law. Currently, the Secretariat for Legal Affairs (SLA) under the Organization of American States (OAS) in Washington DC is aiming to develop, promote, and implement the Inter-American Program for the Development of International Law and is providing advisory services concerning international law and the development and codification of inter-American law.[63] The current approaches towards harmonisation of consumer private international law in the Americas have been undertaken by the Inter-American Specialized Conference on Private International Law (CIDIP). The most recent conference, the sixth conference of CIDIP (CIDIP-VI), was held at the OAS headquarters in Washington DC in 2002. CIDIP has been preparing for the seventh conference (CIDIP VII) since October 2005.[64] At the fourth plenary session of CIDIP VII on 4 June 2009, CIDIP confirmed the selection of two topics for the conference agenda: one was consumer protection and the other was secured transaction registries.[65] With regard to the area of secured transactions registries, the Permanent Council approved the model registry regulations drafted by the member states and convened a three-day meeting of CIDIP VII at OAS Headquarters in Washington, DC, from 7 October 2009; whereas, with regard to the area of consumer protection, the member states are determined to work towards completion of the proposed documents on consumer protection with a view to setting dates for CIDIP VII on the said topics in the first half of 2010.[66]

One of the most important tasks for the working group in the area of consumer protection is the harmonisation of consumer private international law. The Working Group has been working on a convention or model law of private international law for consumer contracts. The first

[63] The Secretariat for Legal Affairs (SLA), Organization of American States (OAS), Washington DC, available at www.oas.org/dil/secretariat_for_legal_affairs.htm (last visited on 20 September 2009).

[64] CIDIP-VII: Preparatory Work for the Seventh Inter-American Specialized Conference on Private International Law, Department of International Legal Affairs, General Secretariat of the Organization of American States, OEA/Ser.G, CP/CAJP-2309/05, 19 October 2005, available at www.oas.org/dil/CIDIP-VII_home.htm (last visited on 20 September 2009).

[65] Agenda of the Seventh Inter-American Specialized Conference on Private International Law, AG/RES. 2527 (XXXIX-O/09), adopted at the fourth plenary session, held on 4 June, 2009, available at www.oas.org/dil/AG-RES_2527_XXXIX-O-09_eng.pdf (last visited on 20 September 2009).

[66] Ibid.

draft of the Model Law of Jurisdiction for Consumer Contracts was proposed by Canada in October 2006[67] and the first draft of the Model Law of the Choice of Law Rules for Consumer Contracts was also proposed by Canada in November 2006.[68] The first drafts were further developed and expanded as the Draft Model Law of Jurisdiction and Applicable Law for Consumer Contracts in May 2008.[69] The primary purpose of the model law or convention is to provide legislative options for addressing Internet jurisdictional issues related to cross-border consumer matters.[70] The Preamble of the Draft Model Law of Jurisdiction and Applicable Law for Consumer Contracts (hereafter "the Model Law") clarifies its purposes and objectives as:

(a) providing a predictable, fair and efficient legal framework for resolving disputes relating to cross-border consumer contracts;
(b) providing effective and meaningful protection for consumers in their relationships with businesses;
(c) facilitating the free movement of goods and services among States and promoting consumer confidence in the marketplace; and
(d) providing greater consistency and enhancing judicial cooperation in disputes relating to cross-border consumer contracts.

As the intention of this Model Law is to harmonise jurisdiction and applicable law rules of cross-border consumer contracts, its scope is obviously "international" as defined in Article 1 of the Model Law. The Model Law addresses the specific grounds of jurisdiction of the court in its Article 3 and further explains the concept of "Substantial Connection" in its Article 4. The Model Law provides that a court may assert jurisdiction over a person who is habitually resident in its jurisdiction at the time of the commencement of the consumer contract proceedings, or where

[67] Draft Model Law of Jurisdiction for Consumer Contracts, October 2006, Canada for CIDIP, available at www.oas.org/dil/esp/propuesta_canada_pc_draft_model_law_on_jurisdiction.pdf (last visited on 20 September 2009).

[68] Draft Model Law for Choice of Law Rules for Consumer Contracts, November 2006, by Canada for CIDIP, available at www.oas.org/dil/esp/Choice_of_Law_Rules_for_Consumer_Contracts%20_nov_2006.pdf (last visited on 20 September 2009).

[69] Draft of Proposal for a Model Law of Jurisdiction and Applicable Law for Consumer Contracts, by Canada for CIDIP VII, in May 2008, available at www.oas.org/dil/Draft_of_proposal_for_a_Model_Law_on_Jurisdiction_and_Applicable_Law_for_Consumer_Contracts_Canada.pdf (last visited on 20 September 2009).

[70] Topics of Jurisdiction, CIDIP VII, available at www.oas.org/dil/CIDIP-VII_topics_cidip_vii_consumerprotection_jurisdiction.htm (last visited on 20 September 2009).

there is a substantial connection between the state and the facts on which the proceeding is based, or by agreement.[71] According to the wording of Article 3, it seems that the states of the courts of both parties – consumers and vendors – may both have the possibility of hearing the disputes depending on whoever is the defendant. In the author's view, the above jurisdictional rules specified in Article 3 of the Model Law are certainly the first step towards the harmonisation of international consumer protections, but the wording of the rules is simple and vague, and may need to be interpreted in an explanatory note accordingly so as to enhance the original and actual purposes of the rules and translate them into practice. It might be clearer to define "a person" in the default rule of consumer jurisdiction. "A person" in this context should be understood as "a consumer" rather than "a business entity" so that it protects the rights of the weaker party – the consumer. It would, therefore, establish a protective rule that proceedings brought against a consumer may only be heard in the courts of the member state in which the consumer is domiciled.

The merit of the draft Model Law lies in its introducing and explaining the concept of "substantial connection", which establishes a clear approach in determining the jurisdictional factors for cross-border consumer contracts, in particular electronic B2C contracts, in the age of information technology. Article 4 of the draft Model Law defines the "substantial connection" rule and provides the circumstances that shall not be deemed to constitute any substantial connection, that:

> (a) a consumer, who is habitually resident in the State, has brought a proceeding under a consumer contract in the courts of the State against a vendor, who is habitually resident in a State other than the State; (b) the consumer contract resulted from a solicitation of business in the State by the vendor; (c) the vendor received the consumer's order in the State, or (d) the vendor induced the consumer to travel to a State other than the State for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.

The provision of the "substantial connection" is specially tailored for adaptation to electronic cross-border consumer contracts. It is derived from the "minimum contacts" and "targeting approach" in US judicial practice, but brings about a uniform understanding or interpretation of such approaches. Accordingly, in order for a web business to have a

[71] Article 3(a), (b) and (c) of the Draft Model Law of Jurisdiction and Applicable Law for Consumer Contracts.

substantial connection to the state of the consumer's domicile or habitual residence, the web vendor must prove that the commercial transaction is not a coincidence but resulted from a purposefully continuous business strategy or activity towards that state. Suppose that a consumer, who lives in the UK, travels to the US and orders a digital camera to be delivered to her hotel in the US during her stay. When disputes occur, the court of the UK may have jurisdiction over the case only if the US website has its business purposefully targeted towards the UK. The Model Law resolves the obstacle of the uncertainty of the place of electronic transactions for the purpose of the determination of jurisdiction as such transactions can take place everywhere in the world via the Internet. Furthermore, Article 4(2) of the Model Law specifies the vendor's burden of proof of the solicitation of business that: unless the vendor demonstrates that he or she took reasonable steps to avoid concluding consumer contracts with consumers habitually residing in the state, the vendor is deemed to induce consumers resident there to enter into contracts with him. This clause helps in identifying the liability of the vendor in consumer contract disputes, which would improve the efficiency of the proceedings and promote the fairness of the court judgments.

5

Chinese legislation on jurisdiction

Although China is one of the largest export countries in the world and also has a significant amount of cross-border electronic commercial transactions, it currently has no single private international law. In the absence of a uniform statute on private international law, the basic jurisdictional rules in Chinese national laws, such as the Contract Law of the People's Republic of China (hereafter "the contract Law of China" or "CLC") and the Civil Procedure Law of the People's Republic of China (hereafter "Civil Procedure Law"), are the primary sources. Some subject-specific civil or commercial laws, such as the Foreign Trade Law of the People's Republic of China (hereafter "Foreign Trade Law"), may include provisions that direct the determination of jurisdiction and applicable law in foreign-related commercial and civil matters. Some special judicial arrangements between Hong Kong and mainland China or between Macao and mainland China, such as "the Arrangement between the Mainland and the Hong Kong Special Administrative Region on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction" of 2008 (hereafter the "China and Hong Kong Arrangement")[1] and "the Arrangement between the Mainland and Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments" in 2006[2] are also important to facilitate judicial certainty and stimulate trade and cooperation between China and its special administrative regions.

The Chinese economic reform – socialism with Chinese characteristics (known as "Gai Ge Kai Fang" in Chinese) – was started in 1978. Since then, new laws and policies have been recommended to generate

[1] No. 9 [2008] of the Supreme People's Court in the People's Republic of China, available at www.chinacourt.org/flwk/show.php?file_id=128128 (last visited on 16 August 2009).

[2] No. 2 [2006] of the Supreme People's Court in the People's Republic of China, available at www.chinalawedu.com/new/1300_12_/2009_5_19_ma0553575556191590024161.shtml (last visited on 16 August 2009).

sufficient surplus value to finance the modernisation of the mainland Chinese economy. Export and import trades have been highly encouraged. With the fast-growing volume of foreign trade, cross-border trade-related disputes have been increasing. There is a need for specific rules of private international law in China to foster the fair order of trade disputes resolution. In response to this need, the Chinese Society of Private International Law, a non-profit organisation, was established in the 1980s and has been working on a Model Law of Private International Law of the People's Republic of China (hereafter "the Draft China Model Law") since then. The most recent draft of the Draft China Model Law, known as the Sixth Draft, was drawn up in 2000. It aims to safeguard the legitimate rights and interests of the parties in international civil and commercial contracts on the basis of equality and mutual benefits, to resolve international disputes in a fair and reasonable manner and to promote the development of international civil and commercial relations. It is deemed to be an important step for China to establish harmonised conflict-of-law rules and be a big but fair economic player. However, the Draft China Model Law covers a wide range of subject matters without precise, practical and advanced clauses concerning jurisdiction for B2B and B2C/consumer contracts. It still needs to be further developed and polished to fit into the newly developing information society. As part of the continued work on the improvement of the Draft China Model Law, the Chinese Society of Private International Law held its annual conference at the Fu Dan University in Shanghai in October 2005 after the launch of the Hague Convention on Choice of Court Agreements (hereafter "the Choice of Court Convention") in 2005. It discussed the lessons and experiences of the Choice of Court Convention with regard to Chinese private international law legislation and considered whether China should sign and ratify it.[3]

5.1 Jurisdiction clauses/agreements

In China, a jurisdiction agreement was generally recognised in the Civil Procedure Law of 1991. Article 25 of the Civil Procedure Law is in favour of "party autonomy", providing that

> the parties to a contract may choose through agreement stipulated in the written contract the people's court in the place where the defendant has

[3] Sun and Du (2006), p. 6.

> his domicile, where the contract is performed, where the contract is signed, where the plaintiff has his domicile or where the object of the action is located to have jurisdiction over the case, provided that the provisions of this Law regarding jurisdiction by level and exclusive jurisdiction shall not be violated.[4]

Although the Civil Procedure Law does not provide a precise explanation of the conditions for the validity and enforceability of a jurisdiction agreement, it is clear that the jurisdiction agreement shall be in writing. The Chinese national laws or arrangements interpret "in writing" as "including electronic means". For example, the CLC of 1999[5] implements several changes to the contract formation rules. A contract can now be made in any manner.[6] Under the CLC, writings include agreement, letters, telegram, telex, fax, electronic data information and electronic mail.[7] Article 2 of the Law of the People's Republic of China on Electronic Signatures in 2005[8] recognises the validity of electronic signatures to contracts. Article 3 of the China and Hong Kong Arrangement also provides that agreements can be concluded by electronic means including telegraph, fax, electronic data exchanges and emails. It allows an exclusive choice of court agreement to be contained in one single document or several documents. It further clarifies that an exclusive choice of court agreement is an independent agreement to the relevant contracts. Thus, the amendment, revocation or termination of the contracts will not affect the validity of the exclusive choice of court agreement, unless the parties agree otherwise.

In practice, jurisdiction clauses or agreements were not strictly recognised and enforced. For example, in the case of *Zhejiang Province Arts & Crafts Import & Export Industrial and Trade Group* v. *Hong Kong Golden*

[4] Article 25 of the Civil Procedure Law of the People's Republic of China, promulgated on 9 April 1991, available at en.chinacourt.org/public/detail.php?id=2694 (last visited on 27 August 2009).

[5] Contract Law of the People's Republic of China, adopted and promulgated by the second session of the Ninth National People's Congress on 15 March 1999, available at cclaw.net (last visited on 27 August 2009).

[6] Article 10 of the Chinese Contract Law states:

> "A contract may be made in writing, in an oral conversation, as well as in any other form."

[7] Article 11 of the Chinese Contract Law.

[8] Law of the People's Republic of China on Electronic Signatures, 28 August 2004, Eleventh Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China, available at www.law-bridge.net/english/LAW/20064/0221374918883.shtml (last visited on 28 September 2009).

Fortune Shipping Co Ltd, although there was a choice of court agreement in the bill of lading that "any disputes in relation to the bill of lading shall be handled by Hong Kong courts in accordance with Hong Kong Law", it was not recognised and enforced by the Shanghai Maritime Court that first seized the case for the reason of *forum non conveniens*.[9]

With the promulgation of the China and Hong Kong Arrangement in 2008, an exclusive choice of court agreement for commercial contracts in relation to the money judgment is now explicitly recognised. It will, therefore, enhance the enforcement of the jurisdiction agreement as the exclusive chosen court of Hong Kong or Mainland China can be valid. However, such exclusive agreement shall be formed after the China and Hong Kong Arrangement has come into effect. In addition, there is a "timing period" rule in Article 8 of the China and Hong Kong Arrangement that an application for the recognition of a judgment must be made within two years of the effective date of that judgment.

However, there is no reference to or provision for the recognition of exclusive choice of court agreements under the Arrangement between the Mainland and Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments of 2006.

In the Draft China Model Law, Article 47 regulates the jurisdiction agreements by parties, providing that:

(1) The parties to a dispute of foreign-related contract or to a dispute of foreign-related property rights and interests may, by written agreement concluded before or after the occurrence of the dispute, choose the PRC court or a foreign court to exercise jurisdiction over the dispute relating to that contract or the property rights and interests.
(2) The court chosen by such agreement shall be factually connected with the dispute.
(3) The jurisdiction by agreement is exclusive. However, the choice of jurisdiction of a court by agreement shall not violate the provisions of exclusive jurisdiction under this law.

In the author's view, the wording of Article 47(1) is complicated and ambiguous. It should simply propose a straight clause without repeating the scope of the legal relationship which has already been defined in the

[9] *Zhejiang Province Arts & Crafts Import & Export Industrial and Trade Group* v. *Hong Kong Golden Fortune Shipping Co Ltd*, September 1988, Supreme People's Court, Selected Cases of People's Courts (1996) 1711–17 (Shanghai Maritime Court 1991).

general provisions of the Draft China Model Law. For instance, the clause could be amended as "if the parties, one of more of whom is domiciled in China, have agreed in writing that a PRC court or a foreign court is to have jurisdiction over the disputes which may arise or have arisen, that court shall have jurisdiction". In addition, Article 47(2) is unique in terms of its requirement that the court chosen by such agreement shall have actual connections with the dispute, although it is consistent with Article 244 of the current Civil Procedure Law in China that parties to a dispute over a contract or property rights and interests involving foreign interests may, through written agreement, choose the people's court in the place which has *actual connections* with the dispute as the court of jurisdiction. In the international practice, neither the EU Brussels I Regulation nor the Choice of Court Convention requires such kind of actual connection between the dispute and the court in exclusive jurisdiction agreements.

5.2 Jurisdiction rules

In China, the Foreign Trade Law of the People's Republic of China was revised and adopted at the 8th Session of the Standing Committee of the Tenth National People's Congress on 6 April 2004 and was promulgated on 1 July 2004. It has no jurisdiction rules or provisions but it provides comprehensive strict liability measures specified in its Articles 60–6. Under such circumstances, the Civil Procedure Law[10] is still deemed to be the only national law that deals with the issues of jurisdiction for the adjudication of foreign trade related matters including the enforcement of foreign courts' judgments.

The Civil Procedure Law, unlike relevant laws in the EU and US, does not structure the provision of jurisdiction by focusing on general and special principles. Overall, it governs jurisdiction over contracts by providing that "a lawsuit initiated for a contract dispute shall be under the jurisdiction of the people's court in the place where the defendant has his domicile or where the contract is performed".[11] Currently, there are three core interpretations of the Civil Procedure Law issued by the Supreme Court to implement jurisdiction issues. They are: the 1992 Opinions of the Supreme Court on the Implementation of the Civil

[10] Articles 237–69 of the Civil Procedure Law of the People's Republic of China, promulgated on 9 April 1991.

[11] Article 24 of the Chinese Civil Procedure Law.

Procedure Law; the 1998 Regulations of the Supreme Court Regarding Some Questions on the Enforcement of Judgments; the 2002 Regulations of the Supreme Court Regarding Some Questions on International Jurisdiction in Civil and Commercial Matters.

According to Article 22 of the Civil Procedure Law, the fundamental rule of jurisdiction is that a civil suit against Chinese citizens comes under the jurisdiction of the court at the place where the defendant is domiciled, or, if not the same, under the jurisdiction of the people's court at the place of his regular abode, or residence.

Article 243 of the Civil Procedure Law deals with lawsuits brought against a defendant who is not domiciled in the People's Republic of China in relation to a contractual dispute or other disputes over property rights and interests. The defendant shall be sued in the courts where the contract is signed or performed; where the object of the action is located, where the defendant's distrainable property is located; where the infringing act takes place; or where the representative agency, branch or business agent is located. For example, in the case of *Avnet Technology (Hong Kong) Ltd* v. *JiaTong Technology (Suzhou) Ltd* (2009)[12] in the dispute of the contract of sale of goods, the Civil Division of the Intermediate People's Court of Suzhou recognised it as a foreign-related lawsuit where the foreign jurisdiction section of the Civil Procedure Law of China applied as the plaintiff was a habitual resident in Hong Kong and therefore outside of the jurisdiction of mainland China. The Intermediate People's Court of Suzhou had jurisdiction over the dispute as the defendant – JiaTong Technology (Suzhou) Ltd – is located in Suzhou. In addition, it is notable that the Intermediate People's Court of Suzhou also accepted the evidence of four purchase orders and two email messages submitted by the plaintiff, Avnet Technology Hong Kong Ltd. Thus, in practice, email messages can be served as evidence in the courts of China.

Sometimes, the court of the place in which the contract is performed or carried out will also exercise jurisdiction. For example, in the case of *Chamber of Japan in Shanghai* v. *Huida Co (Hong Kong)* (1994)[13] resolving a dispute over an investment agreement, neither of the parties had offices in mainland China, but the Intermediate People's Court of

[12] *Avnet Technology (Hong Kong) Ltd* v. *JiaTong Technology (Suzhou) Ltd*, (2009) the Intermediate People's Court of Suzhou, No.0027, available at www.ccmt.org.cn/ss/writ/judgementDetial.php?sId=3866 (last visited on 21 September 2009).

[13] *Chamber of Japan in Shanghai* v. *Huida Co (Hong Kong)*, (1994) the Intermediate People's Court of Ningbo, from Selected Cases of the Higher People's Court of Zhejiang Province, 1994.

Ningbo exercised jurisdiction over the case as the contract was performed in Ningbo city in Zhejiang Province.

Moreover, Article 246 of the Civil Procedure Law provides that "Lawsuits initiated for disputes arising from the performance of contracts for Chinese–foreign equity joint ventures, or Chinese–foreign contractual joint ventures, or Chinese–foreign cooperative exploration and development of the natural resources in the People's Republic of China shall be under the jurisdiction of the people's courts of the People's Republic of China."

Different from the Civil Procedure Law, the China and Hong Kong Arrangement has its unique judicial characteristics, which can be found in Articles 5 and 8. Article 5(2) of the China and Hong Kong Arrangement provides that if the defendant has its residence, habitual residence or possessions in both the mainland and Hong Kong, the plaintiff has the right to file the lawsuit with the courts of both mainland China and Hong Kong at the same time. The total compensation or value of the judgments to be enforced by both courts should not exceed the disputed value/money of the case itself. It is fundamentally different from the EU Brussels I Regulation and the Hague Convention on Choice of Court Agreements as they avoid two or more courts in different jurisdictions hearing the same case so as to reduce the conflict of interest and increase the fairness.

Different from the arrangements in Hong Kong and Macao, the Draft China Model Law covers a wider range of the jurisdictional issues and addresses jurisdiction rules in terms of general jurisdiction and special jurisdiction, which is similar to the EU and US main jurisdiction doctrines.

As far as general jurisdiction is concerned, Article 20 of the Draft China Model Law provides that "subject to the exclusive jurisdiction provided in this law or to the choice of the parties, the courts of the PRC shall have jurisdiction over a defendant whose domicile or habitual residence is located within the territory of the PRC". This is consistent with the defendant's domicile rule of Article 22 of the Civil Procedure Law.

As far as special jurisdiction for B2B contracts is concerned, Article 27 of the Draft China Model Law states that

> the courts of the PRC shall have jurisdiction over an action arising from a contractual relationship, if the domicile, the habitual residence or the business establishment of the defendant, or the place where the contract is concluded, or the place where the contract is performed or the place where the subject matter of the contract is located is within the territory of the PRC.

This rule is unclear about the determination of the place where the contract is performed or the subject matter of the contract is located. In the author's view, the place of performance in the Draft China Model Law should be understood as the place where the goods were delivered or should have been delivered, or the place where the services were provided or should have been provided.

As far as special jurisdiction for B2C contracts is concerned, Article 31 of the Draft China Model Law provides that "the courts of the PRC shall have jurisdiction over an action arising from a dispute in respect of consumer rights and interests, if the domicile or the habitual residence of the consumer is situated within the territory of the PRC". The clause provides a general protection rule for consumers who are domiciled in China. However, it does not consider the protection of the consumer who is not domiciled in China but enters into a contract of sale of goods with a Chinese business entity. In addition, the wording of the clause or the doctrine of the clause is not tailored for the determination of disputes resulting from cross-border electronic consumer contracts.

With regard to the principles of parallel proceedings, Article 54 of the Draft China Model Law specifies that

> unless otherwise provided by the international treaties concluded or acceded to by the PRC, where a foreign court has rendered a judgment over an action between the same parties on the same subject matter or the action is pending before the court, a PRC court may not exercise its jurisdiction if it predicts the foreign judgment can be recognised in the PRC. However, a PRC court may exercise its jurisdiction over the action if the PRC court seizes the case first, or the legitimate interests of the parties cannot be safeguarded if the PRC court does not exercise the jurisdiction.

In the author's opinion, the jurisdiction provision in the Civil Procedure Law is vague when referring to international contracts for the sale of goods. As more electronic contract disputes emerge, the Civil Procedure Law will appear to be increasingly insufficient. Although the Chinese Electronic Signature Law does not deal with any jurisdiction issues, China has tried to establish some regulations governing the Internet, with, for example, the Management of Chinese Computer Information Networks connected to International Networks Regulation,[14] as well as the Computer Information Network and Internet Security, Protection and

[14] Provisional Regulations of the People's Republic of China Governing the Management of Computer Information Networks Hooked Up With International Networks, available at www.fas.org/irp/world/china/docs/internet_960201.htm (last visited on 31 August 2009).

Management Regulation.[15] These two regulations cover both civil and criminal issues. However, the rules relating to jurisdiction are still largely insufficient. There are, however, specific rules to determine which law should apply, such as Article 15 of the Management of Chinese Computer Information Networks Regulation, which states vaguely that those who violate these regulations while at the same time breaking other relevant laws and administrative rules and regulations shall be punished in accordance with the relevant laws and administrative rules and regulations.

Overall, according to Chinese law, there are six basic principles to determine the jurisdiction: the domicile principle,[16] the personal jurisdiction principle,[17] the freedom of choice principle,[18] the principle of related location,[19] the exclusive jurisdiction principle[20] and the territorial jurisdiction principle.[21] The fundamental jurisdiction rule in Chinese conflicts of law is that a civil suit against a Chinese citizen comes under the jurisdiction of the court at the place where the defendant is domiciled, or if not the same, under the jurisdiction of the people's court at the place of his regular abode, or residence.[22]

Summary

As discussed earlier, the Internet lacks geographic boundaries, which makes it difficult to determine jurisdiction. Also, given the countless ways in which contracting parties can hide or distort identifying personal

[15] Computer Information Network and Internet Security, Protection and Management Regulations, available at www.woodmedia.com/cinfolink/netregs.htm (last visited on 31 August 2009).

[16] According to the related law, whatever their nationality, a lawsuit will be heard in the court of the state of the defendant's domicile. In order to determine whether a party is domiciled in a contracting state, a court shall apply its domicile rules; in order to determine that seat, the court shall apply its rules of private international law. For example, if the defendant's domicile is China, the Chinese court will apply the internal law rules and related Chinese private international law to determine the domicile.

[17] That is the Nationality Principle.

[18] Articles 244–5 of the Chinese Civil Procedure Law.

[19] The Chinese Civil Procedure Law provides a plaintiff with a choice where he may sue the defendant. The plaintiff can choose the place where the contract should be performed, the place where the contract was signed or executed, the place where the defendant has distrainable property, the place where the infringing conduct took place or the place where the representative office is located, to be the forum.

[20] Article 246 of the Civil Procedure Law of the People's Republic of China.

[21] It means China has jurisdiction over crimes happening within Chinese territory.

[22] Tan (2001).

or geographic information, it is no wonder that Internet anonymity poses especially difficult problems for determining the level of "contact" with the potential forum state under any contacts-based analysis.[23] Let's consider, for example, a German website offering free music downloading services to users with a German area code only. Under these circumstances, users may be tempted to make false statements in order to use the service. This most telling example is given because filtering websites and Internet service providers often design or filter content based on user location.[24] The geo-location of users is sometimes relevant if the activity accessed via a website is targeted for the user's jurisdiction or users located in particular places are prevented from interacting with it.[25]

The EU's efforts in establishing cyber jurisdiction have been identified as being different from US jurisdictional ideas. The EU applies the general and special jurisdiction rules of the Brussels I Regulation, whilst the US courts, following the *International Shoe* case, focus on whether a defendant's activities constitute "minimum contacts" with a forum state,[26] as well as applying the sliding scale from the *Zippo* case that distinguishes between three broad categories of websites based on their interactive and commercial characteristics.[27]

The US and EU have fundamentally different philosophical approaches to jurisdiction. Whereas the US legal system embraces discretionary jurisprudence, European countries, and particularly civil law regimes, have always preferred more formal rules.[28] How to bridge the gap between the European and US views of jurisdiction, and how to provide a framework which could facilitate US and EU participation in a unified international jurisdictional system, are the key obstacles to electronic commercial transactions. These gaps can be filled by bilateral or multilateral agreements; by learning from each other's jurisdictional languages; or by modernising and harmonising international, regional and national rules from each other's previous experiences and practices.

It is notable that, like the EU and US, China has a very similar approach, which is composed of the principle of party autonomy, general jurisdiction and special jurisdiction. However, the substantial requirements or standards of these rules are different in each country.

[23] Boone (Spring 2006), p. 241, p. 247. [24] Reidenburg (2005), 1951, p. 1961.
[25] Ibid., p. 1962.
[26] *International Shoe Co* v. *Washington*, 326 U.S. 310 (1945).
[27] *Zippo Manufacturing Co* v. *Zippo Dot Com, Inc*, 952 F. Supp. 1119 (W. D. Pa. 1997).
[28] Boone (Spring 2006), p. 241, p. 273.

For example, the implementation of the "party autonomy" principle in China requires that parties shall choose a court of jurisdiction that has an actual link to the contract or matter under the Civil Procedure Law. The EU and US both have no such restrictions or limitation on the principle of "party autonomy".

Compared to the EU special jurisdiction approach, the US specific jurisdiction approach is different. Whilst the US employs "*Zippo*", "effects" and "targeting" tests, the EU has adopted classical general and special jurisdiction approaches in the Brussels I Regulation. The "pursuing and directing activities" approach under Article 15 of the Brussels I Regulation leaves open the possibility that a targeting framework could be utilised under the Brussels I Regulation without substantive change to the language of the Regulation itself.[29] However, it is still ambiguous without the explicit definition or explanation of "pursuing and directing activities" in the Brussels I Regulation.

Moreover, both the US and the EU have appeared to be applying their individually developed standards of determining jurisdiction in the context of conventional contracts to the jurisdictional problem of e-commerce. It may be necessary either to amend the law by modifying the normal rules on jurisdiction, or to amend the law by introducing a special regime of rules of jurisdiction for cases of electronic contracting. For the former, a new rule could be introduced in Article 5(1)(b) of the Brussels I Regulation, which would provide how to define the place of performance for digitised products and services. Some scholars have argued that this would be to treat electronic commerce contracts differently from other contracts, which goes against the current philosophy of Article 5(1) of the Brussels I Regulation.[30] In the author's view, to some extent, this would not be contrary to the fundamental principle that contracts can be formed by electronic means. But from a narrower perspective, electronic contracting or transactions do have unique characteristics. However, there is still no clear indication of the creation of a special regime of jurisdiction rules for e-commerce cases. It is a process which is time and money consuming. Even if efforts were made to draft a specific regulation or convention, it would still take time and efforts to come into force. It is conceivable that in future the new fast-developing electronic communication industry will develop further advanced techniques that would clearly indicate that existing laws were no longer suitable or applicable. A special regime of jurisdictional rules

[29] Ibid., p. 277. [30] Fawcett, Harris and Bridge (2005), p. 594.

for electronic commerce should then be introduced on the grounds that traditional territorially based concepts of jurisdiction are not entirely appropriate anymore to regulate cyberspace.[31]

Currently, new international conventions have taken steps to modernise international jurisdiction in electronic contracts. The Hague Convention on Choice of Court Agreements contributes to the harmonisation of the legal certainty of the validity, recognition and enforcement of an electronic exclusive choice of court agreement, while the provision of "the location of parties" under the United Nations Convention on the Use of Electronic Communications in International Contracts increases the legal certainty of determining the location of parties in cyberspace and ascertaining Internet jurisdiction.

To sum up, Internet jurisdiction rules for electronic B2B contracts shall include: (1) parties are free to agree whose court has jurisdiction over contractual disputes in electronic contracts; (2) without a choice of court clause, when an e-contract dispute arises, the defendant should be sued in the courts where the defendant has his domicile. If the defendant's domicile is uncertain, an e-contract dispute should be under the jurisdiction of the courts in the place of the performance of the contract; the place of delivery of goods; the place of the recipient's place of business; or the place where the seller purposefully directs and targets his business activities, which is determined by the level of interactivity and commercial nature of the exchange of information on the website; or the place where the defendant's action has effects.

Internet jurisdiction rules for electronic B2C contracts shall include: (1) parties are free to choose the court on the condition that such choice will not infringe the mandatory consumer protection rules; (2) in absence of such choice, the court where the consumer is domiciled or habitually resident shall hear the case brought against the consumer, resulting from a person who pursues commercial or professional online activities in the country of the consumer's domicile or, by any means, directs such online activities to that country.

[31] Please note that part of this chapter is a reprint and update of the author's journal paper: Wang (2008) pp. 233–41.

PART III

Choice of law

6

Choice of law in electronic contracting

6.1 Development of Internet choice of law

Once a court has competence to hear the case, in the absence of a choice of law by the parties, the next step is for the court to determine which law will govern the dispute. When a contract has a foreign factor, the laws of several different countries may all be related to the contract or dispute. However, the determination of the appropriate applicable law becomes complicated. With the ever increasing number of cross-border electronic commercial transactions, courts may have even more difficulties in devising suitable substantive law rules that respond to the global nature of the e-commerce market. The problem with choice of law in electronic commerce cases is that parties from different states often have competing interests in desiring the application of their own substantive law. The tendency of delocalising transactions over the internet will pose questions at the choice of law level.[1] To avoid problems with regard to the applicable law, it is suggested that parties should include a choice of law clause in the contract. However, some electronic contracts do not have any choice of law provisions, thus creating uncertainty about which country's law applies to disputes. A greater clarity about the choice of law would certainly contribute to an increased trust in the use of international e-commerce.

Confronting the unpredictability of the application of relevant laws, scholars and legislators are searching for uniform rules for the use of electronic communications in international contracts. International organisations, such as the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC), the World Trade Organization (WTO), the Organisation for Economic Co-operation and Development (OECD), the Hague Conference on Private International Law (Hague) and the International Institute for the

[1] Fawcett, Harris and Bridge (2005), p. 635.

Unification of Private Law (UNIDROIT) are all participating in an emerging global debate concerning the changes that should be made to the form or substance of international commercial law to accommodate innovation in the technology used in international trade, and are edging, in particular, towards a global agreement on electronic contracting.

6.2 International dimension

At the international level, the Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods (hereafter "the Hague Convention on the Applicable Law") regulates the international choice-of-law rules for B2B contracts. It is only signed by Argentina, the Czech Republic, the Netherlands and Slovakia. However, Argentina is the only country that has ratified it. There are two basic articles in the Hague Convention on the Applicable Law: one is applicable law in cases of choice (Article 7); and the other is applicable law in the absence of choice (Article 8).

Article 7 of the Hague Convention on the Applicable Law provides that:

(1) A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract.
(2) The parties may at any time agree to subject the contract in whole or in part to a law other than that which previously governed it, whether or not the law previously governing the contract was chosen by the parties. Any change by the parties of the applicable law made after the conclusion of the contract does not prejudice its formal validity or the rights of third parties.

It is clear that the Hague Convention on the Applicable Law employs the principle of "party autonomy" to the law applicable to contractual obligations in that parties are free to choose the applicable law for their contract in part or in whole.

Article 8 of the Hague Convention on the Applicable Law, providing for the choice of law in the absence of the parties' choice, states that:

(1) To the extent that the law applicable to a contract of sale has not been chosen by the parties in accordance with Article 7, the contract is

governed by the law of the State where the seller has his place of business at the time of conclusion of the contract.

(2) However, the contract is governed by the law of the State where the buyer has his place of business at the time of conclusion of the contract, if
   a) negotiations were conducted, and the contract concluded by and in the presence of the parties, in that State; or
   b) the contract provides expressly that the seller must perform his obligation to deliver the goods in that State; or
   c) the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to persons invited to bid (a call for tenders).

(3) By way of exception, where, in the light of the circumstances as a whole, for instance any business relations between the parties, the contract is manifestly more closely connected with a law which is not the law which would otherwise be applicable to the contract under paragraphs 1 or 2 of this Article, the contract is governed by that other law.

In view of these provisions on the applicable law in the absence of choice in the Hague Convention on the Applicable Law, it is not clear whether the principles behind the determination of connection should consider the factors that connect the parties and the dispute or the contract and the dispute.

Contrary to the Hague Convention on the Applicable Law, the UN Convention on Contracts for the International Sale of Goods 1980 (known as the "Vienna Convention/CISG"), as a uniform commercial law, has a large number of Contracting States and plays a significant role in the harmonisation of international trade law. When parties choose the uniform international commercial law as the applicable law, the hearing court will apply such law to resolve the dispute. In the absence of a parties' choice of law agreement, the international uniform commercial law may still apply if both parties are contracting parties to that law. The most commonly used uniform international commercial laws or regulations for B2B contracts are *lex mercatoria*, the UN Convention on Contracts for the International Sale of Goods 1980 (Vienna Convention/CISG) and Incoterms 2000. With regard to international uniform commercial law for consumer contracts, there is currently no such international convention or regulation. The applicable law for B2C contracts usually refers to national or regional law.

6.2.1 *Lex mercatoria*

The *lex mercatoria* is known as "the Law Merchant", which was developed in the Middle Ages. In the fifteenth and sixteenth centuries, the *lex mercatoria* was incorporated into the common law; in the seventeenth and eighteenth centuries, a new *lex mercatoria*, which is known as "the international law of commerce", was developed. In the nineteenth century, commercial law entered into the age of codification.

The *lex mercatoria* is used to indicate the part of transnational commercial law that is uncodified and consists of customary commercial law, customary rules of evidence and procedure, and general principles of commercial law. The *lex mercatoria* is based on the general customs and practices of merchants which were common throughout Europe and was applied almost uniformly by the merchant courts in different counties. It was created spontaneously by the participants in international trade and applied by arbitrators to settle international trade disputes. The new *lex mercatoria* is described as international legislation and international commercial custom for international trade.

6.2.2 *CISG*

The Convention on Contracts for the International Sale of Goods (Vienna Convention/CISG) has been partially applicable to cross-border electronic commercial transactions, even though not specifically designed for e-commerce. The CISG is an international agreement on uniform substantive rules governing the international sales of goods. Several provisions of the CISG can be of particular use to recognise the validity of contracts concluded by electronic means: Article 11 provides that the contract can be concluded by any means, whereas Article 29 provides that the contract may be modified or terminated by agreement through any means, unless otherwise stated by the contract.[2] However, Article 96 entitles states to be exempt from Article 11 or Article 29. The CISG is applicable to "contracts of sale of goods between parties whose places of business are in different States: (a) when the States are Contracting States; or (b) when the rules of private international law lead to the application of the law of a Contracting State".[3] For example, if

[2] Explanatory Note on the UN Convention on Contracts for the International Sale of Goods (CISG), 11 April 1980, UNCITRAL, available at p. 43, www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf (last visited on 24 August 2009); see also Article 12 of the CISG.

[3] Article 1(1) of the CISG.

A and B have their places of business in different CISG contracting states, when a dispute arises regarding the sale of goods, A or B's national court will hear the case on the basis of the CISG. This may be the case even if only one of the parties is based in a contracting state of the CISG.[4]

However, Article 6 of the CISG gives parties the opportunity to opt out of the CISG in part or entirely: "The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions." Thus, for example, the parties (A in France and B in Germany), whose states are Contracting States of the CISG, may insert a choice of law clause in their contract that "disputes shall be governed by the French Sale of Goods Act". In that case, French law should replace the CISG. Alternatively, if the choice of law clause between A and B states that "disputes shall be governed by the law of the vendor's country", "disputes shall be governed by the law of the seller's country" or "disputes shall be governed by French law", either French law or the CISG can apply. Moreover, the CISG also allows Contracting States to make a declaration or reservation under Article 95, whereby they may not want to be bound by Article 1(1)(b). Currently China and the US and a few other States have ratified the Convention subject to a reservation excluding the Convention's application as a result of a choice-of-law reference,[5] which means "the CISG applies only when all the contracting parties have their place of business in states that have ratified the CISG".[6]

6.2.3 ICC – Incoterms 2000

Incoterms 2000, by the International Chamber of Commerce (ICC), interprets mercantile trade terms. The obligations of each party, under particular types of contract, are laid out in simple terms in a standard book, along with guidance. An Incoterm can form part of a sale of goods contract if it is expressly incorporated by reference into it, e.g. "This contract is to be FOB Bournemouth and is governed by Incoterms 2000."

6.3 Other regions

Regarding choice of law in e-commerce contracts, the location and timing of contract negotiations and communications play an important

[4] Goode, Kronke and McKendrick (2007), p. 264.
[5] Scoles, Hay, Borchers and Symeonides (2000), p. 901.
[6] Symeonides (Fall 2006), p. 697, p. 757.

role in the applicable law analysis. Generally, the location where the contract is concluded provides the substantive law that governs the agreement under the rules of private international law; hence, the place of contracting determines the outcome. There are no specific instruments governing a choice of law clause in electronic B2B and consumer contracts. Also, most of the national or special e-commerce or e-contract laws do not include conflict-of-law rules. For example, in the EU, the EC Directive on Electronic Commerce does not include a choice of law provision, but there is a "country of origin" principle. It refers to the applicable law for service providers, stating that "each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field",[7] which relates to "online activities", such as "online information, online advertising, online shopping, and online contracting".[8] The "country of origin" principle aims to regulate the conduct of service providers in general, but not specifically contracting parties in electronic transactions. Thus, the "country of origin" principle does not affect the application of the law chosen by the parties to govern a contract.[9]

Currently, regions or countries such as the EU and US have been working towards the modernisation of their existing rules of the law applicable to contractual obligations. For example, in the EU, the Rome I Regulation on the law applicable to contractual obligations for both B2B and B2C contracts was adopted in 2008 to modernise the choice-of-law rules of the Rome Convention with some new wording and concepts that may be more adaptable to the new information society. The Regulation replaces the Rome Convention and applies to contracts concluded after its entry into force on 17 December 2009.

In North and South America, the Secretariat for Legal Affairs (SLA) develops, promotes and implements the Inter-American Program for the Development of International Law. Its Inter-American Specialized Conferences on Private International Law (CIDIP) held by the Organization of American States, Washington DC has been working

[7] Article 3(1) of Directive 2000/31/EC of the European Parliament and of the council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("EC Directive on Electronic Commerce"), OJ L178, 17.07.2000, pp. 1–16.

[8] Recital 21 of the EC Directive on Electronic Commerce.

[9] Fawcett, Harris and Bridge (2005), p. 1233, see also Annex 3 of the EC Directive on Electronic Commerce.

on a draft Model Law on Jurisdiction and Applicable Law for Consumer Contracts.

The difference in the law applicable to contractual obligations between B2B and B2C contracts is identical to the circumstances of the determination of proper jurisdiction, in that the rules are designed to protect the weaker party – "the consumer". In addition, the rules of jurisdiction and applicable law both employ the concept of "closest connection", "substantial connection" or "actual connection" for the determination of the court or law that applies to the dispute.

The purpose of this part of the book is to examine how conventional choice of law doctrines in the EU, US and China are applicable to disputes arising out of electronic contracts and to discuss how to resolve the electronic commerce choice of law dilemma at the international level.

7

EU Internet choice of law regime

7.1 Overview: the Rome Convention and Rome I Regulation

Over the last thirty years in the EU, the Rome Convention of 1980 (hereafter "the Rome Convention"),[1] has governed choice-of-law rules for contractual obligations. The Rome Convention can be divided into several key elements. First, Articles 3 and 4 are the core provisions of the Convention. Article 3 deals with the applicable law chosen by the parties while Article 4 contains the provisions for ascertaining the applicable law in the absence of choice. Second, there are provisions dealing with the mandatory rules of the forum country or public policy. Third, there are provisions relating to choice of law rules fit for specific aspects of a contract, such as material and formal validity, interpretation, performance and the quantification of contractual damages. The Rome Convention does not specifically tailor its rules for application to electronic commercial transactions.

In the early 2000s, the European Economic and Social Committee and the European Parliament were in favour of converting the Rome Convention of 1980 into a Community Regulation and modernising certain provisions of the Rome Convention, making them clearer and more precise. The proposal for a "Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I),[2] was finally adopted by the Commission on 15 December 2005 in Brussels. The Vice-President said: "By providing foreseeable and simplified rules, the Rome I proposal on the law applicable to contracts will enable Europe's citizens and firms to make more of the possibilities offered by the internal market."[3]

[1] The Convention on the Law Applicable to Contractual Obligations ("The Rome Convention") 1980, latest consolidated version, OJ C 334/1 30.12.2005.

[2] Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), Brussels, 15.12.2005, COM(2005) 650 final 2005/0261 (COD).

[3] "Adoption of two Commission Proposals is a Vital Step in Completing the European Law-Enforcement Area for Individuals and Firms", IP/05/1605, Brussels, 15 December 2005.

The proposed Rome I Regulation aims to reinforce two core principles of the Rome Convention: freedom of choice and the applicable law in the absence of choice.

The Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) was finally adopted by the European Commission on 17 June 2008.[4] The Rome I Regulation replaced the Rome Convention in member states except for those member states that fall within the territorial scope of the Rome Convention and to which Rome I does not apply by virtue of Article 299 of the EC Treaty.[5] The Rome I Regulation applies to contracts concluded after 17 December 2009.[6]

In general, the Rome I Regulation, just like the Rome Convention, does not specifically deal with electronic commercial transactions. However, its new wording in some provisions relating to the choice of law rules might provide a better reference for the determination of applicable law to electronic commercial contracts. As with normal contracts, contracts made via electronic communications may also insert a choice of law agreement/clause. In the absence of a choice of law clause, it will be even more difficult to determine the applicable law for electronic contracts than normal contracts due to the unique features of electronic communications. The modernisation and radical reform of Article 3 on choice of the applicable law by the parties, Article 4 concerning determination of the applicable law in the absence of choice and Article 5 on consumer contracts[7] may make it clearer and easier to ascertain the applicable law for an e-contract than under the Rome Convention.

The following section of this chapter will introduce the Rome I Regulation, compare it with the Rome Convention and discuss the applicable law in cases of choice and in the absence of choice regarding both B2B and B2C electronic contracts.

7.2 Scope and aims

7.2.1 The Rome Convention

Article 1 of the Rome Convention sets out the Convention's material scope: "The rules of this Convention shall apply to contractual obligations

[4] Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation), OJ L 177/6–16, 04.07.08 pp. 6–16, available at eur-lex.eurgoa.eu/Lexclriserv/Lexclriserv.do?uri=OJ:L:2008:177:0006:01:EN:HTML (last visited on 16 September 2009).

[5] Ibid., Article 24(1). [6] Ibid., Article 28. [7] Wilderspin (2008), pp. 259–74.

in any situation involving a choice between the laws of different countries." The material scope of the Convention, as defined by the first paragraph of Article 1, is limited by the exceptions set out in the second, third and fourth paragraphs. Article 1(2)(a) excludes "questions involving the status or legal capacity of natural persons". This is, however, subject to the limited exception in Article 11. Subparagraph (b) goes on excluding all remaining questions of family law: wills and succession; rights in property arising out of a matrimonial relationship; and rights and duties arising out of a family relationship.[8] The terminology of paragraphs (a) and (b) corresponds to the equivalent provisions of Article 1 of the Brussels I Regulation.[9] Concerning the territorial scope, Article 2 of the Convention provides: "Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State." This is of universal application.

7.2.2 The Rome I Regulation

The Rome I Regulation changes some wording of the material scope of the Rome Convention, providing that "the Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters". The change in the wording is not significant. The additional words "in civil and commercial matters" are intended to be in line with the text of the Brussels I Regulation. The scope remains the same as the Rome Convention.

In addition, the intention of the Rome I Regulation to establish consistency with the Brussels I Regulation with regard to the relationship between jurisdiction and choice of law can also be found in Recital 7 of the Rome I Regulation, which provides that "the substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)".[10]

7.3 The applicable law in cases of choice

7.3.1 B2B contracts

Freedom of choice: party autonomy

Article 3(1) of the Rome Convention embodies the principle of party autonomy: "A contract shall be governed by the law chosen by the parties.

[8] Article 1(2)(b) of the Rome Convention.
[9] Hill (2005), p. 465.
[10] OJ L 12, 16.1.2001, p. 1.

The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case." Most cases are entirely straightforward, since the parties simply agree that the contract is to be governed by the law of a particular country.[11] Even if not expressed in the contract, in some circumstances, the parties' choice may be implied. Whether the parties' choice of law is expressed or implied, the effects will be the same as mentioned in the Giuliano–Lagarde Report: "The Convention recognizes the possibility that the court may, in the light of all the facts, find that the parties have made a real choice of law although this was not expressly stated in the contract."[12] It is, however, important to distinguish cases of implied choice, which fall within Article 3(1), from cases in which the parties have clearly failed to make a choice, which are governed by Article 4.

Article 3 of the Rome I Regulation attempts to strengthen the freedom of parties in the business world to choose the law applicable to the relationship between them. Article 3(1) and (2) of the Rome I Regulation has slightly changed the wording but retained the same meaning as that of the Rome Convention. Article 3(1) of the Rome I Regulation is a fundamental rule providing party autonomy in choice of law that "a contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract." Contracts frequently contain different obligations, so the parties must have freedom to subject different obligations to different laws. That is known as "splitting the applicable law".[13] This may be divided up into four different categories: first, it is possible to apply different laws to different aspects of the same obligation; second, different terms of one contract may be governed by different laws;[14] third, different groups of obligations may be governed by different laws;[15] fourth, the obligations of each party may be governed by a different law.[16]

Furthermore, Article 3(3) and (4) of the Rome I Regulation replace Article 3(3) of the Rome Convention, providing more comprehensive rules on parties' freedom of choice of law. Article 3(3) and (4) strengthens the fact that the chosen law should govern rather than the law of the

[11] Ibid, p. 472. [12] [1980] OJ C 282/1, p. 17. [13] Hill (2005), p. 481.
[14] Giuliano–Lagarde Report, [1980] OJ C282/1, p. 17 available at www.rome-convention.org/instruments/i_rep_lagarde_en.htm (last visited on 23 August 2009).
[15] Lando (1987), p. 159, p. 168. [16] McLachlan (1990), p. 311.

country that has more factual links unless the law of that country cannot be derogated from by agreement according to a relevant rule.

Other methods of express or implied choice

It is notable that the Rome I Regulation changes the degree of certainty necessary to permit the court to infer a tacit choice when the parties have not expressly selected the governing law by affirming that "the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case". There are two layers in this rule: the first layer is that "the choice shall be made expressly by the terms of the contract"; and the second layer is that "the choice shall be clearly demonstrated by the circumstances of the case".

It is vital to interpret the condition and requirement of "the choice shall be clearly demonstrated by the circumstances of the case". In the author's view, this layer of the rule permits a degree of implied choice of the applicable law.

With regard to the implied choice, there was a debate as to whether an exclusive jurisdiction clause in the contract can be assumed, in the absence of choice of law, to imply the law of that country as the governing law.[17] This assumption was not accepted by the Council and the Parliament. However, an exclusive jurisdiction as a linking factor for a choice of applicable law is recognised by the Rome I Regulation. Recital 10 of the Rome I Regulation provides that "an agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated".

In addition, many contracts contain a dispute-resolution clause, either a jurisdiction clause or an arbitration agreement. But in what circumstances is a choice of the courts of country A (or a choice of arbitration in country A) to be treated as an implied choice of the law of country A? The Giuliano–Lagarde Report is of limited assistance:

> In some cases the choice of a particular forum may show in no uncertain manner that the parties intend the contract to be governed by the law of

[17] Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM (2002) 654 final, Brussels, 14.01.2003, Conversion of the European Communities, p. 25, available at eur-lex-europe.eu/LexuriServ/site/en/com/2002/com2002_0654end.pdf (last visited on 25 August 2009).

> the forum, but this must always be subject to the other terms of the contract and all the circumstances of the case. Other matters that may impel the court to the conclusion that a real choice of law has been made might include the choice of place where disputes are to be settled by arbitration in circumstances indicating that the arbitrator should apply the law of that place.[18]

In addition, previous course of dealing,[19] dispute resolution clauses[20] and related transactions[21] may also be taken into account to determine the applicable law in cases of choice. A previous course of dealing between the parties in contracts containing an expressed choice of law may leave the court in no doubt that the contract in question is to be governed by the law previously chosen where the choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties.[22]

In the course of electronic contracting, standard forms have been widely used. However, an e-contract may be in "standard form which is known to be governed by a particular system of law even though there is no expressed statement to this effect".[23] Consider, for example, in the absence of evidence of a common intention to choose any law, an e-contract that was of a standard type and made between a seller who is located in California and a buyer who is located in Germany. If the seller and buyer had had previous disputes, which were resolved by Californian law, that would be sufficient to indicate that the parties had implicitly intended Californian law to govern the contract.

Furthermore, on one e-business website, there may be a large amount of related transactions. The Giuliano–Lagarde Report accepts the idea that a choice may be implied into a contract from "an express choice of law in related transactions between the same parties".[24] For instance, where there is an express choice of law in an e-contract between A and B, it is possible to imply a choice for another related e-contract between B and A on the basis that the parties must have intended or assumed that the transactions would be governed by the same law.

Extension of party autonomy

As with the Rome Convention, Article 3(2) of the Rome I Regulation gives the parties freedom to re-choose their applicable law at a different

[18] Giuliano–Lagarde Report. [19] Hill (2005), p. 476. [20] Ibid. [21] Ibid., p. 479.
[22] Giuliano–Lagarde Report. [23] Ibid. [24] Ibid.

stage. The wording of Article 3(2) of the Rome I Regulation is identical to the Rome Convention, providing that:

> The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Regulation. Any variation by the parties of the law to be applied made after the conclusion to the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

By virtue of this provision, the parties may, having included a choice of law clause in their contract, subsequently decide to change the applicable law by a new mutual agreement. Alternatively, in a situation where the contract does not include a choice of law, the parties may agree on the applicable law at some later stage. If parties are free to decide on the applicable law, there is no reason why they should not be able to change it.[25]

As regards the validity of a choice of law agreement, it is notable that both the Rome Convention and the Rome I Regulation make no assertion on it. In the author's opinion, the Rome I Regulation needs to learn from the experience of the Hague Convention on Choice of Court Agreements, asserting a clause concerning "the validity of a choice-of-law agreement and the recognition of electronic means". The rules concerning the choice of law in the online world can best be explained by the most recent international legislation: the UN Convention on the Use of Electronic Communications in International Contracts (hereafter "the UN Convention on Electronic Contracts"). In the electronic commerce environment, parties have the same freedom to include a choice of law clause when concluding contracts online, because the UN Convention explicitly employs "party autonomy" in the choice of a party's place of business. Thus, party autonomy is the core principle of the UN Convention on Electronic Contracts. Furthermore, parties can amend their choice of law clause. The new choice of law clause that parties agree will not affect the validity of the contract. The provision of "error in electronic communications"[26] in the UN Convention on Electronic Contracts supports the above principle. It provides that the information system should provide the other party with an opportunity to correct the

[25] Hill (2005), p. 482.

[26] Article 14 of the UN Convention on the Use of Electronic Communications in International Contracts ("the UN Convention on Electronic Contracts" 9 December 2005, A/RES/60/21, UNCITRAL, available at daccessdds.un.org/doc/UNDOC/GEN/NOS/488/80/PDF/NO548880.pdf?Open Element (last visited on 30 September 2009).

input error. Thus, parties might have an opportunity to add or amend a choice of law clause in the "additional information" or "comments" space box on the website, or they might enclose or upload a document expressing the intention to change the applicable law, or they might send a subsequent email noting the amendment of the applicable law. However, which party's proposal will prevail depends on the rules of the battle of forms.

7.3.2 B2C/consumer contracts

Article 6(1) of the Rome I Regulation defines a consumer contract as "a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional)". It extends the material scope of the consumer provision in Article 5 of the Rome Convention, which only applies to a contract for the supply of goods or services to the consumer. The change of the material scope of the Rome I Regulation is aligned with that of the Brussels I Regulation on jurisdiction.

It has been suggested that the Commission's plans to permit the choice by the parties of the applicable law was abandoned; thus the Rome I Regulation retained the Rome Convention's solution to the issue.[27] Article 6(2) of the Rome I Regulation is in favour of party autonomy but at the same time it provides a protective provision giving parties only a certain degree of freedom to choose the applicable law. It provides that notwithstanding Article 6(1) ("a consumer contract shall be governed by the law of the country where the consumer has his habitual residence"), the parties may choose the law applicable to a contract which fulfils the requirements of Article 6(1), in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of Article 6(1). For example, the law of State A provides a four-year period of liability for products so that the trader may be held liable where the lack of conformity becomes apparent within four years as from the time the risk passed to the consumer, whilst the law of State B provides a two-year period of liability. If a trader established in State B sold products to consumers habitually resident in State A, the law of State A will be the applicable law even if the

[27] Wilderspin (2008), pp. 259–74, p. 270.

parties choose the law of State B in the contract, according to Article 6(2) of the Rome I Regulation.

Article 6(2) of the Rome I Regulation is the same as Article 5(2) of the Rome Convention in that a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence. However, it includes far reaching changes to the wording and criteria set out in Article 5(2) of the Rome Convention. Article 6(2) of the Rome I Regulation completely removes the condition of the determination of a consumer's habitual residence specified in Article 5(2) of the Rome Convention, which presumes that the consumer's habitual residence shall not be deemed to be the place

> if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or if the other party or his agent received the consumer's order in that country, or if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

In the author's view, Article 6(2) of the Rome I Regulation retains the special rules of ascertaining the consumer's habitual residence that were contained in Article 5(2) of the Rome Convention, as it does not conflict with the general rule of a "pursuing or directing approach" under Article 6(1) of the Rome I Regulation but gives a considerable explanation.

7.4 The applicable law in the absence of choice

7.4.1 B2B contracts

Closest connection

In the absence of a choice of law clause, the determination of the applicable law can be very complicated. The Rome Convention provides that the law of the country with which the contract is most closely connected will govern the contract, as provided by Article 4(1) of the Rome Convention:

> To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

The general principle of "the closest connection" is therefore established. However, the closest connection is a vague formula because it leaves it to the courts to weigh up the factors that determine the "centre of gravity" of the contract.[28]

The flexibility of the general principle established by Article 4(1) is substantially modified by the presumptions in paragraphs 2, 3 and 4.[29] To consolidate certainty, Article 4(2) of the Rome Convention establishes a general presumption that the factors of the closest connection include habitual residence, central administration and principal place of business. Article 4(2) of the Rome Convention applies to all contracts falling within the scope of Article 4 other than contracts related to immovable property and the carriage of goods. It provides:

> subject to the provisions of paragraph 5 of this Article,[30] it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

The Rome I Regulation deleted Article 4(1) of the Rome Convention, replacing it by more precise rules whose "proposed changes seek to enhance certainty as to the law by converting mere presumptions into fixed rules and abolishing the exception clause".[31] Article 4 (1)(a) and (b) of the Rome I Regulation provides that to the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

[28] Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation.

[29] Giuliano–Lagarde Report, p. 38.

[30] Article 4(5) of the Rome Convention states:

> Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraph 2 to 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

[31] Proposal for the Rome I Regulation, p. 5.

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence.

As shown above, Article 4(1) of the Rome I Regulation are one of the major changes to the determination of the applicable law in the absence of choice by the parties under the Rome Convention. It aims to specify the rules applicable, in the absence of a choice, as precisely and foreseeably as possible so that the parties can decide whether or not to exercise their choice. Thus, Article 4(2), (3) and (4) continually enhance the predictability of choice of law rules by providing conditions for situations which are not applicable to Article 4(1).

For example, Article 4(2) of the Rome I Regulation employs the condition of "characteristic performance", providing that:

> Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the *characteristic performance* of the contract has his habitual residence.

Article 4(2) of the Rome I Regulation is identical to Article 4(2) of the Rome Convention in terms of the relationship between characteristic performance and habitual residence. However, the new article in the Rome I Regulation does not link characteristic performance to closest connection. In the author's opinion, the contract is most closely connected with the country where the party required to effect the *characteristic performance* of the contract has his habitual residence but, from the wording of the Article 4(2) of the Rome I Regulation, it is seen that habitual residence shall not be considered as one of the factors most closely connected to the contract, and the concept of "closest connection" shall be treated separately from the concept of "characteristic performance".

Article 4(3) of the Rome I Regulation proposes the theory of "manifestly more closely connected" as an escape route to the circumstances of the case when "habitual residence" and "characteristic performance" have weaker links to the contract. It provides that:

> Where it is clear from all the circumstances of the case that the contract is *manifestly more closely connected* with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

This clause changes the wording of Article 4(2) of the Rome Convention from "most closely connected" to "manifestly more closely connected". The new clause provides a softer and wider scope of the connecting factors to the contract.

Article 4(4) of the Rome I Regulation employs the concept of "most closely connected" in the Rome Convention, specifying that this stricter rule applies if there is no finding of "habitual residence" and "characteristic performance". It states that:

> Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is *most closely connected*.

It can be seen that although the concepts of closest connection and characteristic performance continue to play an important role in the operation of the determination of the applicable law in the absence of parties' choice, their respective rankings in the methodological hierarchy have changed considerably.[32]

To assist in the application of Article 4, the Rome I Regulation also inserted a new provision of the interpretation of "habitual residence" under Article 19, which is identical to Article 4(2) of the Rome Convention. Article 19(1) of the Rome I Regulation provides that the principal establishment of companies (i.e. the place of central administration or the principal place of business) shall be considered to be the habitual residence. The difference from the Rome Convention is that Article 19(2) of the Rome I Regulation provides that "where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence", whilst Article 4(2) of the Rome Convention would only determine the habitual residence as the principal place of business.

As regards the concept of "characteristic performance", there are two main considerations in Article 4(2) of the Rome Convention: first, characteristic performance is, in principle, the relevant factor in applying the presumption for determining the applicable law;[33] second, the factor of characteristic performance is determined "at the time of conclusion of the contract". Characteristic performance of the contract refers to the

[32] Wilderspin (2008), pp. 259–74, p. 267. [33] Giuliano–Lagarde Report, p. 40.

performance that constitutes the essence of the contract. The nationality of the contracting parties or the place where the contract was concluded should not be the elements relating to the essence of the obligation. Where the party has habitual residence, its central administration, or its principal place of business should be the essential factors to determine the country in which the party performs its obligation. Thus, for instance, in a commercial contract of sale, the law of the vendor's place of business will govern the contract.[34] In the author's view, the concept of "characteristic performance" under the Rome I Regulation shall be interpreted in the same way as that under the Rome Convention.

However, is there any difference in determining characteristic performance between contracts concluded online and offline?

There are two main types of B2B electronic transactions: one is selling tangible or digitised goods online with physical delivery or providing services online with physical performance, the other is selling digitised goods with delivery over the Internet or providing digitised services online. A contract concluded by electronic means with physical delivery of goods is no different from a contract concluded offline, because it will not affect the determination of the place of performance, i.e. the place of delivery. Thus, the focus in this section will be on the transfer of digitised products.

When transferring digitised goods over the Internet, there are four possible connecting factors when determining the place of performance of the contract: first, the place where digitised goods are dispatched by the seller (i.e. the place of uploading); second, the place where digitised goods are received by the buyer (i.e. the place of downloading); third, the place where the recipient has his place of business; and last, the place where the seller (sometimes, sellers can also be service providers) has his place of business. Because the seller can upload digitised goods anywhere in the world, the place of uploading is not sufficient to show that the performance of the contract is most closely connected to the country where the digitised goods are uploaded. The same applies to the buyer, because the digitised goods can be downloaded without any restriction on the place of delivery. Therefore, the most realistic factor to determine the place of performance will be the place of business. But whose place of business is most closely connected with the country where the performance of the contract is to be affected?

The seller's place of business should be regarded as having the closest connection, since, according to the UN Convention on the Use of

[34] Ibid., p. 39.

Electronic Communications in International Contracts, the location of parties in cyberspace cannot be the place where technology and equipment such as computers or servers are located or where information can be accessed.[35] The seller's place of business has an enduring connection with the contract, because it is not temporary and it has effects on his past, present and future business. But how can the seller's place of business on the Internet be determined, as he might not have a physical place of business? In these circumstances, the seller's place of business should be the place where he/she targets marketing and has an economic and social impact.

Let us look at the following example to illustrate the problems: will a business with its central administration in state X which does business via the Internet using a website located on a server in state Y (with no further connections to that state) be regarded as effecting performance through a place of business in state Y?[36] The mere fact that the service provider uses a website to promote its goods or digitised products does not in itself create a place of business.[37] However, if the service provider has its own server located in State Y, from which it concludes contracts of sale, would matters be different?

The answer is no for the reason that a location is not a place of business merely because that is where the technology and equipment supporting the electronic transactions are located.[38] However, if the website in state Y is an interactive one which allows customers to contract online, rather than a passive channel of communication, then there is a solid argument in favour of the claim that the company has a place of business in state Y. In addition, under the terms of the contract, if the performance is to be effected through a place of business in state Y rather than the principal place of business in state X (the country in which that other place of business is situated), then the law of state Y shall govern the contract.

Let us assume that company A which is based in state X uses the website of another company B which is based in state Y with a server. Which country's law will apply when A sells goods online? From this presumption, state X is company A's principal place of business. But if company A uploads a digitised product, stores it and transfers it in state Y, and it has

[35] Article 6(4) of the UN Convention on Electronic Contracts.
[36] *Matchnet* v. *Blair* [2002] EWHC 2128 (Ch), [2003] 2 BCLC 195.
[37] Article 6(4)(b) of the UN Convention on Electronic Contracts.
[38] Ibid., Article 6(4)(a).

an enduring connection (i.e. the principal place of business, market targeting or economic impact) with state Y, the law of state Y will govern, because the performance of contract is effected through state Y other than the principal place of business X.[39] However, if the buyer orders the products while company A is temporarily situated in a third state Z, when any dispute arises, the law of state X will govern the contract since it is his principal place of business.

Following the above analysis, in the absence of choice, the law applicable to a contract under the Rome Regulation will normally be that of the seller's principal place of business. This principle applies to contracts concluded online in the absence of choice of the applicable law.

In the author's opinion, Article 4(2) of the Rome Convention is incompatible with Article 6(2) of the UN Convention on the Use of Electronic Communications on International Contracts. Whereas under Article 4(2) of the Rome Convention the contract is presumed to be most closely connected with the country "*at the time of conclusion* of the contract", Article 6(2) of the UN Convention and Article 10(a) of the CISG provide that the place of business is where it has the closest relationship to the relevant contract "*at any time before or at the conclusion* of the contract". In the author's view, the latter principle is in practice more appropriate to be applied in the online world, because it is much more difficult to identify the place of business when concluding an electronic contract online than offline. The Internet is borderless and placeless. To determine a party's place of business for electronic transactions, it is more sensible to examine his/her continuous business behaviours and locations, from before the conclusion of the contract, than to consider the situation at the conclusion of the contract. The place of online business is sometimes not located in a specific building, unlike traditional companies in the offline world. Hence, the linking factors to the place of online business could be where the seller has "minimum contacts", "purposefully targets" or has "effects" in a specific market. It is an improvement that Article 4 of the Rome I Regulation removes the wording of "*at the time of conclusion* of the contract" for determining "manifestly more closely connected" or "most closely connected". However, Article 19(3) of the Rome I Regulation retains the same wording of "at the time of conclusion of the contract" when determining the concept of "habitual residence".

[39] Fawcett, Harris and Bridge (2005), pp. 1244, p. 1249. See Article 4(2) of the Rome Convention.

With regard to requirements as to form, the International Chamber of Commerce (ICC) and the United Kingdom (UK) Government responded to the Green Paper on the conversion of the Rome Convention into a Community instrument[40] (hereafter, "Green Paper") on whether Article 9 of the Rome Convention[41] should be reformed. According to the opinion of the ICC and UK, Article 9 adequately covered contracts concluded by email; thus, there should be no need to modify this article[42] because a contract concluded by email in the same country or different countries shall be valid if it satisfies the formal requirements of the law of either of those countries. Moreover, the Green Paper advises that "as regards contracts concluded at a distance (by fax, mail or e-mail, for example), there is a place of conclusion for each party in the contract is valid as to form. This solution has made it unnecessary to take a more or less artificial decision on the location of a contract between distant parties."[43]

In the author's view, Article 9 of the Rome Convention was drawn up before electronic contracts came into common practice, and thus the determination of the place of conclusion did not take account of the characteristics of the online world. According to the UN Convention on the Use of Electronic Communications in International Contracts, the place of dispatch or receipt of an electronic communication is the place where the party has its place of business,[44] but if the party does not have a

[40] Green Paper on the Conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation.

[41] According to Article 9 of the Rome Convention, it governs formal validity by providing:

1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.
2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.
3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.
4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act *was done*.

[42] Document 373–33/8, p. 6; "Response of the Government of the United Kingdom", p. 8, available at ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/united_kingdom_en.pdf (last visited on 25 August 2009).

[43] Green Paper on the conversion of the Rome convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, p. 39.

[44] Article 10(3) of the UN Convention on Electronic Contracts.

place of business, reference should be made to his habitual residence.[45] It would have been advisable for Article 9 of the Rome Convention to contain an additional rule by adding the law of the country where either of the parties has its habitual residence. It would thus mean there were three possible laws governing the formal requirements of the contract: the law which governs it under this Regulation; the law of the country of the place of conclusion; and the law of either party's place of habitual residence.[46]

The Commission of the European Communities amended Article 9 of the Rome Convention in Article 10 of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I),[47] adding "habitual residence" as a linking factor. Article 10 of the proposal was adopted in Article 11 of the Rome I Regulation, which is more accurate but does not substantially change the content. It provides that:

1. A contract concluded between persons who, or whose agents, are in the same country 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 the country where it is concluded.
2. 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.
3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the

[45] Ibid., Article 6(3).

[46] As stated in the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a community instrument and its modernisation, "It will be enough, therefore, for the statement to satisfy the formal requirements of one of the three laws to be valid as to form. This rule will apply without discrimination to contracts concluded by electronic means and to other contracts concluded at a distance"; p. 39.

[47] Article 11 of the Rome I Regulation.

act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.[48]

In the author's opinion, a subsidiary rule concerning the validity of contracts formed in electronic communications should also be addressed in Article 11 of the Rome I Regulation to the effect that a choice of law clause shall be valid if concluded either in writing or by electronic means. Employing a provision from Article 3(c) of the Hague Convention on Choice of Court Agreements, it could be proposed that:

> A choice of law agreement can be concluded or documented:
>
> 1) in writing; or
> 2) by any other means of communication which renders information accessible so as to be usable for subsequent reference.[49]

In relation to the amendment of the existing rules, in the author's view, it was sensible that the International Chamber of Commerce (ICC) recommended to the European Commission that the principle "If it is not broken, don't fix it" should be the preferred approach when examining the Rome Convention.[50] However, the inclusion of more precise and specific provisions might have helped to facilitate choice of law issues. The focal point for reform of the Rome Convention was to consider the worldwide reach and accessibility of electronic transactions, which are different from traditional offline transactions in terms of determining the habitual residence, central administration or place of business when ascertaining the applicable law in the absence of choice.

From the author's perspective, it may be helpful if the explanatory of the Rome I Regulation could include an explanation of its application in electronic commercial contracts: for example, assists in determining the applicable law for e-commerce/Internet service providers and

[48] Article 10 (1) and (2) of the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), Council of the European Union, 13853/06, LIMITE, JUSTCIV 224, CODEC 1085, Brussels, 12 October 2006.

[49] Employed from Article 3(c) of the Hague Convention on Choice of Court Agreements, concluded 30 June 2005, available at hcch.net/index_en.php?act=conventions.textpcid=98 (last visited on 16 August 2009).

[50] "ICC Comments on the European Commission's Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization", Department of Policy and Business Practices, Commission on Commercial Law and Practices, 3 October 2003 JA/ef, Document 373–33/8, p. 1,(hereafter "Document 373–33/8"), available at ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/international_chamber_commerce_en.pdf (last visited on 25 August 2009).

ascertaining the online contracting parties' place of business. First, as discussed earlier, the EC Directive on Electronic Commerce is based on a country of origin principle that "in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established".[51] Since the certainty provided by the country of origin principle is vital for the functioning and progress of the EU internal market, EuroISPA ("European Internet Services Providers Association") urged the European Commission to incorporate this principle into the Rome I Community instrument.[52] Second, the law of the country where the seller has his place of business should govern a contract of sale or for the provision of services with performance online.

In summary, there are two stages in determining the applicable law for electronic contracts: first, to ascertain the seller's habitual residence; second, if the seller's habitual residence cannot be determined, the court will identify the characteristic performance of the contract and determine the applicable law which is most closely connected to the contract. The Rome I Regulation has a significant improvement for the application of electronic contracts, compared to the Rome Convention, as the Rome I Regulation is more precise and explicitly states that "the contract shall be governed by the law of the country in which the seller has his habitual residence" first and failing that it will examine the factor of "most closely connected".[53] Thus, the Rome I Regulation is more precise for parties to determine the applicable law.

7.4.2 B2C/consumer contracts

Article 6 of the Rome I Regulation governs the applicable law for consumer contracts. It adopts the concept of "pursuing or directing" approach in determining the applicable law for consumer contracts in

[51] Recital 21 of Directive 2000/3/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereafter "EC Directive on Electronic Commerce"), OJ L178, 17.07.2000 pp. 1–16.

[52] EuroISPA Position Paper "Green Paper on the Conversion of the Rome Convention into a Community Instrument: COM(2002)654", September 2003, available at ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/euroispa_en.pdf (last visited 25 August 2007).

[53] Article 4(1)(a) of the Rome I Regulation.

the absence of parties' choice. The "pursuing or directing" approach is provided in Article 6(1) as:

> Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
> (a) *pursues* his commercial or professional activities in the country where the consumer has his habitual residence, or
> (b) by any means, *directs* such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.

This is the exact same wording as the provision of jurisdiction for consumer contracts in Article 15(1) of the Brussels I Regulation. It provides consistency with the Brussels I Regulation. Moreover, it is suggested that such wording is specially tailored for the determination of conflict-of-law rules for consumer contracts. In the author's opinion, the understanding or interpretation of the concept of "pursuing activities" and "directing activities" should be in line with that of the Brussels I Regulation.

As discussed in the part of the book on jurisdiction, the new approach of "pursuing or directing activities" for determining appropriate jurisdiction in consumer contracts has criteria to determine the place of jurisdiction in consumer contracts. Likewise, the "pursuing or directing" approach shall fulfil the two criteria for ascertaining which country's law shall be applicable. First, the seller should pursue or direct commercial or professional activities in the Member State; second, such Member State shall be the place of the consumer's domicile. If such activities take place in several Member States, the place of the consumer's domicile shall be one of those Member States.

The difference is that under the Brussels I Regulation, Article 15(2) complements the "pursuing and directing" approach and further provides that "where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State". However, under the Rome I Regulation, there is no such rule. Instead, Article 6(2) provides a protective rule that the parties may choose the law applicable to a contract

which fulfils the requirements of the "pursuing and directing" approach, but such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by the provisions. In the author's view, the branch, agency or other establishment of the seller could be seen to be the place where the seller pursues and directs his business to consumers. The law of the country in that place shall be the applicable law for consumer contracts.

Similarly to the Brussels I Regulation, the complication of applying the "pursuing or directing approach" under the Rome I Regulation is in how to determine such activities for online merchants. In other words, when will the online commercial activities be regarded as the seller's having pursued or directed his/her activities to the Member State of the consumer's domicile?

Online "pursuing or directing activities" could be widely interpreted as websites or online sellers targeting activities, providing an online shopping platform, and offering goods or services to consumers in the Member State of the consumer's domicile, or in a number of Member States including that Member State. The Commission has explained that the extended concept of "pursuing or directing activities" is designed to include consumer contracts concluded via "interactive websites accessible in the State of the consumer's domicile".[54] Such Internet "pursuing" and "directing" activities shall not require any physical presence as electronic contracts can be performed without physical presence. However, such activities shall be considered to purposefully target the place of the consumer's domicile or habitual residence. Purposefully targeting shall be shown or evidenced by the seller's continuous business strategy aiming to have an economic or financial impact on the business, but not simply the registration of domain names or the location of IT systems, in that state.

With regard to the substantive law for consumer protection, in order to facilitate the harmonisation of consumer protection standards in the EU, the European Commission adopted the proposal for an EC Directive on Consumer Rights[55] on 8 October 2008. It aims to update and

[54] Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 14.07.1999, COM (1999) 384 final, p. 16 available at ew-lex.europa.eu/LexUriServ/LexUriServ.do?un=COM:1999:0348:FIN:EN:PDF.

[55] Proposal for a Directive of the European Parliament and of the Council on consumer rights, Commission of European Communities, Brussels, 8.10.2008, COM(2008) 614 final, 2008/0196 (COD), available at ec.europa.eu/consumers/rights/docs/COMM_

modernise existing consumer rights, bringing them in line with technological change and strengthening provisions in the key problem areas.[56] From a conflict-of-laws perspective, the proposed directive also achieves a sound coordination with the Rome I Regulation, as in Recitals (10) and (59) it provides that:

> (10) The provisions of this Directive should be without prejudice to Regulation (EC) No 593/2008 of the European Parliament and of the Council applicable to contractual obligations (Rome I);
> (59) The consumer should not be deprived of the protection granted by this Directive. Where the law applicable to the contract is that of a third country, Regulation (EC) No 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) should apply, in order to determine whether the consumer retains the protection granted by this Directive.

The compatibility of the EC Directive on Consumer Rights and the Rome I Regulation (Article 6 Consumer Contracts) will bring legal certainty and harmonised standard of consumer protection to the internal market. This is particularly beneficial to the protection of electronic consumer contracts as the proposal of the EC Directive on Consumer Rights is specially geared to the needs of the information society. For example, Article 11 of the Proposal of the EC Directive on Consumer Rights designates the formal requirements for distance contracts. Article 14 further details that

> for distance contracts concluded on the Internet, the trader may, in addition to the possibilities referred to in paragraph 1, give the option to the consumer to electronically fill in and submit the standard withdrawal form on the trader's website. In that case the trader shall communicate to the consumer an acknowledgement of receipt of such a withdrawal by email without delay.

In addition, the Proposal of the EC Directive on Consumer Rights controls unfair contract terms both offline and online with explicitly detailed rules. It adopts a wide cooling off period of fourteen calendar days when consumers can change their mind and withdraw the contract

PDF_COM_2008_0614_F_EN_PROPOSITION_DE_DIRECTIVE.pdf (last visited on 29 June 2009). The proposal of the EC Directive on Consumer Rights simplifies and merges four existing EU consumer directives into one set of rules. They are: EC Directive on sale of consumer goods and guarantees (99/44/EC); EC Directive on unfair contract terms (93/13/EC); EC Directive on distance selling (97/7/EC); EC Directive on doorstep selling (85/577/EC).

[56] Proposal for a Directive on Consumer Rights, EUROPA, Consumer Affairs, available at ec.europa.eu/consumers/rights/cons_acquis_en.htm (last visited on 29 June 2009).

using a standard withdrawal form. It maintains the principle that the trader is liable to the consumer for a period of two years if the goods are not in conformity with the contract and entitles consumers to ask for repair or replacement and guarantees of goods and service. In general, the proposal of the EC Directive on Consumer Rights seems to have reasonable provisions aimed at creating a balance between a high level of consumer protection and the competitiveness of enterprises, enhancing consumer confidence in the internal market and reducing business reluctance to engage in cross-border trade.

8

US Internet choice of law rules

8.1 Overview

The basic methodology for ascertaining the choice of law is to characterise the issue or question to fit into a category, to determine the connecting factor for that category, and then to apply the law indicated by that connecting factor.[1] Just like what has been discussed in the applicable law for contractual obligations in the EU, the difference in determining the applicable law for online as opposed to offline commercial transactions only arises when transactions involve digitised goods or services with electronic delivery. Unlike the EC Directive on Electronic Commerce, the US has a special provision governing choice of law in a uniform commercial code "Uniform Computer Transactions Act" (UCITA). Unfortunately, the UCITA has not been widely adopted by the states of the US. Although the UCITA only applies to computer information transactions such as computer software, online databases, software access contracts or e-books[2] involving licensing contracts, the choice of law provision of the UCITA can be learned from or adapted to determine the applicable law in general electronic contracting for the reason that the features of concluding contracts with products or services being transferred online will be identical to those of transacting computer information. In the absence of a uniform choice of law statute for electronic contractual obligations in the US, traditional uniform commercial laws, such as the Uniform Commercial Code (UCC) and the Second Restatement, still play a significant role in determining applicable law to contracts concluded and performed electronically.

Similar to the EU, there are two core doctrines in ascertaining applicable law in the US: freedom of choice and in the absence of choice. Freedom of choice is so called "party autonomy". It is the fundamental

[1] Yeo (2004), p. 1.
[2] Section 103 of the Uniform Computer Information Transactions Act.

rule, which means that the parties are free to select the law governing their contract, subject to certain limitations.[3] Party autonomy is recognised by §187 of the Second Restatement, §109(a) of UCITA and the case law adopting it[4] as well as by 1–301 of the UCC. In the absence of the parties' choice, rules are specified in §188 of the Second Restatement and §109 of UCITA.

8.2 The applicable law for B2B contracts

8.2.1 The applicable law in cases of choice

In the US, contracting parties in principle have the right to choose the applicable law for their commercial contracts. For example, §1–301 of the UCC regulates the territorial applicability of the parties' power to choose applicable law, providing that:

> (c) Except as otherwise provided in this section:
>
> (1) an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State is effective, whether or not the transaction bears a relation to the State designated; and
>
> (2) an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated.

§187 of the Second Restatement of Conflict of Law also provides that:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater

[3] Scoles, Hay, Borchers and Symeonides (2000), p. 858.
[4] *Valley Juice Ltd., Inc* v. *Evian Waters of France, Inc*, 87 F. 3d 604 (2nd Circuit 1996).

interest than the chosen state in the determination of the particular issue and which, under the rule of s 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

§187(1) gives a general rule that the law chosen by the parties shall govern the contract. §187(2) of the Second Restatement is an exemption rule to §187(1) that if the parties failed to provide that the chosen law has a substantial relationship to the parties or the transactions, the law of that state will not apply. In addition, if the chosen law conflicts with a fundamental policy of the state, it will also not be applicable to the case. In principle, the rule of "party autonomy" requires that the party's choice should have a close relationship either to them or to the transaction, or there should be a "reasonable basis" for the choice and it should not be contrary to "a fundamental policy of a state".

Similar to the Second Restatement, the UCITA expressly deals with choice of law issues. Section 109(a) of the UCITA states that "parties in their agreement may choose the applicable law", but such choices are not enforced if they are determined to be unconscionable.[5] Under Section 105(b) of the UCITA, a court will also refuse to recognise the chosen law if it violates the fundamental public policy of the forum state.

It is seen that the rule of applicable law of the state chosen by the parties in the US is similar to Article 3 of the Rome I Regulation in that both laws are in favour of party autonomy and respecting the choice of the applicable law made by contracting parties. Their difference lies in the determination or limitation of freedom of choice of law. They are twofold:

First, the US requires that the state of the choice of law must have a substantial relationship to the parties or transactions with a reasonable basis, whilst the EU does not require the chosen law to have any real connection with the parties or the subject matter of their contract.[6]

Second, in the US, the Second Restatement and the UCITA exclude the choice of law if it contradicts the "fundamental policy" of the state whose law would be applicable to the contract in the absence of any choice by the parties. The interpretation of the "fundamental policy" rule

[5] Mazzotta (Summer 2001), p. 249, p. 252.

[6] *Vita Food Products Inc* v. *Unus Shipping Co Ltd* [1939] A.C. 277, cited from McClean and Beevers (2005), p. 343.

may vary in different courts of the states. However, in the EU, the Rome I Regulation prevents the parties from opting out of a mandatory rule of Community law: if contracting parties A and B choose the law of country B as their governing law, but the law of country A contains mandatory rules, the mandatory rules of country A will override any different rule in the law of country B.

With regard to the choice of law provision of electronic commercial contracts, many disputes involving e-commerce arise between parties who are bound by a contract that specifies the terms and conditions upon which they have agreed to interact. Frequently, the contract itself may provide that any dispute arising from it is to be heard in the courts of a specified state (i.e., it contains a choice of forum or forum selection clause) and is to be determined under the substantive laws of a specified state (i.e., it contains a choice of law clause).[7] Generally, contracting parties will choose the applicable law on the basis of the place of contract formation, the place of performance, domicile or the state of incorporation, corporate headquarters and branches.

It may be difficult to determine whether the parties have genuinely consented to a choice of a particular law which appears as a standard term on the seller's website and which might not be immediately visible to the buyer. It becomes therefore a primary concern that a choice-of-law clause contained on an Internet site, or included in an email, was sufficiently visible and actually represents the bilateral consent of the parties. Take a click-wrap agreement as an example: a choice of law clause is included by the seller on his website but is not directly visible on screen and can only be seen when scrolling down the screen or clicking on a separate link. The seller alleges that the buyer consents to the clause when he concludes the contract, even though he never properly reads that clause. So can it be deemed to be lack of parties' consent? If the seller performs his duty of making a contract available online,[8] that is, the buyer can get back to the terms and conditions on the website any time he wants (even after the contract is concluded), then it will be the buyer's responsibility to make sure of the choice of law clause before he clicks the "I agree" button. Once having clicked the "I agree" button, the parties will be deemed to have consented to the terms and conditions.

[7] Rice (Fall 2000), p. 608.

[8] Article 9(4) of the UN Convention on the use of Electronic Communications in International Contracts, 9 December 2005, A/RES/60/21, UNCITRAL, available at daccessdds.un.org/doc/UNDOC/GEN/NO5/488/80/PDF/NO548880.pdf? Open Element (last visited on 30 September 2009).

8.2.2 The applicable law in the absence of choice

Where a choice of law provision is absent from a contract, the court has to determine whether to apply the substantive laws of one state over another in resolving the issues presented before it. Section 1–301(d) of the UCC provides that:

> (d) In the absence of an agreement effective [. . .], the rights and obligations of the parties are determined by the law that would be selected by application of this State's conflict of laws principles.

§188 of the Second Restatement also provides that:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the *most significant relationship* to the transaction and the parties under the principles stated in §6.
> (2) In the absence of an effective choice of law by the parties (see §187), the contacts to be taken into account in applying the principles of §6 to determine the law applicable to an issue include:
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.
> (3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in § 189–199 and 203.

§188(1) of the Second Restatement introduces the concept of "*the most significant relationship*" to the transaction and the parties as a criterion to determine the applicable law to the contracts. §188(2) of the Second Restatement further provides the connecting factors of showing the most significant relationship to the transaction and the parties. It includes the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties. §188(3) of the Second Restatement points out that, if the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied.[9]

[9] Except as otherwise provided in § 189–99 and 203, provided by § 188 (3) of the Second Restatement.

However, while §188 of the Second Restatement governs contracts of sale for both goods and services, §191 of the Second Restatement specifically regulates the sale of goods. §204 of the Second Restatement provides, for all contracts, that a contract should be construed under the law generally applicable under §188 (the place of the most significant relationship). §191 of the Second Restatement provides a reference to the place of delivery, stating that the

> validity of a contract for the sale of an interest in a chattel and the rights created thereby are determined, in the absence of an effective choice of law by the parties, by the local law of the state where under the terms of the contract the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in §6 to the transaction and the parties, in which event the local law of the other state will be applied.

However, the case law largely ignores the Second Restatement provisions and refers questions of construction either to the contract's "centre of gravity",[10] or the law of the place of making,[11] whereby the two often coincide on the facts of a given case.[12]

With regards to digitised goods and services, Section 109(b)(3) of the UCITA provides that "In the absence of an enforceable agreement on choice of law, the following rules determine which jurisdiction's law governs in all respects for purposes of contract law: the contract is governed by the law of the jurisdiction having *the most significant relationship* to the transaction," while Section 109(b)(1)and(2) specifically refers to the location of the licensor in an access contract and the location of the physical delivery in a consumer contract.[13] In the author's view, the action and nature of a licensor who transfers computer information and electronically delivers a copy of software containing information is identical to that of a seller concluding a contract

[10] *Sander* v. *Doe*, 831 F. Supp. 886 (S.D.Ga.1993).

[11] *International Harvester Credit Corp* v. *Risks*, 16 N.C. App. 491, 192 S.E. 2d 707 (1972).

[12] *McLouth Steel Corp* v. *Jewell Coal & Coke Co* 570 F. 2d 594, 601 (6th Circuit 1978), cert. dismissed 439 U.S. 801, 99 S. Ct. 43, 58 L.Ed.2d 94 (1978).

[13] § 109 (a) of UCITA provides: "(1) An access contract or a contract providing for electronic delivery of a copy is governed by the law of the jurisdiction in which the licensor was located when the agreement was entered into. (2) A consumer contract that requires delivery of a copy on a tangible medium is governed by the law of the jurisdiction in which the copy is or should have been delivered to the consumer."

online with electronic delivery of goods. Thus, if the law of the place where the licensor is located governs the applicable law, then it can be presumed that the law of the place where the seller is located should govern the applicable law. In this case, where a party is located should be understood as where he has a place of business.[14]

Under the UCITA, in the absence of an applicable choice of law provision, the law of a foreign jurisdiction will apply only if it provides substantially similar protections and rights to a party located in a domestic jurisdiction.[15] Section 109(d) further provides that "a party is located at its place of business if it has one place of business, at its chief executive office if it has more than one place of business, or at its place of incorporation or primary registration if it does not have a physical place of business. Otherwise, a party is located at its primary residence."

According to the discussion above, it is notable that the "most significant relationship to the transaction" is a connecting factor to determine the applicable law in the absence of choice both online and offline. It is identical to the "most closely connected" approach under Article 4 (4) of the Rome I Regulation in the EU but different from the "manifestly more closely connected" approach under Article 4(3) of the Rome I Regulation. The "most significant relationship" approach emphasises the importance and depth of the relationship or connection between the law of the country and the transactions/parties, whilst the "manifestly more closely connected" targets the obviousness of the relationship or connection between the law of the country and the contract.

The "most significant relationship" test in the US requires consideration of factors including

> place of contracting; place of negotiation; place of performance; location of the subject matter of the contract; domicile, residence, nationality, place of incorporation and place of business of one or both parties; needs of the interstate and international systems; relative interests of the forum and other interested states in the determination of the particular issue; protection of justified and other interested states in the determination of the particular issue; protection of justified expectations of the parties; and promotion of certainty, predictability and uniformity of result.[16]

[14] "Location of the Parties", provided by Article 6 of the UN Convention on Electronic Contracts.

[15] § 109(c) of UCITA.

[16] UCITA with prefatory note and comments, available at www.law.upenn.edu/bll/ulc/ucita/2002final.htm (last visited on 30 April 2009).

However, the "place of contracting" appears to be the weakest basis for party autonomy: such a place is easy to manipulate and may result in an "interstate contract", that is a contract that becomes valid by virtue of the interstate factor although it would be defective in any state with a more real connection. Place of performance may also be difficult to identify. If seller A sells the software to the buyer B in the US and installs it in London, under these circumstances, where was the contract performed? It is hard to determine. In the author's view, it should be suggested that the instalment agreement alongside the sales of goods contract is deemed to be the secondary agreement; thus, the place of performance is taken to be the place of performance of the main contract, that is, in the US.

8.3 The applicable law for B2C/consumer contracts

American law intends to treat consumer agreements through the traditional choice-of-law approach to contracts as there are no separate rules or provisions for B2B contracts and B2C/consumer contracts in the Second Restatement. §187 and §188 of the Second Restatement of Conflict of Laws are still employed to determine the applicable law for consumer contracts. The US Second Restatement of Conflict of Law in this respect is different from the Rome I Regulation in the EU, as the Rome I Regulation has a special provision tailored for consumer contracts in order to establish legal certainty and ensure the protection of consumers.

However, Section 1–301(e) of the UCC has a special clause of the choice of applicable law for consumer contracts, providing that:

> (e) If one of the parties to a transaction is a consumer, the following rules apply:
>
> (1) An agreement referred to in subsection (c) (general rule) is not effective unless the transaction bears a reasonable relation to the State or country designated.
>
> (2) Application of the law of the State or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement: (A) of the State or country in which the consumer principally resides, unless subparagraph (B) applies; or (B) if the transaction is a sale of goods, of the State or country in which the consumer both makes the contract and takes delivery of those goods, if such State or country is not the State or country in which the consumer principally resides.

According to the UCC, the applicable law for consumer contracts will be the law of the State or country in which the consumer principally resides, or the law of the State or country in which the consumer both makes the contract and takes delivery of those goods. However, the seller who sells goods widely in most of the States may choose the law of one of the States on consumer contracts as a governing law for the reason that the transaction bears a reasonable relation to the State or country designated. For example, in the case of *BMW of N. Am. Inc. v. Gore*,[17] BMW markets and sells their products all across the US. BMW had to look to the consumer law in each state and choose the most stringent law as the applicable law.

It is notable that the UCC brings in the concept of "reasonable relation" to determine the applicable law for consumer contracts, which aims to provide a reasonable ground for the chosen law. In the author's view, it is doubtful whether the "reasonable relation" approach can actually ensure the protection of consumer rights, as it will be up to the courts to interpret the measures of "reasonable relation" and such interpretation might be given differently in different states. Nevertheless, the chosen law for consumer contracts shall not derogate from the fundamental policy of the state or country.

However, neither the UCC nor the Second Restatement of Conflict of Law is geared up for application to electronic consumer contracts. Due to the complexities of ascertaining choice of law for electronic cross-border consumer contracts and the various ways of interpreting the Internet choice-of-law approaches from the courts, it is important to enhance the legal certainty by harmonising consumer private international law. As discussed in Part II of this book on jurisdiction, the current approaches towards harmonisation of consumer private international law in the Americas have been undertaken by the Inter-American Specialized Conference on Private International Law (CIDIP), organised by the Organization of American States (OAS) in Washington DC of the Secretariat for Legal Affairs (SLA).[18] The seventh conference (CIDIP VII) has been working on the Draft Model Law of Jurisdiction and Applicable Law for Consumer Contracts – May 2008.[19] This Model

[17] *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 563–5 (1996).

[18] The Secretariat for Legal Affairs (SLA), Organization of American States (OAS), Washington D.C, available at www.oas.org/dil/secretariat_for_legal_affairs.htm (last visited on 20 September 2009).

[19] Draft of Proposal for a Model Law of Jurisdiction and Applicable Law for Consumer Contracts, by Canada for CIDIP VII, in May 2008, available at www.oas.org/dil/Draft_of_proposal_for_a_Model_Law_on_Jurisdiction_and_Applicable_Law_for_Consumer_ Contracts_Canada.pdf (last visited on 20 September 2009).

Law is to harmonise jurisdiction and applicable law rules for cross-border consumer contracts and provide a predictable, fair and efficient legal framework for resolving disputes relating to cross-border consumer contracts. Article 7 of the Draft Model Law regulates the applicable law rules for consumer contracts. It employs the party autonomy principle that parties may agree in writing that the law of a particular state will apply to their consumer contract. However, such agreement may not be valid if it deprives a consumer who is habitually resident in the state of the protection to which he or she is entitled pursuant to the laws of the state. The law of the chosen state shall not govern the consumer contract if one of the three conditions exists. They are:

(a) the consumer contract resulted from a solicitation of business in [name of State] by the vendor and the consumer and the vendor were not in the presence of one another in the vendor's State when the consumer contract was concluded;
(b) the vendor received the consumer's order in [name of State]; or
(c) the vendor induced the consumer to travel to a State other than [name of State] for the purpose of forming the consumer contract, and the vendor assisted the consumer's travel.

As provided by Article 7(3), the vendor will bear the responsibility of burden of proof in case of solicitation of business, demonstrating that he/she took reasonable steps to avoid concluding consumer contracts with consumers habitually residing in the state. In the absence of parties' choice, Article 7(4) provides a general rule that the law of the country where the consumer is habitually resident will govern the consumer contract.

However, the Draft Model Law does not explain the scope of the agreement "in writing". It leaves each enacting state to consider whether such an agreement would or should be effective in law if made electronically, and provide accordingly. In the author's opinion, the Draft Model Law should be modern and up-to-date and in line with the development of the information society. It should not just impliedly tailor its rules for electronic consumer contracts, but explicitly recognise the validity of electronic contracts.

9

Chinese Internet choice of law approaches

In China, the two general principles to determine applicable law in contracts are the same as those in the EU and US: the first is party autonomy, where parties are free to choose the applicable law governing the contract; second, the closest connection or the most significant relationship to the contract or transaction is regarded as a linking factor to determine the applicable law in the absence of choice by parties. However, China is a civil law country with written laws. There can be no choice of law element in a contract in China unless the contract includes an "international" factor.[1] A contract is deemed to be "international" when (1) at least one party is not a Chinese citizen or legal person, (2) the subject matter of the contract is in a third country (i.e. the goods to be sold or purchased are located outside of China), or (3) the conclusion or performance of the contract is made in a third country.[2]

Foreign-related cases have been dramatically increasing. In 2004, there were about 17,066 new foreign-related cases, an increase of about 8%.[3]

9.1 Party autonomy/freedom of choice

In China, party autonomy is a paramount principle in determining the applicable law for contracts. The National People's Congress of the People's Republic of China enacted a unified Contract Law,[4] which has been in force since 1 October 1999. It also deals with the applicable law in foreign contracts. Article 126 of the Chinese Contract Law provides a party autonomy rule that:

[1] Zhang (Winter 2006), p. 289, p. 297.
[2] Ibid., p. 298. See also Article 178 of Organic Law of the People's Courts, promulgated by the National People's Congress in 1979.
[3] 2004 Public Report on Judicial Statistics of the People's Courts, from *Gazette of the Supreme People's Court of the People's Republic of China* 2005 No. 3, p. 18.
[4] China National People's Congress, Public Notice 1999 No 14.

> Parties to a foreign related contract may select the applicable law for resolution of a contractual dispute, except as otherwise provided by law.[5]

The General Principles of Civil Law of the People's Republic of China[6] also determines which applicable law should be applied in civil relations with foreigners in its Chapter VIII. As in the Chinese Contract Law, it is in favour of party autonomy in the choice of applicable law. Article 145 of the General Principle of Civil Law provides that:

> the parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law.

The choice of law agreement shall be made orally or in writing.[7] In practice, parties are allowed to choose or re-choose the applicable law for contracts after the conclusion of the contract. In the case of *Avnet Technology (Hong Kong) Ltd* v. *JiaTong Technology (Suzhou) Ltd* (2009) for the contract of sale of goods,[8] the parties chose Chinese law as the applicable law. Consequently, the Intermediate People's Court of Suzhou applied Chinese law. In *Hong Kong Baiyue Financial Services Co* v. *Hong Kong Hungli Gourmet Co*,[9] the People's Court accepted that the parties changed from Hong Kong law to Chinese law as the applicable law in the proceeding. In the case of *US Kangke Ltd* v. *Suzhou Qinyu Cloths Ltd*,[10] the parties agreed to choose Chinese law rather than US law. Thus, Chinese law was applicable to the case.

Although there is no requirement of "material connection" between the law and the contract, the choice of applicable law by parties shall not derogate from the public policy of China.[11] For example, there are certain

[5] Article 126 of the Contract Law of the People's Republic of China 1999 (hereafter "the Chinese Contract Law"), available at cclaw.net/ (last visited 27 August 2009).

[6] General Principles of Civil Law of the People's Republic of China, promulgated on 12 April 1986, Articles 142–50.

[7] Article 2 of the Supreme People's Court Opinions on Certain Questions on the Application of the Foreign Economic Contract Law 1987.

[8] *Avnet Technology (Hong Kong) Ltd* v. *JiaTong Technology (Suzhou) Ltd*, (2009) the Intermediate People's Court of Suzhou, No.0027, available at www.ccmt.org.cn/ss/writ/judgementDetial.php?sId=3866 (last visited on 21 September 2009).

[9] *Hong Kong Baiyue Financial Services Co* v. *Hong Kong Hungli Gourmet Co*, Supreme People's Court, Selected Cases of People's Courts (1996) 1051–4 (Guangzhou Intermediate People's Court, Guangdong Province, 1991).

[10] *US Kangke Ltd* v. *Suzhou Qinyu Cloths Ltd*, (2004) the Intermediate People's Court of Suzhou, No. 001.

[11] Article 2 of the Supreme People's Court Opinions on Certain Questions on the Application of the Foreign Economic Contract Law 1987.

mandatory rules on choice of law in some foreign trade issues in the Foreign Trade Law of the People's Republic of China (hereafter "Foreign Trade Law"), which was revised and adopted at the 8th Session of the Standing Committee of the Tenth National People's Congress on 6 April 2004, promulgated on 1 July 2004. Article 47 of the Foreign Trade Law provides that:

> Where any country or region that enters into or participates in the economic and trade treaties or agreements with the People's Republic of China deprives the People's Republic of China of or impairs her interests under such treaties or agreements, the People's Republic of China has the right to request the relevant country or region to take appropriate remedies and has the right to suspend or terminate its performance of relevant obligations in compliance with relevant treaties and agreements.

Furthermore, Article 48 of the Foreign Trade Law provides that:

> The authority responsible for foreign trade under the State Council shall carry out bilateral or multilateral foreign trade consultations, negotiations and settle disputes in accordance with this Law and other relevant laws.

9.2 The applicable law in the absence of choice

To determine applicable law in the absence of choice by the parties, Article 126 of the Chinese Contract Law provides that:

> If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied.[12]

It further provides special rules such as, "the contracts for Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and Chinese-foreign cooperative exploration and development of natural resources to be performed within the territory of the People's Republic of China shall apply the laws of the People's Republic of China".[13] Article 145 of the General Principle of Civil Law also provides that "the parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law; if the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied".

[12] See n. 5 above. [13] See n. 5 above.

It is notable that China employs the principle of "most closely connected" to determine the applicable law for contracts. This is similar to the Rome I Regulation in the EU and the US conflict-of-law doctrines. The Supreme Court of China has accepted the idea of applying characteristic performance in order to achieve a more efficient determination of the applicable law under the "closest connection" rule. It decided to make it one of the standards used to judicially determine the applicable law. The reason for the Supreme Court's adoption of the characteristic performance based criteria is twofold: first, it makes the determination more objective by limiting the discretionary powers of the courts when determining the applicable law: second, this approach will improve the result's certainty, predictability and uniformity.[14]

The Supreme Court has explained characteristic performance, stating that in a contract for the international sale of goods, the law that is most closely connected with the contract is the law of the seller's place of business at the conclusion of the contract. If, however, the contract was negotiated and concluded in the place of the buyer's business, the applicable law shall then be that of the place of the buyer's business.[15] A foreign law cannot be chosen as the applicable law if it violates the social public order of China.

In the case of *China Pacific Insurance Ltd, Chengdu Branch* v. *UK Bertling Ltd*[16] in a dispute over compensation on the contract of carriage by sea, the Shanghai Maritime Court ruled that the Chinese law had the closest connection to the contract as the contract of carriage by sea was concluded in China and the contract was also performed in China. Thus, Chinese law applied to the case.

With regard to the applicable law for electronic contracts, in the author's opinion, the determination of the applicable law for electronic contracts should be treated exactly the same as ordinary paper-based contracts unless the electronic contracts do not involve any physical delivery. For example, at the time of concluding contracts for the international sale of digital goods online, the seller may be situated at his place of business, communicating electronically with the buyer who may be located at his place of business. The electronic contract will be formed

[14] Zhang (Winter 2006), p. 289, p. 325.

[15] See Supreme People's Court, The Answers to Questions about Application of The Foreign Economic Contract Law of China (1987).

[16] *China Pacific Insurance Ltd, Chengdu Branch* v. *UK Bertling Ltd*, (2004) Shanghai Maritime Court, No. 36.

and performed without the seller and buyer's physical presence. Due to the feature of an electronic contract, the applicable law shall be the law of the seller's place of business before or at the conclusion of the contract. In short, "party autonomy" is the principle used for ascertaining the applicable law, whereas "most closely connected", the same as the EU and US, is the factor to determine the applicable law in the absence of choices. The place most closely connected to the contract concluded online should be the seller's place of business, or if not, the place of his habitual residence.

As discussed in part II of the book on jurisdiction, the Chinese Society of Private International law has been working on a Draft Model Law of Private International Law of the People's Republic of China (hereafter "Draft China Model Law") to promote the development of international relationships in a fair and reasonable manner. Article 6 of the Draft China Model Law recognises the application of bilateral or multilateral agreements/treaties in foreign disputes in that "if any international treaty concluded or acceded to by the PRC contains provisions differing from those in this law, the provisions of the international treaty shall apply, unless the provisions are ones on which the PRC has announced reservations".

In its applicable law rules for contracts, the Draft China Model Law, just like the EU and US, employs the principle of party autonomy. Article 100 of the Draft China Model Law provides that "contracts are governed by the law the parties agreed on and explicitly chose except as otherwise stipulated by the PRC law and by the treaties concluded or acceded to by the PRC. The choice of law shall not be contrary to the mandatory rules." It further explains that

> parties to a contract can make a choice of law when or after the contract is concluded but before the court holds hearing. And after the contract is concluded, parties can also vary the law chosen at the time of the conclusion of the contract. The variation has retrospective effect, but without any prejudice to the rights and benefits of the third party.

In addition, parties can decide whether the law they choose is applied to the whole contract, or only to one or several parts of the contract.

In the absence of choice by parties, Article 101 of the Draft China Model Law employs the principle of "the closest connection", which is identical to the principle of "most closely connected" in the Rome I Regulation in the EU, and is also compatible with Article 145 of the General Principles of Civil Law in China. It provides that, in the absence of choice, the contract is governed by the law of the place with which it has the closest connection.

Furthermore, the Draft China Model Law treats the applicable law to the determination of B2B contracts and B2C/consumer contracts separately. Article 101(1) of the Draft China Model Law provides that

> the contract of international sale of goods is governed by the law of the place where the seller's seat of business is located at the time of the conclusion of the contract. If the contract was concluded at the buyer's seat of business, or the contract provides expressly that the seller must perform his obligation of delivering the goods at the buyer's seat of business, or the contract was concluded on terms determined mainly by the buyer and in response to an invitation directed by the buyer to a person invited to bid, the law of the place of the buyer's seat of business shall apply.

The proposed rule concerning the applicable law for B2B contracts in the Draft China Model Law shares the same general principle as the EU and US practice. However, it is more rigid than the Rome I Regulation in terms of the escape or exemption rule to the application of the law of the seller's place of business for B2B contracts. The Draft China Model Law presumes some particular and precise circumstances when the law of the buyer's place of business shall apply, whereas the Rome I Regulation provides a general condition of the determination of "characteristic performance", "manifestly more closely connected" and "most closely connected" as exemptions to the employment of the law of the seller's place of business. In the author's view, the Chinese private international law should learn from the experience of the Rome I Regulation and produces rules that are flexible to cover a wide scope of situations.

With regard to the applicable law for B2C/consumer contracts, Article 101(2) of the Draft China Model Law provides a simple and brief general rule that "the consumer contract is governed by the law of the place of the consumer's domicile or habitual residence". In the author's opinion, the issue of the applicable law for consumer contracts should be drafted as a separate provision providing more sophisticated rules, including the determination/interpretation of the concept of consumer contracts and other exemption rules to the general law applicable to consumer contracts.

Summary

In summary, the EU, US and China choice of law rules are all in favour of party autonomy. Parties are free to choose the governing law and state it in the contract (in cases of express choice or its equivalent). Otherwise,

the contract will be governed by the law of the country with which the contract is most closely connected or which has the most significant relationship to the transaction in the absence of express choice.

With regard to applicable law for B2B contracts, in the US the principle of "the most significant relationship to the contract" for the determination of applicable law is identical to the principle of "the most closely connected" approach in the determination of applicable law for B2B contractual obligations in the EU. According to the findings of the applicable law in B2B electronic contracts, the place which has the most significant relationship to the contract or transaction would be the seller's place of business. With regard to the applicable law for electronic contracts, the law of the country that has the closest relationship to electronic contracts or transactions should be the law of the seller's place of business, which is compatible with the provision of the Rome I Regulation.

With regard to the applicable law for B2C/consumer contracts, although the EU and US are both in favour of party autonomy, they limit the choice of law that may be included by the parties, stating that it should not infringe the mandatory rules or fundamental policy of the country in terms of consumer protection. Although the choice-of-law rules for consumer contracts under the Rome I Regulation in the EU provide more legal certainty and predictability than those of the Second Restatement of Conflict of Law and the Uniform Commercial Code in the US, they both have the same aim of protecting the weaker party – the consumer. They both employ a general rule that the law of the country where the consumer is habitually resident will govern the contract.

In the author's opinion, the place of business and the place of performance are more difficult to determine in electronic transactions. Generally, traditional choice of law principles should still apply to electronic contracts if the delivery of goods involves physical transfer. However, due to the complex and unique nature of online contracting when involving electronic delivery, it is necessary to further establish or clarify the methods of determining the law applicable to e-contract disputes. For instance, in the absence of a choice of law clause in electronic contracts, how do we ascertain the "most closely connected" factor in order to determine the applicable law for contracts concluded over the Internet?

In absence of a choice of law, the law of the country which is most closely connected with the contract will govern the contract. This will be determined by looking at the most closely connected factors: where the

place of performance is and whether the defendant's activities have effects in that state. According to the findings in the EU, US and China, the seller's place of business seems to be the most enduring connecting factor, which has an economic impact on its area; thus, the law of the seller's place of business should be the law governing B2B electronic contracts in the absence of a choice of law clause.

PART IV

Online dispute resolution

10

Alternative dispute resolution and the Internet

10.1 The movement from ADR to ODR

Alternative dispute resolution (ADR) can be deemed to be a key technique in resolving disputes, a structured process with a third party intervention and an escape from court litigation. ADR includes arbitration, mediation/conciliation and negotiation.

"Arbitration" is a form of adjudication with a neutral decision-maker – an arbitrator rather than a judge – and its award is normally enforceable as a court judgment. "Mediation" is different from arbitration in that a neutral third party – a mediator – will have no power to adjudicate or impose an award but seeks to help the disputing parties to reach a negotiated agreement. "Negotiation" is the most informal method of ADR where the parties communicate with each other with the aim of making a decision, which is voluntary and non-binding. Sometimes, negotiation can be assisted by a third party chosen by the disputing parties.

From a commercial dispute perspective, as ADR aims to resolve disputes in a more friendly way rather than by going to court, it is used for merchants who are making efforts to establish or maintain a long-term business relationship with each other. As ADR is also considered to be more efficient, flexible, confidential and less costly, compared with traditional litigation, it is also useful for consumers who are seeking help for small claims.

In the 1980s, ADR was most commonly used to resolve international commercial transactions disputes other than cross-border litigation, as ADR can avoid the long court proceedings for international disputes which are affected by the conflicts of jurisdiction and choice of law. International instruments have been developed to promote the harmonisation of international ADR practices, such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; the UNCITRAL Model Law on International Commercial Arbitration 1985 and the UNCITRAL Model Law on International Commercial Conciliation 2002.

In the early 1990s, global Internet transactions or usages increased the probability of cross-border disputes. Parties situated in different continents may be opposed over cyber-related or small claims issues. To some extent, the traditional ADR system may be lagging behind due to the complexity and various prohibitive costs of pursuing a legal action across jurisdictional boundaries; the difficulty of the determination of the place of business or the place of performance in cyberspace; and the need for legal experts with the knowledge and practical experience of the new technology. So a less costly but more efficient solution to resolve e-disputes was needed to match the legal, business and social concerns in the new environment. The modernisation of ADR was required.

The modernisation of ADR started in the mid-1990s, when four non-profit organisations introduced the concept and basic experiment of online dispute resolutions (ODR). They are the Virtual Magistrate at Villanova University, the Online Ombuds Office at the University of Massachusetts, the Online Mediation Project at the University of Maryland, and the CyberTribunal Project at the University of Montreal, Canada.[1] ODR, tailored for the new information society, aims to provide more efficient, cost effective and flexible dispute resolutions. It uses the Internet as a channel, a resource that extends what we can do, where we can do it and when we can do it[2] to establish and facilitate a platform for dispute resolution.

10.2 The concept of ODR

The ABA Task Force on E-Commerce and ADR provides a generic definition of ODR:

> ODR is a broad term that encompasses many forms of ADR and court proceedings that incorporate the use of the internet, websites, e-mail communications, streaming media and other information technology as part of the dispute resolution process. Parties may never meet face to face when participating in ODR. Rather, they might communicate solely online.[3]

As defined by the ABA Task Force, ODR is not only an extension of alternative dispute resolution (ADR) – online arbitration, online mediation and online negotiation – but also an application of litigation in

[1] Ponte (Spring 2001), p. 55, pp. 60–1. [2] Katsh and Rifkin (2001), p. 10.
[3] American Bar Association Task Force on E-Commerce and ADR, "Addressing Disputes in Electronic Commerce, Final Report and Recommendation", available at www.abanet.org/dispute/documents/FinalReport102802.pdf (last visited on 29 July 2009).

cybercourts, although online litigation is not as common as eADR. It can be also considered to be the online administration of justice. It is debatable how much use needs to be made of electronic communications in a dispute before it can constitute ODR. In practice, it is widely recognised that the portion of the usage is flexible. The process of ODR can be partly or wholly online. For example, parties might prefer to file a case via the online filing system and submit electronic evidence, but arrange a face-to-face negotiation, mediation or arbitration. Or, parties might file a case in writing and submit evidence by post but negotiate, mediate or arbitrate online using a designated ODR platform. Or, the entire process of dispute resolution is conducted online.

10.3 ODR practice

10.3.1 Suitable cases for the usage of ODR

In theory, ODR can be used in most civil and commercial disputes, from contracts to torts; from family to business; and from domestic to international cases. However, disputes that involve electronic transactions or Internet-related cases are most suitable for the use of ODR services as the documents related to such cases are usually formed by electronic means. Electronic documents can be submitted easily via the Internet on the ODR platform and served as evidence.

In practice, disputes that use the ODR mechanism are mostly cases involving online shopping (small claims) and domain names disputes. In order to promote the usage of ODR in a wider scope of practice (e.g. international trade disputes) in the future, parties choosing ODR must have confidence in the quality of dispute resolution in terms of the expertise in resolving Internet-featured cases.

Domain name infringement disputes are one of the most likely types of dispute to use ODR as domain names are non-territorial. They are unique and global in nature. Only one entity in the world can own the right to use a specific domain name and it can be accessed globally. In the absence of reliable and accurate contact details of the domain name registrants, it may lead to the situation that the plaintiff would find it hard to protect his/her rights against the defendant due to the missing link of the defendant's personal name and address. In other words, there is no *in personam* jurisdiction under those circumstances on the website. Courts will need a special rule for resolving such cases. A good example is found in the US Anticybersquatting Consumer Protection Act (ACPA),

which has set up specific rules concerning *in rem* jurisdiction to prevent cybersquatters. This rule enables a trademark holder to bring a civil action against the domain name itself in the US district court. *In rem* action can apply to the case where the mark owner cannot establish *in personam* jurisdiction, or is not able to find the registrant's physical location through due diligence (15 USC sec. 1125 (d)(2)(A)). Take *Barcelona.com, Inc.* v. *Excelentisimo Ayuntamiento de Barcelona*[4] for example. It shows how a party who lost a domain name dispute can obtain standing as a plaintiff in a federal court. Barcelona.com was registered by a Spanish couple, providing tourist information about Barcelona, e-mail services, a chat room, advertising and links to other websites. Before Barcelona.com, Inc started a lawsuit in a federal court, the City Council of Barcelona (Excelentisimo Ayuntamiento de Barcelona), who have approximately 1000 registrations of the mark "Barcelona", filed a complaint with WIPO and won the UDRP (Uniform Dispute Resolution Policy) proceedings. The domain name was ordered to be transferred to the City Council. Before the execution of the transfer, Barcelona.com, Inc commenced a lawsuit in the District Court for the Eastern District of Virginia, seeking a declaratory judgment and asserting that the registration of the domain name was not unlawful. The Court found that, first Barcelona.com, Inc was registered with the US registrar, NSI; second, it had a mailing address in New York but had no office space, no telephone number and no employees. This action therefore met the ACPA criteria for an *in rem* action. So the domain name "Barcelona.com" was named as a complainant in the lawsuit in the US. The Court's decision validated the transfer according to the ACPA through the *in rem* jurisdiction.

In rem jurisdiction also applies to another case between the US and China – *Cable News Network LP, LLLP* v. *CNNEWS.COM*.[5] The plaintiff alleged that cnnews.com violated his rights because cnnews.com is similar to his registered marks "CNN" in the US. As Ellis, a district judge, noted, "This is an in rem ACPA suit brought by an American company against 'cnnews.com' domain name used by a Chinese company in connection with a website that focused chiefly on China and Chinese speakers by providing online services in the Chinese language." This case fulfilled the criteria for an *in rem* action because (1) the action was

[4] *Barcelona.com, Inc* v. *Excelentisimo Ayuntamiento de Barcelona*, 189 F. Supp. 2d 367 (E. D. Va. 2002), rev'd and vacated, 330 F. 3d 617 (4th Circuit 2003).

[5] *Cable News Network LP, LLLP* v. *CNNEWS.COM*, No. 00–2022-A, E.D. Virginia (21 December 2001).

brought in the jurisdiction where the registrar or registry of the infringing domain name was located; and (2) *in personam* jurisdiction over the registrant did not exist (15 USC sec. 1125 (d)(2)(A)). Under the ACPA, a trademark owner can petition a US court to transfer a foreign national's domain name to the trademark owner despite the fact that the foreign national domain name has never transacted business in any forum within the US.[6]

There are two features of domain name disputes brought under the ACPA. The first is that US courts can apply specialised legislation to the subject matter without identifying a person or entity as the plaintiff. The second feature is that US courts can enforce the judgment by directly instructing the domain name registrars to cancel or transfer the disputed domain name. The withdrawal, cancellation or transfer of domain names will be done by the registrars via the Internet as the disputed objects are in electronic forms.

Let us take the features of domain name disputes linked to the characteristics of ODR as an example of suitable cases for ODR. The growth in the use of domain names appears to have increased the number of bad faith registrations and further raised concerns that trade mark owners' rights are increasingly infringed or diluted by the use of trade marks in domain names.[7] That is, domain names have come into conflict with trade marks. The main reason for such conflict can be attributed to the lack of connection between the system of registering trade marks and the registration of domain names. The former is a system of granting territorial rights enforceable only within the designated territory; the latter is a system of granting rights that can be enforced globally.[8] Because trade mark law is territorial, a mark may be protected only in the geographic location where it distinguishes its goods or services. Thus, trade mark law can tolerate identical or similar marks in different territories even within the same classes of goods and services. Domain names, by contrast, are both unique and global in nature.[9] Only one entity in the world can own the right to use a specific domain name that

[6] The case examples given above come from the author's journal paper: Wang (2006), pp. 116–27.

[7] "A Review of the Relationship between Trade Marks and Business Names, Company Names and Domain Names" (March 2006), Australian Government, Advisory Council on Intellectual Property, p. 5, available at www.acip.gov.au/library/TM,%20business,company,domain%20names-%20Final%20Report.pdf (last visited on 17 March 2007), (hereafter "Australian DR Review").

[8] Tunkel and York (2000). [9] Wang (2006), pp. 116–27, p. 119.

can be accessed globally.[10] Due to the specific features of a domain name, in particular, without territory but with a registrar, ODR will be one of the most suitable methods of resolving domain names disputes.

Likewise, consumers are also encouraged to use the ODR system to resolve online shopping disputes or privacy protection issues as those cases involve electronic records, i.e. electronic order forms and payment etc., which can be easily submitted to the cybercourt or online arbitration or mediation forum as supporting evidence. Some online merchants may also offer consumers ODR services for free so as to boost consumers' confidence and trust in shopping at its electronic market place.

There are a number of successful ODR services that deal with consumer-related small claims or domain names disputes. The following section will introduce and examine some of the most successful world-wide experiences.

10.3.2 Global successful examples of ODR services[11]

In the author's view, up till 2009, there are two main types of ODR services that provide the most successful ODR experiences:

(1) Neg-Med or Med-Arb;
(2) Administrative-online-dispute-resolution service.

Neg-Med or Med-Arb

eBay and SquareTrade eBay and SquareTrade successfully provide its users with two stages of dispute resolution – online negotiation and mediation – in the general operation of eBay-SquareTrade dispute resolution service. At the first stage, SquareTrade offers eBay users a free web-based forum which allows users to attempt to resolve their differences on their own. It is known as an "automated negotiation platform". If settlement cannot be reached at the first stage, SquareTrade offers the use of a professional mediator for a nominal fee as eBay will subsidise the rest of the cost.[12] This second stage is called "online mediation". SquareTrade's position is practically that of an in-house dispute resolution provider as eBay refers its users exclusively to SquareTrade through a link on its website.

[10] Efroni (2002), p. 343.
[11] Some successful experiences in this section are part of the author's other book: Wang (2009).
[12] Dispute Resolution Overview, available at www.pages.ebay.com/services/buyandsell/disputeres.html (last visited on 19 June 2009).

The strategy cooperation between eBay and SquareTrade to share each other's resources of users and promote each other's business will be beneficial as eBay is one of the world's largest online marketplaces providing trading platforms, established in 1995, and SquareTrade is an industry-leader in online merchant verification and dispute resolution, created in 1999. Such strategy cooperation is known as one of the "e-trust" buildings. It is designed to make customers comfortable and gain confidence in buying and selling online so that a maximum number of sellers and buyers will be attracted to its online marketplace. The usage of SquareTrade by eBay will benefit eBay's customers in resolving misunderstandings fairly, providing a neutral go-between for buyers and sellers, reducing premature negative feedback and generating trust in the eBay community.[13]

AAA and Cybersettle Since October 2006, AAA (the American Arbitration Association) and Cybersettle have been successfully offering a Neg-Med-Arb online dispute resolution to their clients. It is a strategic alliance plan with the goal of "ensuring that no one walks away without a resolution", said Cybersettle President and CEO Charles Brofman. AAA clients using the AAA's online case management tools will be able to attempt settlement via Cybersettle's online mediation before AAA neutrals are selected for online arbitration. Cybersettle clients who have not been able to reach settlement through online negotiation will be able to switch to the AAA's dispute resolution processes, including conciliation, mediation and arbitration.[14]

The cooperation between AAA and Cybersettle creates a win–win situation to attract clients as both AAA and Cybersettle have an excellent reputation, exclusive expertise and successful experiences in their fields. AAA, established in 1926, is a non-profit making public service organisation and a global leader in conflict management, providing services to individuals and organisations who wish to resolve conflicts out of court. It also serves as a centre for education and training, issues specialised publications and conducts relevant research.[15] Cybersettle,

[13] Dispute Resolution Overview, available at www.pages.ebay.com/services/buyandsell/disputeres.html (last visited on 19 June 2009).

[14] "Information about AAA and Cybersettle Sign Unique Partnership Agreement", available at www.cybersettle.com/pub/16/section.aspx/11 & http://www.cybersettle.com/pub/home/about/partners/aaa.aspx and www.adr.org/sp.asp?id=32533 (last visited on 19 June 2009).

[15] "About us (AAA)", available at www.adr.org/about (last visited on 19 June 2009).

founded in the mid 1990s, is a pioneer in online negotiation and an inventor and patent-holder of the online double-blind bid system. AAA offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities and all levels of government, while since 1996 Cybersettle has handled more than 162,000 transactions, with more than $1.2 billion in settlements.[16] Professional regulations of AAA, such as Commercial Arbitration Rules and Mediation Procedures, can be integrated into the self-regulation of private ODR services, which enhance the standardisation of the ODR order in the society. AAA's dispute resolution rules are professional and comprehensive. There are Procedures for Large, Complex Commercial Disputes as well as Supplementary Rules for the Resolution of Patent Disputes and a Practical Guide on Drafting Dispute Resolution Clauses, including negotiation, mediation, arbitration and large, complex cases. In addition, Cybersettle can also contribute its private practices and work with AAA to promote other services when appropriate and to make joint proposals and business presentations under certain circumstances.

The cooperation between AAA, an experienced public organisation, and Cybersettle, a young enthusiastic private organisation, can be a model with good strategic plans for the development of ODR industry.

Administrative online dispute resolution service

ICANN and WIPO-UDRP The Internet Corporation of Assigned Names and Numbers (ICANN) and the World Intellectual Property Organisation (WIPO) are both public international organisations but with different functions. ICANN is responsible for managing the generic top level domains and was in urgent need of a solution to the dispute resolution problem,[17] while WIPO is responsible for developing a balanced and accessible international intellectual property (IP) system.[18] In 1994, the WIPO Arbitration and Mediation Centre was established to provide ADR services – arbitration and mediation for the resolution of international commercial disputes between private parties. Its WIPO Electronic

[16] "Industry New: New Joint Dispute Resolution Service Ready to Launch", available at www.adr.org/sp.asp?id=29624 (last visited on 19 June 2009).

[17] The Internet Corporation for Assigned Names and Numbers (ICANN), available at www.icann.org/ (last visited on 29 May 2009).

[18] "What is WIPO?", available at www.wipo.int/about-wipo/en/what_is_wipo.html (last visited on 19 June 2009).

Case Facility (WIPO ECAF) has been designed to offer time and cost efficient arbitration and mediation in cross-border dispute settlement.[19]

ICANN adopted the Uniform Domain Name Dispute Resolution Policy (UDRP), which went into effect on 1 December 1999, for all ICANN-accredited registrars of Internet domain names. WIPO is accredited by ICANN as a domain name dispute resolution service provider.[20] Since then, WIPO Centre has been providing ODR service for resolving domain name disputes and has administered over 30,000 proceedings, of which over 15,000 were under the WIPO-UDRP adopted by ICANN.[21]

In December 2008, WIPO submitted a proposal "eUDRP Initiative"[22] to ICANN. The "eUDRP Initiative" proposed to remove the requirement to submit and distribute paper copies of pleadings relating to the UDRP process, primarily through the use of email in order to eliminate the use of vast quantities of paper and improve the timeliness of UDRP proceedings without prejudicing either complainants or respondents.[23]

Scholars have identified the reasons for the success of the WIPO-UDRP domain name dispute resolution system as including credibility, transparency, self-enforcement, accountability, etc.[24] First, WIPO and ICANN are both public organisations with authority. WIPO's participation in dealing with domain name disputes particularly adds *credibility* to the process due to its professional expertise and resources. Second, every dot.com registrant is *compulsorily* governed by the WIPO-UDRP so no conflict of rules or procedural issues arise when disputes occur. Third, domain name case decisions are available online immediately in full text,[25] which increases *transparency* of the procedure and imposes a degree of public *accountability*, which protects the rights of

[19] The WIPO Arbitration and Mediation Centre, available at www.wipo.int/amc/en/index.html (last visited on 29 May 2009).

[20] "Frequently Asked Questions: Internet Domain Names", available at www.wipo.int/amc/en/center/faq/domains.html (last visited on 29 May 2009).

[21] WIPO Advanced Workshop on Domain Name Dispute Resolution: Update on Practices and Precedents, WIPO, Geneva, Switzerland, Tuesday and Wednesday, 13 and 14 October, 2009, available at www.wipo.int/amc/en/events/workshops/2009/domain-name/ (last visited on 19 June 2009).

[22] WIPO eUDRP Initiative, available at www.wipo.int/export/sites/www/amc/en/docs/icann301208.pdf (last visited on 19 June 2009).

[23] "Record Number of Cybersquatting Cases in 2008, WIPO Proposes Paperless UDRP", PR/2009/585, Geneva, March 16, 2009, available at www.wipo.int/pressroom/en/articles/2009/article_0005.html (last visited on 19 June 2009).

[24] Motion (2005), pp. 137–69, p. 148.

[25] WIPO UDRP Domain Name Decision (gTLD), available at www.wipo.int/amc/en/domains/decisionsx/index.html (last visited on 19 June 2009).

lawful domain name holders. Fourth, the case is usually closed two months after filing and an administrative panel decision is implemented by the registrar ten days after the decision is rendered.[26] No foreign authorities can block the outcome, which promotes the *enforceability* of settlement. Lastly but most importantly, WIPO provides an *efficient* domain name dispute resolutions service, as all complaints and responses can be completed and submitted directly online.[27] The supplementary rule of "eUDRP initiative" is an example of the efforts of WIPO to promote efficiency and improve *quality* in domain name online dispute resolution.

CIETAC and HKIAC Another example of a successful administrative ODR service can be provided by the cooperation between the China International Economic and Trade Arbitration Commission (CIETAC) and the Hong Kong International Arbitration Centre (HKIAC).

With the aim of bridging and harmonising the domain name administration in China and Hong Kong,[28] the Asian Domain Name Dispute Resolution Centre (ADNDRC) was set up as a joint undertaking of CIETAC and HKIAC to deal with gTLDs (.com / .org) domain names disputes.[29] The Asian Domain Names Dispute Resolution Centre has two offices: one in Beijing and the other in Hong Kong. Both offices comply with the WIPO UDRP for gTLDs disputes. Complainants can choose to file a case at either of them.

Both CIETAC in Beijing and HKIAC in Hong Kong are appointed by the China Internet Network Information Center (CNNIC) providing dispute resolution services with regard to .CN domain names, known as "CIETAC Domain Name Dispute Resolution Centre"[30] and "HKIAC .cn Domain Name Resolution Centre".[31] The .CN Domain Name Disputes are carried out under CNNIC Domain Name Dispute Resolution Policy

[26] Paragraph 4(k) of the UDRP Policy.
[27] Case Filing under the UDRP, available at www.wipo.int/amc/en/domains/filing/udrp/index.html (last visited on 19 June 2009).
[28] It is known that China and Hong Kong enact the "one country, two systems" policy.
[29] Asian Domain Name Dispute Resolutions Centre, www.adndrc.org/adndrc/index.html (last visited on 19 June 2009). Please note that it also includes the Korean Internet Address Dispute Resolution Committee (KIDRC).
[30] CIETAC Domain Name Dispute Resolution Centre, available at www.dndrc.cietac.org/static/english/engfrmain.html (last visited on 19 June 2009).
[31] HKIAC .cn Domain Name Resolution Centre, available at www.dn.hkiac.org/cn/cne_welcome.html (last visited on 19 June 2009).

(CNDRP)[32] in both China and Hong Kong centres, while HKIAC uses its own policy for .HK disputes.

With these two ODR service providers (CIETAC and HKIAC), the complainant should submit a Complaint Form in electronic form by email.[33] Generally, a decision should be made on the basis of the statements and documents submitted by the parties. The panel has fourteen days to render a decision.[34] The panel's decision will be submitted both in electronic and paper form signed by all the panellists. The decisions will be published on the websites of the service providers unless special circumstances apply.[35]

For example, the case *Avon Products, Inc* v. *Ni Ping*[36] was filed with ADNDRC Beijing Office on 27 April 2007. The complainant is one of the world's most well known direct sellers of cosmetic products. The claimant claimed that since 1886 it had built up distribution networks covering 145 countries, 8 million customers and 4.8 million independent sales representatives. The claimant has expended extensive amounts of fiscal and temporal capital in preserving the value of its AVON and "Ya Fang" trademarks in Roman and Chinese characters, including registration of these trademarks throughout the world, including mainland China, Hong Kong, Taiwan and Singapore. It entered into the PRC market in 1990 and now has 77 branches in China, over 6,000 speciality shops, and sales of products marked with "Ya Fang" in Chinese characters (or derivative marks) totalled over US$681 million between 2000 and 2004, thereby providing substantial evidence of a global association of the complainant's "Ya Fang" marks with its cosmetic products. The claimant asserted that the respondent's use of domain name "yafang.net", which was registered on 12 August 2003 in Beijing, would confuse its existing and future customers, and constitute use and registration in bad faith. When visitors type in www.yafang.net, they are directly connect to www.x-y-f.com. The respondent Ni Ping also registered "avon.cn", "yafang.cn" and "niping.cn" on 17 March 2003, and sold cosmetic

[32] The China Internet Network Information Centre (CNNIC) approved and implemented the CNNIC Domain Name Dispute Resolution Policy (CNDRP) on 30 September 2002. The new amended CNDRP came into force on 17 March 2006.

[33] Hong Kong International Arbitration Centre (HKIAC), www.dn.hkiac.org/cn/cne_complaint_form.html (last visited on 24 May 2009).

[34] Article 37 of the Rules for CNNIC Domain Name Dispute Resolution Policy, available at www.dn.hkiac.org/cn/cne_rules_procedure.html (last visited on 25 May 2009).

[35] Article 44 of the Rules for CNNIC Domain Name Dispute Resolution Policy.

[36] *Avon Products, Inc* v. *Ni Ping*, CN-0600087, available at www.adndrc.org/adndrc/bj_statostocs.html (last visited on 27 March 2009).

products online. Ni Ping transferred "yafang.net" to link to "avon.cn", "yafang.cn" and "niping.cn" after the complaint was filed. The Panel ordered that the domain name "yafang.net" be transferred to the Complainant, pursuant to Article 4(a) of the UDRP.

In the author's opinion, the characteristics or advantages of CIETAC and HKIAC ODR services for domain name disputes are very similar to the WIPO domain dispute resolution service in terms of efficiency, accountability, transparency and self-enforceability. The CIETAC and HKIAC centres provide valuable experiences and cornerstones for developing the Chinese ODR system for disputes arising from e-commerce transactions. The launch of the Asian Domain Name Dispute Resolution Centre (ADNDRC) successfully combined the two systems in China and Hong Kong. It serves as a joint venture providing ODR for domain names, which generates consistency, harmony and certainty.

Summary: Lessons to be learned The ICANN and WIPO-UDRP, eBay and SquareTrade, AAA and Cybersettle, CIETAC and HKIAC – the four successful examples of international ODR practices provide a tremendous amount of valuable experience.

First, they provide advanced technological support and make a very attractive offer for easily accessible, quick, effective and low-cost dispute resolution. For example, eBay users only need to pay US$15 for online mediation service provided by SquareTrade, and, if they choose automated online negotiation to resolve their trade disputes, it may even be free.[37] The mediation process on SquareTrade for eBay users generally takes only ten days.[38]

Second, they have succeeded in integrating their offer to their primary markets.[39] The four ODR services mainly aim at resolving e-commerce related disputes. For example, SquareTrade dispute resolution service provider deals with eBay users' online trading disputes. WIPO-UDRP or CIETAC and HKIAC deal with ICANN domain name users' disputes.

Third, the integration is brought about by cooperation agreements with the primary market makers. For example, SquareTrade is appointed

[37] Dispute Resolution Overview, available at www.pages.ebay.com/services/buyandsell/disputeres.html (last visited on 19 June 2009).
[38] Dispute Resolution Overview, available at www.pages.ebay.com/services/buyandsell/disputeres.html (last visited on 19 June 2009).
[39] Calliess (2006), p. 647, p. 653.

by eBay (a primary market maker) for resolving eBay users' trading disputes. AAA and Cybersettle create a strategic alliance. WIPO-UDRP is accredited by ICANN as the domain name dispute service provider, while CIETAC and HKIAC are accredited by ADNDRC.

Fourth, the ODR service is promoted by creating socio-legal bonds for potential disputing parties to commit to the process.[40] That is, the WIPO-UDRP administrative procedure is mandatory to domain name holders, whilst the SquareTrade automated negotiation process (at the first stage) is free of charge for eBay users.

Fifth, the self-enforcement or self-execution mechanisms to enforce dispute settlements are a credential that makes ODR services successful. For example, ICANN and WIPO has a self-enforcement mechanism. The ICANN accredited registrars have the rights to transfer or cancel a domain name directly when the decision of settlement is made.[41]

Sixth, ODR service has the advantage of providing expertise to resolve certain Internet disputes, such as cross-border small claim disputes and domain names disputes. For example, "ICANN and WIPO-UDRP" and "CIETA and HKIAC" both provide successful domain name dispute resolution online.

[40] From the author's perspective, "social-legal bonds" means the combination of the powers between social organisations and legislation. The term "legal bond" is being used in a very broad sense, including not only contractual design but also all kinds of "private ordering": see more details in www.odrworkshop.info/papers2005/odrworkshop2005Bol.pdf (last visited on 29 July 2009).

[41] Available at www.icann.org/tlds/agreements/name/registry-agmt-appl-03jul01.htm (last visited on 3 September 2009).

11

The legal obstacles and solutions to online arbitration and online mediation

Online dispute resolution (ODR) brings efficiency and convenience to the resolution of conflicts but at the same time it faces a number of challenges due to technology, management and legal obstacles. This chapter will focus on the legal obstacles to the facilitation of online arbitration and mediation, discuss the modernisation of the current legislation in the field of private international law and alternative dispute resolution and evaluate the necessity for harmonisation of international standards of ODR services and implementation of the proposed solutions through the reform of the existing international, regional and national laws or by supplementing it with new subject-specific legislation.

11.1 Legal obstacles to ODR

ODR is certainly much younger than most of the existing laws. Whether the existing laws can provide a sufficient legal basis for cases resolved through ODR is very controversial. Whether new laws should consider the inclusion of provisions tailored for the new information technology is also debatable. However, the bottom line is that ODR has become a reality due to its increasing use. The interpretation of the rules determining the validity of electronic arbitration and mediation agreements and the enforcement of electronic arbitral awards and settlement agreements differs in different countries. In order to encourage and enable ODR to proceed, legal obstacles must be removed.

11.1.1 Online arbitration

Online arbitration is one of the most complicated ODR processes as its non-localisation challenges the traditional concepts of "the arbitration agreements", "the place of arbitration" and "the place of arbitral awards".

It leads to the legal uncertainty of the validity, jurisdiction and applicable law, and enforceability of the arbitration agreements and arbitral awards.

Validity

Traditionally, an arbitration agreement shall be in writing. This is provided by Article 2 of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter "the New York Convention").[1] The New York Convention has been adopted by most countries, including China, the US and EU. It is considered to be one of the most successful conventions, which gives certainty to the recognition and enforcement of cross-border arbitral awards.

As the New York Convention was adopted far before the birth of the electronic communication society, it did not include the functional equivalent rule to recognise the validity of electronic arbitration agreements and awards. Online arbitration has been challenged because there is uncertainty on whether the electronic arbitration agreements and awards can meet the requirements for such agreements and awards to be in written form under the New York Convention. It is suggested that if the digital arbitral awards can be printed and signed, it would satisfy the written requirement. However, if electronic arbitration agreements and arbitral awards can be treated as "electronic contracts", their validity will be automatically recognised by the UN Convention on the Use of Electronic Communications in International Contracts and other national electronic contract laws.

In some countries, conflict of law rules may include the determination of the validity of an arbitration agreement. In practice, the validity of an arbitration agreement should be governed by the law chosen by the parties. In the absence of the parties' choice of law, the law of the place where the arbitration takes place or the award is made should apply. Such a rule is proposed in Article 151 of the Draft Model Law of Private International Law in China (hereafter "Draft China Model Law"). The adoption of such a rule would definitely increase the legal certainty. However, the determination of the place of arbitration in cyberspace would still face legal challenges.

Jurisdiction and applicable law

The place of arbitration or seat of arbitration is usually used to ascertain the application of the country's arbitration law and later the country of

[1] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 status, available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited on 19 June 2009).

origin for enforcement purposes. The seat or place of arbitration shall be agreed by the parties. In the absence of such choice, it can be problematic to identify the place of arbitration and this is even worse in cyberspace. Arbitral proceedings in cyberspace have no physical location. In common practice, the place of arbitration in cyberspace shall be interpreted as the place of domicile of the chairman of the arbitral tribunal, the location of the main server or the place of business of the dispute resolution provider.[2] In the author's view, "the domicile of the chairman of the arbitral tribunal" seems to be a more appropriate and effective connecting factor in determining the location of arbitral proceedings than "the location of the main server or the place of business of the dispute resolution provider". The latter contradicts the general principle of the determination of the location of the party in cyberspace according to Article 6 of the UN Convention on the Use of Electronic Communications in International Contracts.

Similar to court litigation, parties are allowed to choose the applicable law for their contracts. However, such choice shall not infringe the mandatory rules or public policy of the country. Within the scope of application of party autonomy, arbitral tribunals do not have the power to disregard the parties' instructions as excess of power and procedural irregularity are both grounds for setting aside or refusing to enforce an arbitral award,[3] according to Article 34(2)(a)(iii) and 34(2)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration and Article V(1)(c) and (1)(d) of the New York Convention.

Beyond the scope of application of party autonomy, the parties' instructions do not have effect and do not limit the arbitral tribunal's power to determine the applicable law.[4] Under such circumstances, the arbitral tribunal will determine the private international law (e.g. under the Brussels I Regulation and Rome I Regulation in the EU), and then the chosen rule/regulation of private international law will direct the appropriate jurisdiction and substantive applicable law.

It is suggested that the parties should choose the system of private international law that the arbitral tribunal shall use in order to avoid any ambiguous application and to create legal certainty as, in the absence of any reference to a private international law, there is no indication that the tribunal will apply a conflict rule to identify the proper law.[5] Meanwhile, if the arbitral tribunal decides to apply a conflict rule, it will face the same challenges of the determination of applicable law of electronic contracts as in court litigation.

[2] Herrmann (2001), p. 273. [3] Moss (2008), pp. 153–64, p. 163. [4] Ibid. [5] Ibid.

With regard to the choice of arbitral procedure, in practice, the procedure of arbitration shall be governed by the procedural rules agreed upon by the parties, which shall not be contrary to the mandatory provisions of the law of the place where the arbitration takes place or the award is made. In the absence of an agreement, procedural rules determined by the arbitral tribunal shall apply. Such rules are specified in Article 13 of the UNCITRAL Model Law on International Commercial Arbitration and also proposed in Article 152 of the Draft Model Law on Private International Law in China. It is challenging that online arbitral procedure might require different rules. For example, the Arbitration Court in the Czech Republic has enacted "additional procedures for on-line arbitration (on-line Rules)" including definition, principles, calculation of time period, statement of claim, notification and place of arbitral award referring to online arbitration.[6] The American Arbitration Association has also introduced "ICDR Online Protocol for Manufacturer/Supplier Disputes".[7] However, those two procedures for online arbitration are very different in terms of the content and style. This raises concern about the criteria of fairness of online arbitration procedures.

Enforceability

ADR, in particular arbitration, is encouraged as a most suitable method for resolving cross-border commercial disputes because of its time efficiency and its flexibility of the appointment of expert arbitrators compared with court litigation. Parties who choose to arbitrate their disputes hope to reach an agreement/arbitral award and execute such award without going to court. However, sometimes, a losing party might bring an arbitral award forward as the refusal of enforcement, or a winning party might seek the recognition and enforcement of the arbitral award if the losing party has not complied with the decision.

Recognition and enforceability of an arbitral award is one of the most complicated issues in the traditional practice of arbitration, because to recognise and enforce an arbitral award, first the court shall determine its competence in exercising jurisdiction over the arbitral award depending on the place of arbitration or the place of arbitral award; second, the court shall examine the validity of the arbitration agreement in terms of its

[6] Additional Procedures for On-line Arbitration (On-line Rules), the Arbitration Court, the Czech Republic, available at www.arbcourt.cz/en_index.php?url=rady/en_rad_online_od_20040601.htm (last visited on 26 September 2009).

[7] American Arbitration Association, ICDR Online Protocol for Manufacturer/Supplier Disputes, available at www.adr.org/icdr (last visited on 26 September 2009).

form, forum and arbitrators; third, the court shall evaluate the arbitrability of the dispute including the validity and scope of the content of the arbitration agreement in reference to the public policy of the chosen state.

The first step is the primary barrier in the offline world and it will be even more problematic for the accomplishment of the recognition and enforcement of electronic arbitral awards as the place of arbitration and the place of arbitral award in cyberspace will need to find connection to the real world.

The complexity of the recognition and enforcement of arbitration was highlighted in the European Commission's Report on the Review of the Brussels I Regulation on 21 April 2009, which stated that the Brussels I Regulation has in specific instances been interpreted so as to support arbitration and the recognition/enforcement of arbitral awards.[8] The Green Paper that accompanies this Report further explains its scope: "however, addressing certain specific points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings".[9] Some suggestions were proposed:

> The first opinion is that Brussels I Regulation shall delete the exclusion of arbitration from its scope. It has been proposed to grant exclusive jurisdiction for such proceedings to the courts of the member state of the place of arbitration, possibly subject to an agreement between the parties.
>
> The second opinion is that the court shall cooperate with an arbitral tribunal to prevent parallel proceedings. The court shall decide on the validity of an arbitration agreement and an arbitral award. A uniform conflict rule concerning the validity of arbitration agreements connecting to the law of the state of the place of arbitration might reduce the risk that the agreement is considered valid in one member state and invalid in another.
>
> The third opinion is that the Brussels I Regulation shall grant the member state where an arbitral award was given exclusive competence

[8] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 21.4.2009, COM(2009) 174 final, Commission of the European Communities, p. 9, available at www.ipex.eu/ipex/cms/home/Documents/doc_COM20090174FIN (last visited on 18 June 2009).

[9] Green Paper on the review of Council Regulation (EC) No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM (2009) 175 final, Brussels, 21.4. 2009, Commission of the European Communities, p. 8, available at www.ipex.eu/ipex/cms/home/Documents/doc_COM20090175FIN (last visited on 18 June 2009).

> to certify the enforceability of the award as well as its procedural fairness.[10]

In the author's view, the recommendations in the Green Paper on the Review of the Brussels I Regulation have a genuine intention to remove the obstacles to arbitration, create legal certainty about the validity of arbitration agreements and facilitate the recognition and enforcement of arbitral awards in the EU. However, to some extent, the suggested options may conflict with the nature and function of arbitration as the reason for parties to choose arbitration is to separate from or avoid court proceedings. The court will intervene/get involved with the recognition and enforcement of arbitral awards only if the losing parties do not want to execute the arbitral award; or the arbitration agreement is invalid or the arbitration procedure is unfair. By introducing cooperation between the courts and arbitral tribunals before it is necessary, the advantages of arbitration will be diminished, and therefore parties will be discouraged from choosing it.

The Brussels I Regulation should, in the author's view, delete the exclusion of arbitration from its scope but make sure that the new provisions encourage and enable arbitration to proceed. At the same time, the Brussels I Regulations should re-focus on the root cause for any remaining or developing obstacles for the validity of arbitration agreements and the recognition and enforcement of arbitral awards in the new information society.

The deletion of the exclusion of arbitration from the scope of the Brussels I Regulation may help the parties to seek the recognition of the validity of the arbitration agreement. In the case of *National Navigation Co* v. *Endesa Generación SA (The Wadi Sudr)*[11], a dispute between an English party and a Spanish party over the loss of coal due to the vessel being damaged during transport, the head charter contained an English law and a London arbitration clause in the bill of lading. The Spanish court dismissed the validity of the arbitration clause according to Spanish law, whilst the English Commercial Court recognised the validity of the arbitration clause according to English law. It is considered that conflicting judgments in different EU member states in relation to arbitration issues are an inevitable consequence of arbitration being excluded from the Brussels Regulation and its rules on recognition and enforcement of judgments.[12]

[10] Ibid., p. 9.

[11] *National Navigation Co* v. *Endesa Generación SA (The Wadi Sudr)*, [2009] EWHC 196 (Comm).

[12] "English High Court Invokes Arbitration Exception, Rejecting Spanish Court's Prior Ruling", 13 August 2009, *International Arbitration Newsletter*, 2009, Quarterly No. 3.

To ensure the smooth circulation of judgments in Europe and prevent parallel proceedings, the Brussels I Regulation should bring forward the harmonisation of the legal certainty of arbitration within the Community in line with the New York Convention, enhance the recognition of electronic arbitration agreements and arbitral awards and propose the interpretation of the place of arbitration in cyberspace.

Consumer protection

Where arbitration is offered for consumer contracts, a major legal barrier is whether the arbitration agreement is valid or effective, as the law of the country of consumer protection may establish exclusive jurisdiction to the court in the country of the consumer's domicile, or the arbitration agreement may be deemed to be unconscionable or an unfair term in the particular context.[13] In other words, countries may restrict the enforceability of a pre-dispute arbitration agreement against a consumer. For example, according to section 91(1) of the English Arbitration Act (hereafter "EAA"), an arbitration agreement concluded with a consumer is considered to be unfair and thus unenforceable if the claim is below £5,000. It means that, in England, if the amount in dispute does not exceed £5,000, an arbitration clause with consumers is non-binding. For example, in the case of *Richard Zellner* v. *Phillip Alexander Securities and Futures Ltd*,[14] the German court and the English Court of Appeal both assessed the validity of the arbitration agreement and held that the arbitration agreement was invalid as it was an unfair term towards the consumer.

However, in the US, it is arguable that an arbitration clause with consumers could be enforceable, as section 2 of the Federal Arbitration Act (hereafter "FAA") 1925 is an open (minimum) clause providing that a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration, i.e. a controversy thereafter arising out of such contract or transaction, shall be valid, irrevocable and enforceable. It will be up to the judge to determine the scope of "involving commerce". Sometimes, a pre-dispute arbitration agreement is valid but unenforceable. For example, in the case of *Allied-Bruce Terminix Cos* v. *Dobson*,[15] the court concluded that the phrase "involving commerce" is broad and was intended

[13] Herrmann (2001), p. 268.
[14] *Richard Zellner* v. *Phillip Alexander Securities and Futures Ltd*, Landgericht Krefeld Case 6 O 186/95, Judgment of 29 April 1996 [1997] ILPr 716; [1997] ILPr 730 (QB) 736–8.
[15] *Allied-Bruce Terminix Cos* v. *Dobson*, 513 U.S. 265, 273 (1995).

as the functional equivalent of "affecting commerce". Sometimes, the court also intends to protect consumers. In the case of *Brower* v. *Gateway 2000, Inc*,[16] the New York Appellate Court held that there was an arbitration agreement in the consumer dispute between the parties according to the Federal Arbitration Act. However, the arbitrator chosen was not fair to the consumer and thus the court asked the parties to find an appropriate arbitrator.

The Arbitration Fairness Act of 2009 (hereafter "AFA") amends the FAA and invalidates pre-dispute agreements to arbitrate "franchise", "consumer", "employment" or "civil rights" disputes.[17] Thus, it prevents the use of pre-dispute mandatory arbitration clauses. The AFA has provisions of consumer protection. However, it does not propose new rules for arbitration agreements or proceedings that are formed over the Internet. Thus, the interpretation of "written" arbitration agreements shall be reconciled with the Electronic Signatures in Global and National Act (E-SIGN). According to this, electronic arbitration agreements for B2B contracts shall be valid and enforceable.

According to the AFA, it should also be understood that no online pre-dispute arbitration agreement for B2C/consumer disputes shall be valid or enforceable. Currently, in a B2C e-commerce situation, sellers or suppliers often include an arbitration clause in the standard form contract for consumer disputes. It is unfair that consumers have no position to negotiate or argue with the arbitration clause. Once consumers click the "I agree" button, the contract is formed. With the amendment of the rules relating to pre-dispute arbitration agreements, such electronic pre-dispute arbitration agreements shall be invalid.

If parties form an electronic arbitration agreement for consumer disputes after the dispute arises, such electronic arbitration agreement shall be assented to by both parties in order to be valid. In the case of *Specht* v. *Netscape Communications Corp*.,[18] the court ruled that the licence agreement for the Smart Download software was not binding on the plaintiffs and thus refused to compel arbitration for the plaintiff's breach of the licence agreement, because Netscape's SmartDownload (shrink-wrap agreement) allows a user to download and use the software

[16] *Brower* v. *Gateway 2000, Inc*, Supreme Court of New York, Appellate Division, 246 A.O.2d 246 676 N.Y.S. 2d 569, 572 (1998).

[17] Section 402 of the Arbitration Fairness Act of 2009, available at www.govtrack.us/congress/billtext.xpd?bill=s111-931 (last visited on 22 September 2009).

[18] *Specht* v. *Netscape Communications Corp*., 150 F. Supp. 2d 585 (SDNY 2001), aff'd, 306 F.3d 17 (2d Cir. 2002).

without taking any action that plainly manifests assent to the terms of the associated licence or indicates an understanding that a contract is being formed.

11.1.2 Online mediation

Validity

Unlike online arbitration, the majority of online mediations are provided by public organisations (e.g. AAA or CIETA), whilst a large amount of online mediation services are provided by private companies. The quality of the online mediation services and the international harmonised standard gives a tremendous boost to the establishment of users' confidence in online mediation.

In the EU, online mediation, as a form of out of court dispute resolution, is generally encouraged. Although there are no substantial ODR rules in the EC Directive on Electronic Commerce, it encourages ODR practice by requiring member states to ensure that their legislation "does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means".[19] In addition, it requires member states to "encourage bodies responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned"[20] and to "encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decisions they take regarding Information Society services and to transmit any other information on the practices, usages, or customs relating to electronic commerce".[21]

In addition, the EC Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters (hereafter "EC Directive on Mediation") was approved by the European Parliament on 23 April 2008[22] and entered into force in June

[19] Article 17(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (hereafter "EC Directive on Electronic Commerce"), OJ L178, 17.7.2000 pp. 1–16.

[20] Article 17(2) of the EC Directive on Electronic Commerce.

[21] Article 17(3) of the EC Directive on Electronic Commerce.

[22] Directive 2008/52/EC of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters, Brussels, 28 February 2008, 15003/5/07 REU5, available at eur-lex.europa.eu/civiljustice/docs/st15003-re05_en07.pdf (last visited on 21 May 2009).

2008.[23] The purpose of the EC Directive on Mediation is to facilitate access to dispute resolution, to encourage the use of mediation and to ensure a sound relationship between mediation and judicial proceedings.[24] It is considered to be an achievement in the regulation of out-of-court dispute resolution. It favours electronic communications and, to an extent, online dispute resolution. It encourages the use of mediation in cross-border disputes and the use of modern communication technologies in the mediation process, which is reflected by Recitals (8) and (9) of the Mediation Directive:[25]

(8) The provisions of this Directive should apply only to mediation in *cross-border* disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.
(9) This Directive should not in any way prevent the use of *modern communication technologies* in the mediation.[26]

Moreover, the provisions of "ensuring the quality of mediation"[27] and "information for the general public"[28] also indicate support for using the ODR methods in the EU. For example, Article 4 of the EC Directive on Mediation encourages member states "*by any means which they consider appropriate*" to develop voluntary codes of conduct for mediation services, as well as other effective quality control mechanisms. In addition, Article 9 of the EC Directive on Mediation also explicitly encourages member states to make mediation services and contact information available to the general public "*by any means which they consider appropriate, in particular on the Internet*".

It is also notable that the EC Directive on Mediation includes the unique provision of "enforceability of agreements resulting from mediation" in Article 6 that:

1. Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the

[23] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (hereafter "Mediation Directive"), OJ L136/5, 24.5.2008, available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF (last visited on 25 May 2009).
[24] EU Press Release Reference: Mediation in civil and commercial matters, MEMO/08/263, Brussels, 23/04/2008, available at europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/263&type=HTML&aged=0&language=EN&guiLanguage=en (last visited on 25 May 2009).
[25] Wang (2009) p. 44.
[26] Emphasis added.
[27] Article 4 of the Mediation Directive 2008.
[28] Article 9 of the Mediation Directive 2008.

content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.

2. The content of the agreement may be made enforceable by a court or other competent authority in a judgment or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

In the author's view, it will be very difficult to have an international standard on the enforceability of agreements resulting from mediation (known as "mediation settlement") due to the different culture and value of mediation in different countries, in particular, between Western countries and Asian countries. For example, China has a long history of using mediation to resolve commercial disputes especially for the purpose of maintaining ongoing business relationships.[29] Thus, mediation is a rather friendly but not enforced option for dispute resolutions in China. For example, Chinese legislation is in support of mediation in civil and commercial disputes. Article 51 of the Civil Procedure Law of the People's Republic of China[30] permits the parties to "reach a compromise of their own consent". Article 49 of the Arbitration Law of the People's Republic of China[31] stipulates that parties may reach a private settlement even after the commencement of arbitration proceedings. Article 25 of the Law of the People's Republic of China on Chinese-foreign Contractual Joint Ventures[32] also provides that:

> Any dispute between the Chinese and foreign parties arising from the execution of the contract or the articles of the association for a contractual joint venture shall be settled through consultation or mediation.

There is no provision of enforceability of agreements resulting from mediation in national laws. An agreement resulting from mediation

[29] Tao (2005), pp. 1012–13.

[30] It was adopted at the Fourth Session of the Seventh National People's Congress on 9 April 1991, promulgated and effective by Order No.44 of the President of the People's Republic of China as of 9 April 1991.

[31] It was adopted at the Eighth Session of the Standing Committee of the Eighth National People's Congress and promulgated on 31 August 1994 and effective as of 1 September 1995.

[32] It was adopted by the First Session of the Standing Committee of the Seventh National People's Congress on 13 April 1988, promulgated and revised by the Eighteenth Session of the Standing Committee on the Ninth National People's Congress on 31 October 2000.

can only be enforced by referring to the Supreme People's Court provisions dealing with actions relating to settlement agreements concluded through mediation in 2002 (hereafter "the Provisions").

The US has a similar legislation situation to China with regard to the enforceability of the mediation settlement. There is no single body of law governing the enforcement of the mediation settlement. For example, the Uniform Mediation Act 2001 focuses on the procedure and confidentiality of mediation but not the enforceability of the mediation settlement. There is also no such provision in the Mediation Procedures for the American Arbitration Association (AAA).

With regard to the enforcement of a mediation agreement/clause, there is no regulation in the EU, US or China. In practice, a mediation agreement is not always enforceable. For example, in the UK case *Brown* v *Rice*,[33] both parties agreed to mediate and entered into a mediation agreement, which provided that any settlement reached in the course of the mediation would not be binding until it was reduced to writing and signed by, or on behalf of, the parties. The judge held that no binding agreement was reached because it was never reduced to writing and signed by, or on behalf of, each of the parties, as required by the mediation agreement, although Brown argued that in the morning of the day after the mediation, he agreed to the settlement made the previous evening. However, there is a UK landmark case where a mediation agreement was enforceable, that is, the case of *Cable & Wireless plc* v. *IBM United Kingdom Limited*.[34] Colman J held that an agreement to participate in ADR was valid, at least to the extent that the party in question could be required to attend the mediation, even if that party withdrew thereafter, as the mediation clause referred to an institution – the Centre for Dispute Resolution (CEDR) – and its specified procedure – CEDR's Model Mediation Procedure. Therefore, the parties' obligation was to participate in the process of initiating the mediation, selecting a mediator and presenting the mediator with the case and relevant documents.

After all, the primary reason for parties to choose mediation is that mediation is a friendly dispute resolution system. Parties may hope to reach an agreement in a less formal but more relaxed environment to preserve their relationship. Due to the nature, function and culture of mediation in different countries, it is very difficult for international

[33] *Brown* v *Rice*, [2007] EWHC 625 (Ch); [2007] B.P.I.R. 305 (Ch D).

[34] *Cable & Wireless plc* v. *IBM United Kingdom Limited*, [2002] EWHC 2059 (Comm); [2002] 2 All ER (Comm) 1041.

legislation to keep the balance between the enforcement of the mediation settlement (known as "settlement agreements enforced by courts") and the friendly nature/culture of mediation. Fostering the enforceability of mediation settlement agreements might jeopardise the function of mediation in the system of dispute resolution. In addition, although legislation such as the EC Directive on Mediation encourages the usage of electronic communications, it does not define online mediation or provide the additional procedures for electronic mediation agreements, online mediation processes and mediators, as well as the technology standard for online mediation services.

Confidentiality

Confidentiality is one of the challenging issues for ODR services, as it conflicts with accountability which is one of the fundamental principles of ODR services. Confidentiality seems to be upheld in most of the ODR self-regulation rules as it is linked with the protection of trade secrets and individual privacy. One of the reasons that parties choose out of court dispute resolutions is that they do not feel comfortable with being exposed to the public. Moreover, when parties choose out of court dispute resolutions particularly on an electronic platform, sometimes it may also mean that they do not even feel comfortable resolving the dispute face-to-face. The EC Directive on Mediation supports the enhancement of the confidentiality of mediation[35] by preventing mediators or those involved in the mediation process from giving information or evidence in civil and commercial judicial proceedings or arbitration.[36] However, in order to boost confidence and increase usage of ODR services, ODR providers should still be allowed to disclose certain mediation settlements or arbitral awards by pre-agreements with users.

SquareTrade provides a good pioneer experience in balancing the rights of confidentiality and accountability. As discussed, accountability hinges on transparency and structure, while mediation's strength is drawn, to a large extent, from its confidentiality and flexibility.[37] An essential component in SquareTrade's accountability system is its substantial database on resolution efforts. SquareTrade has managed to gather extensive information internally without completely forgoing confidentiality externally. SquareTrade collects a vast amount of

[35] Recital 23 and Article 7 of the Mediation Directive 2008.
[36] Article 7(1) of the Mediation Directive 2008. [37] Rabinovich-Einy (2006), p. 256.

information on the services it provides, which will remain accessible to SquareTrade, the mediator and the disputing parties for up to one year. SquareTrade also collects other data through its seal programme and users' registration. SquareTrade also records "Resolution Behaviour Information" at the end of each ODR service, which is composed of information on whether a party participated in the process to completion, whether an agreement was reached, whether the party accepted or rejected the mediator's recommendation, and, with respect to a respondent, whether the person had been involved in multiple cases of this type.[38] Such kinds of data will be kept confidential, but the outcome of statistics can be used in the market analysis for the promotion of ODR. Thus, a harmonised procedure for online mediation may need to be introduced by international, regional or national laws.

11.2 Solutions to legal obstacles

ODR not only provides speedy and cost-effective techniques for resolving cross-border disputes, but also boosts trust and confidence in electronic commercial transactions in the e-marketplace, because it diminishes the risk that e-commerce users are left with no redress if contracts are not performed.[39] The continuing challenge and on-going demand for resolving cross-border commercial disputes resulting from globalisation calls for the improvement of ODR services. Different forms or methods of ODR services may require different rules and will have to apply different substantive international, regional or national laws. However, they have something in common in that they are all within the field of alternative dispute resolution implemented with the assistance of information technology; in other words, they are all methods of resolving disputes online. Thus, online arbitration, mediation and negotiation must meet the minimum standard. The harmonisation of the legal environment can be achieved by three steps: first, by proposing an International Standard for ODR in a model law or convention; second, by providing subject-specific laws in national or regional legislation in line with the general Model Law on ODR; and third, by issuing recommendations or amendments to the existing Model Law or Convention in the relevant fields referring to the subject matter of ODR.

[38] Square Trade Privacy Policy, available at www.squaretrade.com/cnt/jsp/lgl/user_conf_agree.jsp?vhostid=chipotle&stmp=squaretradeconf_infocollect (last visited on 29 November 2009).

[39] Wang (2008), p. 61.

International standard – ODR

International standardisation of the principles of ODR will enhance the quality and facilitate the development of ODR services. It can be reached through the adoption of a "minimum technique-neutral" approach in an international regulation; for example, a model law or convention. In the author's view, there are five basic principles that should be included in a Model Law or Convention on Online Dispute Resolution: validity; enforceability; confidentiality/privacy; liability; and technology. Below are proposed considerations or recommendations on the principles.

First: validity An electronic dispute resolution agreement or clause shall be valid. Parties are free to conclude an online arbitration, online mediation and online negotiation agreement by electronic means before or after a dispute has arisen. Such agreements shall not conflict with the mandatory rules or public policies of the relevant law of the country. Pre-dispute resolution agreements or clauses shall not be applicable to consumer contracts.

An arbitral award can be valid by electronic means. A mediation settlement may also be valid when it is signed by both parties according to the mediation agreement. Or if parties pre-agree an open basis, the mediation settlement may be agreed upon during the mediation process or after the mediation.

Second: Enforceability An electronic arbitration agreement and arbitral award shall be enforceable, unless such agreement and award is invalid. An electronic mediation agreement shall only be enforceable if the parties show their strong intention to form a mediation agreement. An electronic mediation settlement agreement can be recognised and enforced by a court or other competent authority in a judgment or decision or in an authentic instrument.

Third: Confidentiality Online arbitration and mediation proceedings are confidential. All submitted electronic information or evidential documents should be kept safely and should not be submitted in civil and commercial judicial proceedings.

ODR service providers shall also ensure that, unless the parties agree otherwise, the disputants' personal information, the evidential materials and the settlement decision will be kept confidential. Statistical data in relation to settlement decisions should only be used and published for market promotion and legislative reform.

Fourth: Liability ODR service providers shall ensure, by any means which they consider appropriate, that the code of conduct for ODR services, including administrative duties and procedures, is available to the general public.[40]

The ODR service provider should clearly provide online arbitration rules and procedures to avoid the result of invalidity and unenforceability of an arbitral award; and also provide online mediation rules or procedures for parties who intend to seek for the enforcement of an electronic mediation settlement.

Fifth: Technology ODR service providers should encourage, by any means which they consider appropriate, the generation of the ODR system with balanced functions. Such system shall be a balance of convenience, trust and expertise.[41]

The quality of ODR service providers shall be accredited and examined by a trusted third party such as authorities of trust mark schemes or seal programmes.

National or regional legislation – specific subject

Once there is an international uniform law – the Model Law or Convention on Online Dispute Resolution – national or regional subject-specific law can be promulgated in line with the international legislation. Currently, regions and countries have been working on subject-specific rules or laws on online arbitration. For example, the China International Economic and Trade Arbitration Commission (CIETAC) promulgated "Online Arbitration Rules" on 8 January 2009, which comply with the China Arbitration Law 1995. The Inter-American Specialized Conference on Private International

[40] "Recommended Best Practices by Online Dispute Resolution Service Providers", available at www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf (last visited on 18 June 2009). It should included, as recommended by the American Bar Association (ABA) Task Force on E-commerce and ADR Recommended Best Practices for Online Dispute Resolution Service Providers: (i) publishing statistical reports; (ii) employing identifiable and accessible data formats; (iii) presenting printable and downloadable information; (iv) publishing decisions with whatever safeguards to prevent party identification; (v) describing the types of services provided; (vi) affirming due process guarantees; (vii) disclosing minimum technology requirements to utilise the provider's technology; (viii) disclosing all fees and expenses to use ODR services; (ix) disclosing qualifications and responsibilities of neutrals; (x) disclosing jurisdiction, choice of law and enforcement clauses: for example, ODR providers should disclose the jurisdiction where complaints against the ODR provider can be brought, and any relevant jurisdictional limitations.

[41] Katsh & Rifkin (2001), p. 76.

Law (CIDIP) is currently working on Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims.[42]

In China, on 31 August 1994, the Arbitration Law was promulgated by the Chinese National People's Congress with the aim of establishing a coherent nationwide arbitral system. It entered into force on 1 September 1995. The establishment of online arbitration is subject to restrictions and requirements due to different local market entry conditions in different provinces in terms of registration,[43] conditions for arbitrators' appointment,[44] and requirements of establishment.[45] The CIETAC Online Arbitration Rules, which came into force on 1 May 2009, are to harmonise the standard of online arbitration practice in China. These rules are formulated to arbitrate online contractual and non-contractual economic and trade disputes and other such disputes. The CIETAC Online Arbitration Rules apply to resolution of disputes over electronic commerce transactions, and other economic and trade disputes in which the parties agree to apply those Rules for dispute resolution.[46] CIETAC, which offers an ODR pioneer experience in China, has provided successful online arbitration services on .CN domain name disputes since 2002. The launch of the CIETAC Online Arbitration Rules can be deemed to be one of the outcomes from the harvest of CIETAC ODR experience, and it will facilitate the development of online dispute resolution in China.

In general, the Online Arbitration Rules are a supplement to the CIETAC Arbitration Rules as, according to Article 54 of the Online Arbitration Rules, matters that are not covered in the Online Arbitration Rules (for example challenges to the arbitrators' appointment) will be still governed by the CIETAC Arbitration Rules. It is notable that the electronic submission of information and evidential materials and other electronic communications must go through the

[42] Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims, CIDIP VII, draft / borrador 15 August 2008, available at www.oas.org/dil/Legislative_Guidelines_for_Inter-American_Law_on_Availability_of_Consumer_Dispute_Resolution_Annex_B_United_States.pdf (last visited on 26 September 2009).

[43] Article 10 of the Arbitration Law of the People's Republic of China, adopted at the 8th Session of the Standing Committee of the Eighth National People's Congress and promulgated on 31 August 1994, available at english.sohu.com/2004/07/04/78/article220847885.shtml (last visited on 4 September 2009).

[44] Article 13 of the Arbitration Law of the People's Republic of China.

[45] Article 11 of the Arbitration Law of the People's Republic of China.

[46] Article 1 of the China International Economic and Trade Arbitration Commission, Online Arbitration Rules, promulgated 8 January 2009, effective 1 May 2009.

arbitral tribunal secretariat.[47] With regard to the validity and reliability of the electronic evidence, Article 29 provides that electronic evidence or documents shall come from reliable methods of producing, storing and authenticating and shall be maintained in integrity. Arbitral hearings can be held either by video conference or other electronic means of communication or by a face-to-face meeting.[48] The Online Arbitration Rules also set different procedures for different types of disputes measured by the disputed value.

Another example can be given by the Inter-American Specialized Conference on Private International Law (CIDIP), which has been working towards the harmonisation of consumer private international law in the Americas. The CIDIP VII has proposed "The Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers".[49] In accordance with this Guideline, the Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims[50] were proposed by the working group. They apply to cross-border consumer contract disputes for claims where the amount claimed by the consumer against a vendor is not more than US$1,000 for economic harm arising from a B2C transaction.[51] They also set out requirements for arbitration agreements and arbitral proceedings.[52]

Both the CIETAC Online Arbitration Rules and the CIDIP Draft Model Law on Electronic Arbitration for Consumer Contracts provide subject-specific rules in the field of online dispute resolution and boost users' confidence in adopting online arbitration as the method of dispute resolution in the region or country. Although they have something in common, they are also different in terms of their scope of application and the requirements for arbitration agreements and arbitral proceedings. If

[47] Article 10, 11 and 12 of the CIETAC Online Arbitration Rules.

[48] Article 33 of the CIETAC Online Arbitration Rules.

[49] The Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers, available at www.oas.org/dil/CIDIPVII_documents_working_group_consumer_protection.htm (last visited on 26 September 2009).

[50] Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims, draft/borrador 15 August 2008, available at www.oas.org/dil/Legislative_Guidelines_for_Inter-American_Law_on_Availability_of_Consumer_Dispute_Resolution_Annex_B_United_States.pdf (last visited on 26 September 2009).

[51] Article 3 of the Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims.

[52] Article 4 and 8 of the Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims.

there were an International Convention or Model Law on Online Dispute Resolution, it would be of great help in harmonising the different standards and improving the fair play in online arbitration.

Recommendation or amendment

Recommendation on or amendment to the existing model laws or conventions is another way to smooth the progression of the harmonisation of legal certainty for ODR practices.

Examples can be given, such as the 2006 Recommendation regarding the interpretation of article II (2) and article VII (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (thereafter "the Recommendation") [53] and the UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006 (hereafter "the Amendment").[54]

The Recommendation recognises widening use of electronic commerce and suggests domestic legislation is enacted to remove the barriers of the New York Convention in respect of the form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards. The Recommendation also encourages parties to apply revised article 7 of the Amendment for the recognition and enforcement of arbitral awards (discussed below).

The 1985 UNCITRAL Model Law on International Commercial Arbitration was amended by UNCITRAL in 2006 with a supplement containing modified definitions and provisions. The most significant achievement of the Amendment is its revised version of article 7, which is intended to modernise the form requirement of an arbitration agreement to better conform with international contract practices in particular in electronic commerce.

Although the amendment of the UNCITRAL Model Law in 2006 has acknowledged the validity of an arbitration agreement by electronic means, it does not adjust the form of hearings as well as the liability of server providers. In the author's view, the further adjustment of the

[53] Recommendation regarding the interpretation of article II (2) and article VII (1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), A/RES/61/33, 18 December 2006 available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html (last visited on 16 September 2009).

[54] The UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, A/RES/61/33, 18 December 2006 available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last visited on 16 September 2009).

UNCITRAL Model Law on International Commercial Arbitration should be considered including the recognition of online hearings with participants at different locations communicating by electronic means, as well as the liability of service providers in the case of lost electronic messages or failure of electronic communication systems.

However, in general, both the Recommendation and the Amendment are valuable references for countries to reform and modernise their laws in relation to arbitral procedures. Such processes shall take into account the particular modern features and needs of international commercial arbitration.

In conclusion, from the examination of the four successful examples of ODR (eBay with SquareTrade, AAA with Cybersettle, ICANN with WIPO-UDRP, as well as CIETAC and HKIAC), it can be suggested that the cooperation agreement between ODR service providers and primary market makers, the expertise of technological and legal support, and the self-enforcement mechanism for resolution outcomes are key factors for their success. In the author's view, international harmonisation of ODR is needed to enhance the standard of ODR services and increase the legal certainty and trust in the ODR mechanism in the global market. Such a harmonising international instrument should provide clarification in at least five main areas as evaluated earlier – validity; enforceability; confidentiality/privacy; liability; and technology. Meanwhile, national or regional legislative councils should amend or modernise the offline ADR rules by recognising electronic means of communication in resolving disputes and regulating special procedures of online dispute resolution. Finally, international organisations shall continue to progress the modernisation and harmonisation of the conduct and legal certainty of online dispute resolution by implementing a Model Law or Convention on Online Dispute Resolution as well as amending or recommending provisions to the existing laws.

PART V

The future

12

Conclusion and recommendation

12.1 Future legislative trends

The implementation of electronic commercial transactions makes the formation of cross-border business or consumer contracts relatively easier and faster without the need for the parties to travel. However, it challenges the scope and sufficiency of the traditional laws. New concepts resulting from the reform of technology cannot always be found in the existing laws. Thus, there is a need to seek interpretations or explanations of traditional rules in judicial instruments. Consistency of interpretation or explanation is difficult to achieve due to the difference of conflict-of-law rules and legal culture in different countries. Private international law, therefore, is one of the fundamental fields that affects the basic order, certainty and fair play of court litigation and dispute resolution. It is sensible that the legislative strategy for the future reform of private international law should be tailored to the needs of the information society. In the author's view the trends of legislative tasks, approaches and enhancements in the future shall be as follows.

First, the future trend of the *legislative tasks* on private international law by international organisations, regional and national legislative councils shall be twofold: (1) continuing working on the modernisation and harmonisation of the existing legislation; and (2) carrying on drafting new subject-specific laws only when necessary.

As discussed in previous chapters, there is strong evidence showing that electronic commercial transactions do have their unique characteristics. The whole concept of electronic transactions is the same as the traditional ones, but the actual conduct of electronic transactions is fundamentally different. Although it seems that issues regarding jurisdiction and choice of law for electronic transactions do not require separate laws as the existing laws can, in part, apply to them, the existing laws are not tailored for the information society. So amendment or

modernisation of the existing laws is needed to increase the legal certainty and facilitate the harmonisation of Internet jurisdiction and choice of law. It can be achieved by changing some wording or incorporating new provisions for electronic commerce.

At the same time, new subject-specific laws might be required in certain fields of private international law due to the complexity of some issues, for example, electronic cross-border consumer contracts. An independent international model law or convention on online dispute resolution (hereafter ODR) may be also needed as ODR is an interdisciplinary concept covering not only law but also technology. Thus, it requires not only legal recognition but also guaranteed service standards. Although the traditional rules of alternative dispute resolution (ADR) can be partly adapted to ODR, new subject matter, such as the validity of electronic dispute-resolution agreements or clauses, the enforceability of electronic dispute-resolution decisions as well as the liability of ODR service providers, needs to be regulated.

Second, the future trend of the *legislative approaches* on private international law by the international organisations, regional and national legislative councils shall be threefold: (1) technique-neutral approach; (2) party autonomy approach; and (3) targeting approach.

In the process of modernisation and harmonisation of existing private international laws, adopting the appropriate approaches is essential as it may directly affect the future success of the legislation. Due to the fast-growing nature of the technology, employing a technique-neutral approach in private international law will be helpful to adapt to the current differences of technological development in different countries, avoiding the risk of the legislation being out of date quickly and facilitating the cross-border recognition of IT-generated documents.

As a consequence of promoting fairness, parties should be free to choose the jurisdiction and choice of law for their own contracts. The party autonomy approach will increase the legal certainty on the hearing court and governing law; reduce the risk of conflicts of jurisdiction and choice of law; and save time in court proceedings.

Owing to lack of territorial boundaries in cyberspace, the relevant place of business can be very difficult to determine through the traditional visual links, such as offices etc. Thus, a targeting approach shall be employed as the measure of determining jurisdiction and choice of law in the virtual world by considering the parties' intentions, continuous and systematic strategic business plans of online business activities and their purposefully pursuing or directing such activities.

Third, the future trend of the *legislative enhancement* on private international law by the international organisations, regional and national legislative councils shall be also threefold: (1) training, (2) consultation/cooperation and (3) experiment.

Because of the demand for experts with sufficient knowledge of law, business and technology to propose contemporary private international law, lawmakers shall liaise with judges, legal practitioners, IT experts and entrepreneurs to share information and experience, as well as participate in the special training course or workshop in different disciplines. So the sophisticated lawmakers will gain cross-disciplinary knowledge and be able to put forward a practical and advanced approach which facilitates the modernisation and harmonisation of private international law in the digital age.

Due to the different expertise, experience and resources in different organisations, international organisations shall consult and cooperate with each other in order to learn from each other. Regional and national legislative councils shall also request advice from the international organisations if necessary. For example, currently, the Hague Conference on Private International Law is working on a new instrument – the Choice of Law in International Contracts. It has learned from the legislative experiences of the European Community (EC) and Inter-American Specialized Conference on Private International Law (CIDIP) and has consulted with the United Nations Commission on International Trade Law (UNCITRAL), the International Institute for the Unification of Private Law (UNIDROIT) and International Chamber of Commerce (ICC) and other organisations.

Lastly, the process of the modernisation and harmonisation of private international law shall be an ongoing experiment. It requires prompt and accurate insight into the newly arising legal issues and needs up-to-date interpretations and recommendations.

12.2 Solutions to obstacles in Internet private international law

It is notable that electronic transactions can be deemed to be means of communication from a technological point of view. However, the legal perspective of the operation of electronic transactions should not be ignored. The two dominant factors that could distinguish the legal consequences of electronic transactions from traditional ones are the determination of "time and place of dispatch and receipt of an electronic

communication",[1] and "the place of business"[2] in cyberspace. When purchases involve digitised goods that are delivered online, these two factors can lead to different outcomes in relation to ascertaining the rules of Internet jurisdiction and applicable law. Traditional contract law and private international law have been challenged. In the author's view solutions can be given as below:

Solution 1: Insert an exclusive conflict of law clause in the contract and enhance the validity of such clause or agreement in an electronic form by choosing the appropriate applicable law.

A good international long-term business relationship is crucial for the maintenance and further development of the business of the enterprises. Forming and keeping an ongoing healthy international business relationship requires interpersonal communication and negotiation skills and more importantly, demands professionalism and maturity in dealing with business disputes. A well-drafted commercial contract usually includes an exclusive choice of court clause and choice of law clause, or an exclusive arbitration clause. It increases predictability and avoids unnecessary conflicts in the court litigations. With the invention of information technology, such conflict-of-law clause or agreement can be formed online. It challenges the validity of an electronic exclusive conflict of law agreement as it is harder to prove or guarantee consensus between the contracting parties. In addition, the validity of the amendment of errors in electronic exclusive jurisdiction agreements or choice of law agreements shall be in line with the rules of errors in electronic communications under the UN Convention on the Use of Electronic Communications in International Contracts. In addition, the formality of electronic exclusive jurisdiction agreements or choice of law agreements shall be valid, but it shall be also subject to customs or formal practices of international trade parties.

Solution 2: Sign and ratify the international conventions, as well as modernise the regional or national laws in line with the international standard.

[1] Article 10 of the UN Convention on the Use of Electronic Communications in International Contracts, 9 December 2005, A/RES/60/21, UNCITRAL, available at daccessdds.un.org/doc/UNDOC/GEN/NO5/488/80/PDF/NO548880.pdf?OpenElement (last visited an 30 September 2009).

[2] Article 6 of the UN Convention on Electronic Contracts.

To harmonise the legal rules and increase the possibility of the enforcement of an electronic exclusive jurisdiction clause or agreement, countries' signatory and ratification of the Hague Convention on Choice of Court Agreements will be beneficial as it adopts the "technique-neutral approach" – in writing or by any other means of communications. Countries can make their decisions and exclude matters by means of a declaration specifying the matter that it wants to exclude or redefine the matter clearly and precisely when signing or ratifying the Choice of Court Convention.

The EU sets a good example for reviewing its existing jurisdiction rules in response to a new international convention. The Report on the Review of the Brussels I Regulation recently indicated that the Choice of Court Convention will apply in all cases where at least one of the parties resides in a Contracting State other than an EU Member State, whereas the Brussels I Regulation applies where at least one party is domiciled in a Member State.[3] The Green Paper on the Review of the Brussels I Regulation also includes a debate on maintaining or excluding the *lis pendens* rule, or introducing a standard choice of court clause,[4] as the Choice of Court Convention does not include a direct rule on *lis pendens*. In the author's opinion, the *lis pendens* rule in the Brussels I Regulation shall be excluded so as to be in line with the international standard in the Choice of Court Convention as it will strengthen the legal certainty and efficiency of jurisdiction agreements. In addition, a standard choice of court clause will at the same time expedite the decision on the jurisdiction question by the courts.[5]

The Rome I Regulation on the law applicable to contractual obligations for both B2B and B2C contracts adopted in 2008 was also to modernise the choice-of-law rules of the Rome Convention with some new wording and concepts that are tailored for the information society. It also forms the consistency with the Brussels I Regulation.

[3] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 21.4.2009, COM(2009) 174 final, Commission of the European Communities, available at www.ipex.eu/ipex/cms/home/Documents/doc_COM20090174FIN.

[4] Green Paper on the Review of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, COM (2009) 175 final, Brussels, 21.4. 2009, Commission of the European Communities, available at www.ipex.eu/ipex/cms/home/Documents/doc_COM20090175FIN (last visited on 20 September 2009).

[5] Ibid.

In China, although the Arrangement between mainland China and Hong Kong has been influenced by the Choice of Court Convention, it still allows parallel proceedings between Hong Kong and China. In the author's view, such provision should be improved upon in order to remove obstacles to a free circulation of judgments and enhance certainty of cross-border jurisdiction.

Solution 3: Interpret conflict of law rules for Internet jurisdiction and choice of law; and establish consistent jurisdictional languages.

In the EU, under the Brussels I Regulation, the difference in a general jurisdiction rule between B2B and B2C contracts is that for B2B contracts, the persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state, whereas, for B2C contracts in case of proceedings against consumers, jurisdiction shall be determined by the consumer's domicile in that proceedings may only be brought in the courts of the member state in which the consumer is domiciled.

With regard to special jurisdiction in B2B contracts, the court of the country where the contract is performed shall hear the case. The place of performance in the physical world means the place of the delivery of goods according to Article 5(1) of the Brussels I Regulation. In B2B electronic contracting disputes, the interpretation of Article 5(1) relies on the determination of whether an electronic contract is for the sale of goods or the provision of services; and a distinction between "physical goods and digitised goods", "physical services and digitised services", as well as "physical performance and digitised performance". This will make it possible to determine the differences and similarities concerning the place of performance between online and offline contracting. When electronic contracts involve physical delivery of goods, the traditional interpretation of jurisdiction rules shall remain. When goods are delivered or downloaded online, it requires some more consideration. In general, the linking factors of the place of performance online are: (1) the place of dispatch /uploading; (2) the place of receipt/downloading; and (3) the place with which it is most closely connected.

In the author's opinion, in cases of digitised goods with performance over the Internet, the interpretation of "the place of performance should be regarded as the place where goods were delivered or should have been delivered" under Article 5(1)(b) of the Brussels I Regulation should be:

> The place of performance should be at a recipient's place of business indicated by the party. If a party has not indicated a place of business, or has more than one place of business, then the place of business should be the one with the closest relationship to the relevant contract or the one where the principal place of business is situated. The place to which online business activities are directed shall be considered to be mostly closely connected with the contract. If there is no place of business, the place of performance shall be at a recipient's domicile.

With regard to jurisdiction rules in B2C contracts, the interpretation of the consumer's domicile shall be in line with that for electronic B2B contracts in terms of the determination of the location of the parties in cyberspace. With regard to the concept of "pursuing or directing activities" tailored for consumer protection, it shall be widely interpreted to include websites or online sellers targeting activities, providing online shopping platforms, and offering goods or services to consumers in the member state of the consumer's domicile, or in a number of member states including that member state. Such pursuing or directing activities shall be deemed to be continuous business actions with genuine intention and strategic business plans.

The interpretation of the Brussels I Regulation above is in line with the US jurisdiction approaches to electronic B2B and B2C contracts. The US jurisdiction rules in electronic B2B and B2C contracts both share the same approaches: (1) minimum contacts – continuous, systematic and purposeful;[6] (2) sliding scale – level of interactivity of websites;[7] and (3) targeting approach – intention and purpose of activities (unification of sliding scale and effect test).[8] In B2C contractual matters, the US courts intend to consider protecting consumers and interpret the approaches with fair play of justice. To harmonise the conflict of law rules, the Inter-American Specialized Conference on Private International Law (CIDIP) has been working on the Draft Model Law of Jurisdiction and Applicable Law for Consumer Contracts. The Draft Model Law creates the concept of "substantial connection" and seller's "burden of proof" for the determination of jurisdiction.

In China, jurisdiction rules in national laws are generally similar to those of the EU and US as it is in favour of party autonomy. However, the principle of party autonomy in China is conditioned on the fact that the

[6] *International Shoe Co* v. *Washington*, 326 U.S. 310 (1945).
[7] *Zippo Mfg Co* v. *Zippo Dot Com, Inc*, 952 F. Supp. 1119 (W. D. Pa. 1997), 1124.
[8] *Calder* v. *Jones*, 465 U.S. 783 (1984); *Bancroft & Masters, Inc* v. *Augusta Nat'l Inc*, 223 F. 3d 1082, 1087 (9th Circuit. 2000).

court chosen must have an actual link with the contract. In addition, it must not break any mandatory rules. With regard to special jurisdiction in B2B contracts, the court of the place where the defendant has his domicile or where the contract is performed will hear the case. The special jurisdiction rule in Chinese Civil Procedure Law is simple, without specific rules or explanation. It should be modernised to be consistent with the international jurisdictional languages. At the same time, the Draft Model Law on Private International Law in China should learn from the EU and US experiences in terms of jurisdictional approaches and their wording.

With regard to choice of law in contractual obligations, in the EU, the Rome I Regulation is also in favour of the principle of "party autonomy" in choice of law.[9] However, in B2C/consumer contracts, party autonomy in choice of law is permitted but with a restrictive provision to protect consumers with mandatory rules. In the absence of choice of law in B2B contracts, the Rome I Regulation changes the wording of the Rome Convention so as to provide precise and foreseeable rules. So the Rome I Regulation explicitly provides that the law of the country where the seller has his habitual residence will govern the case.[10] If there is no habitual residence, the concepts of "characteristic performance", "manifestly more closely connected" and "most closely connected" are employed to determine the applicable law for B2B contracts. In relation to electronic B2B contracts with physical delivery of goods, it won't affect the determination of the place of performance in the traditional way. With regard to electronic B2B contracts with digital delivery (download), the seller's place of business should be regarded as the location with the closest connection as it is in line with the UN Convention on the Use of Electronic Communications on International Contracts that a location is not a place of business merely because that is (1) where technical equipment is located or (2) where information can be accessed. In relation to the applicable law for B2C/consumer contracts, the Rome I Regulation adopts the concept of a "pursuing or directing" approach in determining the applicable law for consumer contracts in the absence of the parties' choice.[11] The concept of online "pursuing or directing activities" under

[9] Article 3 and 6 of Regulation (EC) No. 593/2008 of the European Parliament and of the council of 17 June 2008 on the law applicable to contractual obligations (hereafter "Rome I Regulation"), OJ L177, 4.7.2008 pp. 6–16, available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L: 2008:177:0006:01:EN:HTML (last visited on 16 September 2009).

[10] Article 4 of the Rome I Regulation.

[11] Article 6 of the Rome I Regulation.

the Rome I Regulation should have the same interpretation as that of the Brussels I Regulation discussed earlier.

In the US, party autonomy is also adopted for choosing the applicable law for both B2B and B2C/consumer contracts by the Second Restatement of Conflict of Law. Similar to the EU, the US allows parties to choose the applicable law for their B2C/consumer contracts on the condition that such choice will not infringe public policy and consumer protection rules. With regard to the applicable law for B2B contracts in the absence of choice, §188 (1) of the Second Restatement introduces the concept of "the most significant relationship" to the transaction and the parties as a criterion to determine the applicable law to contracts. With regard to the applicable law for B2C/consumer contracts, the applicable law shall be the law of the state or country in which the consumer principally resides, or the law of the state or country in which the consumer both makes the contract and takes delivery of the goods. It is notable that the Second Restatement of Conflict of Law is not geared for application to electronic contracts. Due to the various ways of interpreting the Internet choice-of-law approaches by the Courts, it is important for the US to harmonise its private international law so as to enhance legal certainty.

In China, just like the EU and US, party autonomy is the basic principle for the determination of applicable law for both B2B and B2C contracts. Parties' choice shall not infringe the mandatory rules of consumer protection in B2C contracts. In the absence of choice in general, the law of the country to which the contract is most closely connected shall be applied. The most closely connected location to the contract concluded online for B2B contracts should be the seller's place of business, if not, his habitual residence. However, it shall be interpreted as the consumer's domicile or habitual residence in B2C contracts. There is no uniform private international law in China. Thus, national laws such as Contract Law and General Civil Law govern the choice of law issues in China. It is suggested that China should continue working on its draft Model Law on Private International Law and learn from the experience of the Rome I Regulation.

Solution 4: Choose online arbitration or online mediation to resolve certain/specific disputes; implement an international Model Law or Convention on online dispute resolution.

For some small claims or Internet-related disputes, it may be beneficial for the parties to choose online arbitration, mediation or negotiation as it

can provide a more friendly and efficient but less costly resolution than going to court. As ODR is not only a new legal concept but also an innovative technology service, amending the traditional arbitration or mediation law itself might not be sufficient to harmonise the conduct of online dispute resolution in the global market. A thorough international ODR legal framework on the technique-related requirements, standards of fair procedure and service liability issues will enhance the legal certainty of the validity and enforcement of ODR agreements resulting from proceedings and facilitate the development of ODR in terms of its mechanism and service. An International Model Law or Convention on ODR could learn from the practical experiences of eBay and SquareTrade, AAA and Cybersettle, ICANN and WIPO-UDRP, and CIETA and HKIAC, as well as using some regional or national subject-specific laws for references, such as the CIETAC Online Arbitration Rules and the CIDIP Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims. Such international instruments will increase the legal certainty of resolving disputes online, and hence boost the users' confidence in forming cross-border electronic commercial contracts.

Lastly, it will be the author's great pleasure if the analysis and evaluation of up-to-date Internet conflict of law approaches in this book can be of any help in improving the legal certainty of resolving disputes in cross-border electronic commercial contracts and in facilitating the process of harmonisation and modernisation of the international, regional and national regimes of private international law, or at least to serve as an interpretation of new concepts in the existing laws.

Appendix 1

Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I)

Official Journal L 012, 16/01/2001, pp. 1–23

The Council of the European Union

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and Article 67(1) thereof,

Having regard to the proposal from the Commission[1],

Having regard to the opinion of the European Parliament[2],

Having regard to the opinion of the Economic and Social Committee[3],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice, in which the free movement of persons is ensured. In order to establish progressively such an area, the Community should adopt, amongst other things, the measures relating to judicial cooperation in civil matters which are necessary for the sound operation of the internal market.

(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

[1] OJ C 376, 28.12.1999, p. 1.
[2] Opinion delivered on 21 September 2000 (not yet published in the Official Journal).
[3] OJ C 117, 26.4.2000, p. 6.

(3) This area is within the field of judicial cooperation in civil matters within the meaning of Article 65 of the Treaty.

(4) In accordance with the principles of subsidiarity and proportionality as set out in Article 5 of the Treaty, the objectives of this Regulation cannot be sufficiently achieved by the Member States and can therefore be better achieved by the Community. This Regulation confines itself to the minimum required in order to achieve those objectives and does not go beyond what is necessary for that purpose.

(5) On 27 September 1968 the Member States, acting under Article 293, fourth indent, of the Treaty, concluded the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by Conventions on the Accession of the New Member States to that Convention (hereinafter referred to as the "Brussels Convention")[4]. On 16 September 1988 Member States and EFTA States concluded the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which is a parallel Convention to the 1968 Brussels Convention. Work has been undertaken for the revision of those Conventions, and the Council has approved the content of the revised texts. Continuity in the results achieved in that revision should be ensured.

(6) In order to attain the objective of free movement of judgments in civil and commercial matters, it is necessary and appropriate that the rules governing jurisdiction and the recognition and enforcement of judgments be governed by a Community legal instrument which is binding and directly applicable.

(7) The scope of this Regulation must cover all the main civil and commercial matters apart from certain well-defined matters.

(8) There must be a link between proceedings to which this Regulation applies and the territory of the Member States bound by this Regulation. Accordingly common rules on jurisdiction should, in principle, apply when the defendant is domiciled in one of those Member States.

(9) A defendant not domiciled in a Member State is in general subject to national rules of jurisdiction applicable in the territory of the Member State of the court seised, and a defendant domiciled in a Member State not bound by this Regulation must remain subject to the Brussels Convention.

[4] OJ L 299, 31.12.1972, p. 32.
OJ L 304, 30.10.1978, p. 1.
OJ L 388, 31.12.1982, p. 1.
OJ L 285, 3.10.1989, p. 1.
OJ C 15, 15.1.1997, p. 1.
For a consolidated text, see OJ C 27, 26.1.1998, p. 1.

(10) For the purposes of the free movement of judgments, judgments given in a Member State bound by this Regulation should be recognised and enforced in another Member State bound by this Regulation, even if the judgment debtor is domiciled in a third State.

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

(12) In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

(13) In relation to insurance, consumer contracts and employment, the weaker party should be protected by rules of jurisdiction more favourable to his interests than the general rules provide for.

(14) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

(15) In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. There must be a clear and effective mechanism for resolving cases of lis pendens and related actions and for obviating problems flowing from national differences as to the determination of the time when a case is regarded as pending. For the purposes of this Regulation that time should be defined autonomously.

(16) Mutual trust in the administration of justice in the Community justifies judgments given in a Member State being recognised automatically without the need for any procedure except in cases of dispute.

(17) By virtue of the same principle of mutual trust, the procedure for making enforceable in one Member State a judgment given in another must be efficient and rapid. To that end, the declaration that a judgment is enforceable should be issued virtually automatically after purely formal checks of the documents supplied, without there being any possibility for the court to raise of its own motion any of the grounds for non-enforcement provided for by this Regulation.

(18) However, respect for the rights of the defence means that the defendant should be able to appeal in an adversarial procedure, against the declaration

of enforceability, if he considers one of the grounds for non-enforcement to be present. Redress procedures should also be available to the claimant where his application for a declaration of enforceability has been rejected.

(19) Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end. The same need for continuity applies as regards the interpretation of the Brussels Convention by the Court of Justice of the European Communities and the 1971 Protocol[5] should remain applicable also to cases already pending when this Regulation enters into force.

(20) The United Kingdom and Ireland, in accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the European Community, have given notice of their wish to take part in the adoption and application of this Regulation.

(21) Denmark, in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, is not participating in the adoption of this Regulation, and is therefore not bound by it nor subject to its application.

(22) Since the Brussels Convention remains in force in relations between Denmark and the Member States that are bound by this Regulation, both the Convention and the 1971 Protocol continue to apply between Denmark and the Member States bound by this Regulation.

(23) The Brussels Convention also continues to apply to the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.

(24) Likewise for the sake of consistency, this Regulation should not affect rules governing jurisdiction and the recognition of judgments contained in specific Community instruments.

(25) Respect for international commitments entered into by the Member States means that this Regulation should not affect conventions relating to specific matters to which the Member States are parties.

[5] OJ L 204, 2.8.1975, p. 28.
OJ L 304, 30.10.1978, p. 1.
OJ L 388, 31.12.1982, p. 1.
OJ L 285, 3.10.1989, p. 1.
OJ C 15, 15.1.1997, p. 1.
For a consolidated text see OJ C 27, 26.1.1998, p. 28.

(26) The necessary flexibility should be provided for in the basic rules of this Regulation in order to take account of the specific procedural rules of certain Member States. Certain provisions of the Protocol annexed to the Brussels Convention should accordingly be incorporated in this Regulation.

(27) In order to allow a harmonious transition in certain areas which were the subject of special provisions in the Protocol annexed to the Brussels Convention, this Regulation lays down, for a transitional period, provisions taking into consideration the specific situation in certain Member States.

(28) No later than five years after entry into force of this Regulation the Commission will present a report on its application and, if need be, submit proposals for adaptations.

(29) The Commission will have to adjust Annexes I to IV on the rules of national jurisdiction, the courts or competent authorities and redress procedures available on the basis of the amendments forwarded by the Member State concerned; amendments made to Annexes V and VI should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission[6],

Has Adopted this Regulation

Chapter I Scope

Article 1

1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
2. The Regulation shall not apply to:
   (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
   (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
   (c) social security;
   (d) arbitration.
3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark.

[6] (6) OJ L 184, 17.7.1999, p. 23.

Chapter II Jurisdiction

Section 1 General provisions

Article 2

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.
2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 3

1. Persons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter.
2. In particular the rules of national jurisdiction set out in Annex I shall not be applicable as against them.

Article 4

1. If the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Articles 22 and 23, be determined by the law of that Member State.
2. As against such a defendant, any person domiciled in a Member State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in Annex I, in the same way as the nationals of that State.

Section 2 Special jurisdiction

Article 5

A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
   (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
   – in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,

– in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,

(c) if subparagraph (b) does not apply then subparagraph (a) applies;

2. in matters relating to maintenance, in the courts for the place where the maintenance creditor is domiciled or habitually resident or, if the matter is ancillary to proceedings concerning the status of a person, in the court which, according to its own law, has jurisdiction to entertain those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties;
3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;
4. as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings;
5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated;
6. as settlor, trustee or beneficiary of a trust created by the operation of a statute, or by a written instrument, or created orally and evidenced in writing, in the courts of the Member State in which the trust is domiciled;
7. as regards a dispute concerning the payment of remuneration claimed in respect of the salvage of a cargo or freight, in the court under the authority of which the cargo or freight in question:
   (a) has been arrested to secure such payment, or
   (b) could have been so arrested, but bail or other security has been given;
   provided that this provision shall apply only if it is claimed that the defendant has an interest in the cargo or freight or had such an interest at the time of salvage.

Article 6

A person domiciled in a Member State may also be sued:

1. where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
2. as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seised of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;

3. on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;
4. in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the Member State in which the property is situated.

Article 7

Where by virtue of this Regulation a court of a Member State has jurisdiction in actions relating to liability from the use or operation of a ship, that court, or any other court substituted for this purpose by the internal law of that Member State, shall also have jurisdiction over claims for limitation of such liability.

Section 3 Jurisdiction in matters relating to insurance

Article 8

In matters relating to insurance, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

Article 9

1. An insurer domiciled in a Member State may be sued:
   (a) in the courts of the Member State where he is domiciled, or
   (b) in another Member State, in the case of actions brought by the policy-holder, the insured or a beneficiary, in the courts for the place where the plaintiff is domiciled,
   (c) if he is a co-insurer, in the courts of a Member State in which proceedings are brought against the leading insurer.
2. An insurer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 10

In respect of liability insurance or insurance of immovable property, the insurer may in addition be sued in the courts for the place where the harmful event occurred. The same applies if movable and immovable property are

covered by the same insurance policy and both are adversely affected by the same contingency.

Article 11

1. In respect of liability insurance, the insurer may also, if the law of the court permits it, be joined in proceedings which the injured party has brought against the insured.
2. Articles 8, 9 and 10 shall apply to actions brought by the injured party directly against the insurer, where such direct actions are permitted.
3. If the law governing such direct actions provides that the policyholder or the insured may be joined as a party to the action, the same court shall have jurisdiction over them.

Article 12

1. Without prejudice to Article 11(3), an insurer may bring proceedings only in the courts of the Member State in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary.
2. The provisions of this Section shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending.

Article 13

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen, or
2. which allows the policyholder, the insured or a beneficiary to bring proceedings in courts other than those indicated in this Section, or
3. which is concluded between a policyholder and an insurer, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which has the effect of conferring jurisdiction on the courts of that State even if the harmful event were to occur abroad, provided that such an agreement is not contrary to the law of that State, or
4. which is concluded with a policyholder who is not domiciled in a Member State, except in so far as the insurance is compulsory or relates to immovable property in a Member State, or
5. which relates to a contract of insurance in so far as it covers one or more of the risks set out in Article 14.

Article 14

The following are the risks referred to in Article 13(5):

1. any loss of or damage to:
   (a) seagoing ships, installations situated offshore or on the high seas, or aircraft, arising from perils which relate to their use for commercial purposes;
   (b) goods in transit other than passengers' baggage where the transit consists of or includes carriage by such ships or aircraft;
2. any liability, other than for bodily injury to passengers or loss of or damage to their baggage:
   (a) arising out of the use or operation of ships, installations or aircraft as referred to in point 1(a) in so far as, in respect of the latter, the law of the Member State in which such aircraft are registered does not prohibit agreements on jurisdiction regarding insurance of such risks;
   (b) for loss or damage caused by goods in transit as described in point 1(b);
3. any financial loss connected with the use or operation of ships, installations or aircraft as referred to in point 1(a), in particular loss of freight or charter-hire;
4. any risk or interest connected with any of those referred to in points 1 to 3;
5. notwithstanding points 1 to 4, all "large risks" as defined in Council Directive 73/239/EEC[7], as amended by Council Directives 88/357/EEC[8] and 90/618/EEC[9], as they may be amended.

Section 4 Jurisdiction over consumer contracts

Article 15

1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:
   (a) it is a contract for the sale of goods on instalment credit terms; or
   (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
   (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of

[7] (7) OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2000/26/EC of the European Parliament and of the Council (OJ L 181, 20.7.2000, p. 65).
[8] OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 2000/26/EC.
[9] OJ L 330, 29.11.1990, p. 44.

the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.
3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Article 16

1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.
2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.
3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Article 17

The provisions of this Section may be departed from only by an agreement:

1. which is entered into after the dispute has arisen; or
2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.

Section 5 Jurisdiction over individual contracts of employment

Article 18

1. In matters relating to individual contracts of employment, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5.

2. Where an employee enters into an individual contract of employment with an employer who is not domiciled in a Member State but has a branch, agency or other establishment in one of the Member States, the employer shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that Member State.

Article 19

An employer domiciled in a Member State may be sued:

1. in the courts of the Member State where he is domiciled; or
2. in another Member State:
   (a) in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so, or
   (b) if the employee does not or did not habitually carry out his work in any one country, in the courts for the place where the business which engaged the employee is or was situated.

Article 20

1. An employer may bring proceedings only in the courts of the Member State in which the employee is domiciled.
2. The provisions of this Section shall not affect the right to bring a counterclaim in the court in which, in accordance with this Section, the original claim is pending.

Article 21

The provisions of this Section may be departed from only by an agreement on jurisdiction:

1. which is entered into after the dispute has arisen; or
2. which allows the employee to bring proceedings in courts other than those indicated in this Section.

Section 6 Exclusive jurisdiction

Article 22

The following courts shall have exclusive jurisdiction, regardless of domicile:

1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;
3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;
4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.

   Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;
5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.

Section 7 Prorogation of jurisdiction

Article 23

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:
   (a) in writing or evidenced in writing; or
   (b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".
3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.
4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.
5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

Article 24

Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22.

Section 8 Examination as to jurisdiction and admissibility

Article 25

Where a court of a Member State is seised of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.

Article 26

1. Where a defendant domiciled in one Member State is sued in a court of another Member State and does not enter an appearance, the court shall declare of its own motion that it has no jurisdiction unless its jurisdiction is derived from the provisions of this Regulation.

2. The court shall stay the proceedings so long as it is not shown that the defendant has been able to receive the document instituting the proceedings or an equivalent document in sufficient time to enable him to arrange for his defence, or that all necessary steps have been taken to this end.
3. Article 19 of Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters[10] shall apply instead of the provisions of paragraph 2 if the document instituting the proceedings or an equivalent document had to be transmitted from one Member State to another pursuant to this Regulation.
4. Where the provisions of Regulation (EC) No 1348/2000 are not applicable, Article 15 of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters shall apply if the document instituting the proceedings or an equivalent document had to be transmitted pursuant to that Convention.

Section 9 Lis pendens – related actions

Article 27

1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established.
2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 28

1. Where related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings.
2. Where these actions are pending at first instance, any court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.
3. For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

[10] OJ L 160, 30.6.2000, p. 37.

Article 29

Where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court.

Article 30

For the purposes of this Section, a court shall be deemed to be seised:

1. at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or
2. if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court.

Section 10 Provisional, including protective, measures

Article 31

Application may be made to the courts of a Member State for such provisional, including protective, measures as may be available under the law of that State, even if, under this Regulation, the courts of another Member State have jurisdiction as to the substance of the matter.

Chapter III Recognition and Enforcement

Article 32

For the purposes of this Regulation, "judgment" means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

Section 1 Recognition

Article 33

1. A judgment given in a Member State shall be recognised in the other Member States without any special procedure being required.

2. Any interested party who raises the recognition of a judgment as the principal issue in a dispute may, in accordance with the procedures provided for in Sections 2 and 3 of this Chapter, apply for a decision that the judgment be recognised.
3. If the outcome of proceedings in a court of a Member State depends on the determination of an incidental question of recognition that court shall have jurisdiction over that question.

Article 34

A judgment shall not be recognised:

1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought;
2. where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so;
3. if it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;
4. if it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.

Article 35

1. Moreover, a judgment shall not be recognised if it conflicts with Sections 3, 4 or 6 of Chapter II, or in a case provided for in Article 72.
2. In its examination of the grounds of jurisdiction referred to in the foregoing paragraph, the court or authority applied to shall be bound by the findings of fact on which the court of the Member State of origin based its jurisdiction.
3. Subject to the paragraph 1, the jurisdiction of the court of the Member State of origin may not be reviewed. The test of public policy referred to in point 1 of Article 34 may not be applied to the rules relating to jurisdiction.

Article 36

Under no circumstances may a foreign judgment be reviewed as to its substance.

Article 37

1. A court of a Member State in which recognition is sought of a judgment given in another Member State may stay the proceedings if an ordinary appeal against the judgment has been lodged.
2. A court of a Member State in which recognition is sought of a judgment given in Ireland or the United Kingdom may stay the proceedings if enforcement is suspended in the State of origin, by reason of an appeal.

Section 2 Enforcement

Article 38

1. A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there.
2. However, in the United Kingdom, such a judgment shall be enforced in England and Wales, in Scotland, or in Northern Ireland when, on the application of any interested party, it has been registered for enforcement in that part of the United Kingdom.

Article 39

1. The application shall be submitted to the court or competent authority indicated in the list in Annex II.
2. The local jurisdiction shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement.

Article 40

1. The procedure for making the application shall be governed by the law of the Member State in which enforcement is sought.
2. The applicant must give an address for service of process within the area of jurisdiction of the court applied to. However, if the law of the Member State in which enforcement is sought does not provide for the furnishing of such an address, the applicant shall appoint a representative ad litem.
3. The documents referred to in Article 53 shall be attached to the application.

Article 41

The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The

party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application.

Article 42

1. The decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought.
2. The declaration of enforceability shall be served on the party against whom enforcement is sought, accompanied by the judgment, if not already served on that party.

Article 43

1. The decision on the application for a declaration of enforceability may be appealed against by either party.
2. The appeal is to be lodged with the court indicated in the list in Annex III.
3. The appeal shall be dealt with in accordance with the rules governing procedure in contradictory matters.
4. If the party against whom enforcement is sought fails to appear before the appellate court in proceedings concerning an appeal brought by the applicant, Article 26(2) to (4) shall apply even where the party against whom enforcement is sought is not domiciled in any of the Member States.
5. An appeal against the declaration of enforceability is to be lodged within one month of service thereof. If the party against whom enforcement is sought is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him in person or at his residence. No extension of time may be granted on account of distance.

Article 44

The judgment given on the appeal may be contested only by the appeal referred to in Annex IV.

Article 45

1. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only on one of the grounds specified in Articles 34 and 35. It shall give its decision without delay.
2. Under no circumstances may the foreign judgment be reviewed as to its substance.

Article 46

1. The court with which an appeal is lodged under Article 43 or Article 44 may, on the application of the party against whom enforcement is sought, stay the proceedings if an ordinary appeal has been lodged against the judgment in the Member State of origin or if the time for such an appeal has not yet expired; in the latter case, the court may specify the time within which such an appeal is to be lodged.
2. Where the judgment was given in Ireland or the United Kingdom, any form of appeal available in the Member State of origin shall be treated as an ordinary appeal for the purposes of paragraph 1.
3. The court may also make enforcement conditional on the provision of such security as it shall determine.

Article 47

1. When a judgment must be recognised in accordance with this Regulation, nothing shall prevent the applicant from availing himself of provisional, including protective, measures in accordance with the law of the Member State requested without a declaration of enforceability under Article 41 being required.
2. The declaration of enforceability shall carry with it the power to proceed to any protective measures.
3. During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.

Article 48

1. Where a foreign judgment has been given in respect of several matters and the declaration of enforceability cannot be given for all of them, the court or competent authority shall give it for one or more of them.
2. An applicant may request a declaration of enforceability limited to parts of a judgment.

Article 49

A foreign judgment which orders a periodic payment by way of a penalty shall be enforceable in the Member State in which enforcement is sought only if the amount of the payment has been finally determined by the courts of the Member State of origin.

Article 50

An applicant who, in the Member State of origin has benefited from complete or partial legal aid or exemption from costs or expenses, shall be entitled, in the procedure provided for in this Section, to benefit from the most favourable legal aid or the most extensive exemption from costs or expenses provided for by the law of the Member State addressed.

Article 51

No security, bond or deposit, however described, shall be required of a party who in one Member State applies for enforcement of a judgment given in another Member State on the ground that he is a foreign national or that he is not domiciled or resident in the State in which enforcement is sought.

Article 52

In proceedings for the issue of a declaration of enforceability, no charge, duty or fee calculated by reference to the value of the matter at issue may be levied in the Member State in which enforcement is sought.

Section 3 Common provisions

Article 53

1. A party seeking recognition or applying for a declaration of enforceability shall produce a copy of the judgment which satisfies the conditions necessary to establish its authenticity.
2. A party applying for a declaration of enforceability shall also produce the certificate referred to in Article 54, without prejudice to Article 55.

Article 54

The court or competent authority of a Member State where a judgment was given shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

Article 55

1. If the certificate referred to in Article 54 is not produced, the court or competent authority may specify a time for its production or accept an equivalent document or, if it considers that it has sufficient information before it, dispense with its production.

2. If the court or competent authority so requires, a translation of the documents shall be produced. The translation shall be certified by a person qualified to do so in one of the Member States.

Article 56

No legalisation or other similar formality shall be required in respect of the documents referred to in Article 53 or Article 55(2), or in respect of a document appointing a representative ad litem.

Chapter IV Authentic Instruments and Court Settlements

Article 57

1. A document which has been formally drawn up or registered as an authentic instrument and is enforceable in one Member State shall, in another Member State, be declared enforceable there, on application made in accordance with the procedures provided for in Articles 38, et seq. The court with which an appeal is lodged under Article 43 or Article 44 shall refuse or revoke a declaration of enforceability only if enforcement of the instrument is manifestly contrary to public policy in the Member State addressed.
2. Arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them shall also be regarded as authentic instruments within the meaning of paragraph 1.
3. The instrument produced must satisfy the conditions necessary to establish its authenticity in the Member State of origin.
4. Section 3 of Chapter III shall apply as appropriate. The competent authority of a Member State where an authentic instrument was drawn up or registered shall issue, at the request of any interested party, a certificate using the standard form in Annex VI to this Regulation.

Article 58

A settlement which has been approved by a court in the course of proceedings and is enforceable in the Member State in which it was concluded shall be enforceable in the State addressed under the same conditions as authentic instruments. The court or competent authority of a Member State where a court settlement was approved shall issue, at the request of any interested party, a certificate using the standard form in Annex V to this Regulation.

Chapter V General Provisions

Article 59

1. In order to determine whether a party is domiciled in the Member State whose courts are seised of a matter, the court shall apply its internal law.
2. If a party is not domiciled in the Member State whose courts are seised of the matter, then, in order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State.

Article 60

1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:
   (a) statutory seat, or
   (b) central administration, or
   (c) principal place of business.
2. For the purposes of the United Kingdom and Ireland "statutory seat" means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place.
3. In order to determine whether a trust is domiciled in the Member State whose courts are seised of the matter, the court shall apply its rules of private international law.

Article 61

Without prejudice to any more favourable provisions of national laws, persons domiciled in a Member State who are being prosecuted in the criminal courts of another Member State of which they are not nationals for an offence which was not intentionally committed may be defended by persons qualified to do so, even if they do not appear in person. However, the court seised of the matter may order appearance in person; in the case of failure to appear, a judgment given in the civil action without the person concerned having had the opportunity to arrange for his defence need not be recognised or enforced in the other Member States.

Article 62

In Sweden, in summary proceedings concerning orders to pay (betalningsföreläggande) and assistance (handräckning), the expression "court" includes the "Swedish enforcement service" (kronofogdemyndighet).

Article 63

1. A person domiciled in the territory of the Grand Duchy of Luxembourg and sued in the court of another Member State pursuant to Article 5(1) may refuse to submit to the jurisdiction of that court if the final place of delivery of the goods or provision of the services is in Luxembourg.
2. Where, under paragraph 1, the final place of delivery of the goods or provision of the services is in Luxembourg, any agreement conferring jurisdiction must, in order to be valid, be accepted in writing or evidenced in writing within the meaning of Article 23(1)(a).
3. The provisions of this Article shall not apply to contracts for the provision of financial services.
4. The provisions of this Article shall apply for a period of six years from entry into force of this Regulation.

Article 64

1. In proceedings involving a dispute between the master and a member of the crew of a seagoing ship registered in Greece or in Portugal, concerning remuneration or other conditions of service, a court in a Member State shall establish whether the diplomatic or consular officer responsible for the ship has been notified of the dispute. It may act as soon as that officer has been notified.
2. The provisions of this Article shall apply for a period of six years from entry into force of this Regulation.

Article 65

1. The jurisdiction specified in Article 6(2), and Article 11 in actions on a warranty of guarantee or in any other third party proceedings may not be resorted to in Germany and Austria. Any person domiciled in another Member State may be sued in the courts:
   (a) of Germany, pursuant to Articles 68 and 72 to 74 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices,
   (b) of Austria, pursuant to Article 21 of the Code of Civil Procedure (Zivilprozessordnung) concerning third-party notices.
2. Judgments given in other Member States by virtue of Article 6(2), or Article 11 shall be recognised and enforced in Germany and Austria in accordance with Chapter III. Any effects which judgments given in these States may have on third parties by application of the provisions in paragraph 1 shall also be recognised in the other Member States.

Chapter VI Transitional Provisions

Article 66

1. This Regulation shall apply only to legal proceedings instituted and to documents formally drawn up or registered as authentic instruments after the entry into force thereof.
2. However, if the proceedings in the Member State of origin were instituted before the entry into force of this Regulation, judgments given after that date shall be recognised and enforced in accordance with Chapter III,
   (a) if the proceedings in the Member State of origin were instituted after the entry into force of the Brussels or the Lugano Convention both in the Member State or origin and in the Member State addressed;
   (b) in all other cases, if jurisdiction was founded upon rules which accorded with those provided for either in Chapter II or in a convention concluded between the Member State of origin and the Member State addressed which was in force when the proceedings were instituted.

Chapter VII Relations with Other Instruments

Article 67

This Regulation shall not prejudice the application of provisions governing jurisdiction and the recognition and enforcement of judgments in specific matters which are contained in Community instruments or in national legislation harmonised pursuant to such instruments.

Article 68

1. This Regulation shall, as between the Member States, supersede the Brussels Convention, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 299 of the Treaty.
2. In so far as this Regulation replaces the provisions of the Brussels Convention between Member States, any reference to the Convention shall be understood as a reference to this Regulation.

Article 69

Subject to Article 66(2) and Article 70, this Regulation shall, as between Member States, supersede the following conventions and treaty concluded between two or more of them:

- the Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Paris on 8 July 1899,
- the Convention between Belgium and the Netherlands on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 28 March 1925,
- the Convention between France and Italy on the Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 3 June 1930,
- the Convention between Germany and Italy on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 9 March 1936,
- the Convention between Belgium and Austria on the Reciprocal Recognition and Enforcement of Judgments and Authentic Instruments relating to Maintenance Obligations, signed at Vienna on 25 October 1957,
- the Convention between Germany and Belgium on the Mutual Recognition and Enforcement of Judgments, Arbitration Awards and Authentic Instruments in Civil and Commercial Matters, signed at Bonn on 30 June 1958,
- the Convention between the Netherlands and Italy on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Rome on 17 April 1959,
- the Convention between Germany and Austria on the Reciprocal Recognition and Enforcement of Judgments, Settlements and Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 6 June 1959,
- the Convention between Belgium and Austria on the Reciprocal Recognition and Enforcement of Judgments, Arbitral Awards and Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 16 June 1959,
- the Convention between Greece and Germany for the Reciprocal Recognition and Enforcement of Judgments, Settlements and Authentic Instruments in Civil and Commercial Matters, signed in Athens on 4 November 1961,
- the Convention between Belgium and Italy on the Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters, signed at Rome on 6 April 1962,
- the Convention between the Netherlands and Germany on the Mutual Recognition and Enforcement of Judgments and Other Enforceable Instruments in Civil and Commercial Matters, signed at The Hague on 30 August 1962,
- the Convention between the Netherlands and Austria on the Reciprocal Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at The Hague on 6 February 1963,

- the Convention between France and Austria on the Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 15 July 1966,
- the Convention between Spain and France on the Recognition and Enforcement of Judgment Arbitration Awards in Civil and Commercial Matters, signed at Paris on 28 May 1969,
- the Convention between Luxembourg and Austria on the Recognition and Enforcement of Judgments and Authentic Instruments in Civil and Commercial Matters, signed at Luxembourg on 29 July 1971,
- the Convention between Italy and Austria on the Recognition and Enforcement of Judgments in Civil and Commercial Matters, of Judicial Settlements and of Authentic Instruments, signed at Rome on 16 November 1971,
- the Convention between Spain and Italy regarding Legal Aid and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, signed at Madrid on 22 May 1973,
- the Convention between Finland, Iceland, Norway, Sweden and Denmark on the Recognition and Enforcement of Judgments in Civil Matters, signed at Copenhagen on 11 October 1977,
- the Convention between Austria and Sweden on the Recognition and Enforcement of Judgments in Civil Matters, signed at Stockholm on 16 September 1982,
- the Convention between Spain and the Federal Republic of Germany on the Recognition and Enforcement of Judgments, Settlements and Enforceable Authentic Instruments in Civil and Commercial Matters, signed at Bonn on 14 November 1983,
- the Convention between Austria and Spain on the Recognition and Enforcement of Judgments, Settlements and Enforceable Authentic Instruments in Civil and Commercial Matters, signed at Vienna on 17 February 1984,
- the Convention between Finland and Austria on the Recognition and Enforcement of Judgments in Civil Matters, signed at Vienna on 17 November 1986, and
- the Treaty between Belgium, the Netherlands and Luxembourg in Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgments, Arbitration Awards and Authentic Instruments, signed at Brussels on 24 November 1961, in so far as it is in force.

Article 70

1. The Treaty and the Conventions referred to in Article 69 shall continue to have effect in relation to matters to which this Regulation does not apply.

2. They shall continue to have effect in respect of judgments given and documents formally drawn up or registered as authentic instruments before the entry into force of this Regulation.

Article 71

1. This Regulation shall not affect any conventions to which the Member States are parties and which in relation to particular matters, govern jurisdiction or the recognition or enforcement of judgments.
2. With a view to its uniform interpretation, paragraph 1 shall be applied in the following manner:
   (a) this Regulation shall not prevent a court of a Member State, which is a party to a convention on a particular matter, from assuming jurisdiction in accordance with that convention, even where the defendant is domiciled in another Member State which is not a party to that convention. The court hearing the action shall, in any event, apply Article 26 of this Regulation;
   (b) judgments given in a Member State by a court in the exercise of jurisdiction provided for in a convention on a particular matter shall be recognised and enforced in the other Member States in accordance with this Regulation.

Where a convention on a particular matter to which both the Member State of origin and the Member State addressed are parties lays down conditions for the recognition or enforcement of judgments, those conditions shall apply. In any event, the provisions of this Regulation which concern the procedure for recognition and enforcement of judgments may be applied.

Article 72

This Regulation shall not affect agreements by which Member States undertook, prior to the entry into force of this Regulation pursuant to Article 59 of the Brussels Convention, not to recognise judgments given, in particular in other Contracting States to that Convention, against defendants domiciled or habitually resident in a third country where, in cases provided for in Article 4 of that Convention, the judgment could only be founded on a ground of jurisdiction specified in the second paragraph of Article 3 of that Convention.

Chapter VIII Final Provisions

Article 73

No later than five years after the entry into force of this Regulation, the Commission shall present to the European Parliament, the Council and the

Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied, if need be, by proposals for adaptations to this Regulation.

Article 74

1. The Member States shall notify the Commission of the texts amending the lists set out in Annexes I to IV. The Commission shall adapt the Annexes concerned accordingly.
2. The updating or technical adjustment of the forms, specimens of which appear in Annexes V and VI, shall be adopted in accordance with the advisory procedure referred to in Article 75(2).

Article 75

1. The Commission shall be assisted by a committee.
2. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.
3. The Committee shall adopt its rules of procedure.

Article 76

This Regulation shall enter into force on l March 2002.

This Regulation is binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Brussels, 22 December 2000.

For the Council

The President

C. Pierret

Appendix 2

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)

Official Journal L 177, 04/07/2008, pp. 6–16

The European Parliament and the Council of the European Union

Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee[1],

Acting in accordance with the procedure laid down in Article 251 of the Treaty[2],

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65, point (b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

[1] OJ C 318, 23.12.2006, p. 56.

[2] Opinion of the European Parliament of 29 November 2007 (not yet published in the Official Journal) and Council Decision of 5 June 2008.

(4) On 30 November 2000 the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters[3]. The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

(5) The Hague Programme[4], adopted by the European Council on 5 November 2004, called for work to be pursued actively on the conflict-of-law rules regarding contractual obligations (Rome I).

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[5] (Brussels I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)[6].

(8) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(9) Obligations under bills of exchange, cheques and promissory notes and other negotiable instruments should also cover bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character.

(10) Obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864/2007. Such obligations should therefore be excluded from the scope of this Regulation.

(11) The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.

[3] OJ C 12, 15.1.2001, p. 1. [4] OJ C 53, 3.3.2005, p. 1.

[5] OJ L 12, 16.1.2001, p. 1. Regulation as last amended by Regulation (EC) No 1791/2006 (OJ L 363, 20.12.2006, p. 1).

[6] OJ L 199, 31.7.2007, p. 40.

(12) An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

(13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.

(14) Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.

(15) Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal. Whereas no substantial change is intended as compared with Article 3(3) of the 1980 Convention on the Law Applicable to Contractual Obligations[7] (the Rome Convention), the wording of this Regulation is aligned as far as possible with Article 14 of Regulation (EC) No 864/2007.

(16) To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation.

(17) As far as the applicable law in the absence of choice is concerned, the concept of "provision of services" and "sale of goods" should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as sale of goods and provision of services are covered by that Regulation. Although franchise and distribution contracts are contracts for services, they are the subject of specific rules.

(18) As far as the applicable law in the absence of choice is concerned, multilateral systems should be those in which trading is conducted, such as regulated markets and multilateral trading facilities as referred to in Article 4 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments[8], regardless of whether or not they rely on a central counterparty.

[7] OJ C 334, 30.12.2005, p. 1.

[8] OJ L 145, 30.4.2004, p. 1. Directive as last amended by Directive 2008/10/EC (OJ L 76, 19.3.2008, p. 33).

(19) Where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity.

(20) Where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.

(21) In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.

(22) As regards the interpretation of contracts for the carriage of goods, no change in substance is intended with respect to Article 4(4), third sentence, of the Rome Convention. Consequently, single-voyage charter parties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods. For the purposes of this Regulation, the term "consignor" should refer to any person who enters into a contract of carriage with the carrier and the term "the carrier" should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.

(23) As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.

(24) With more specific reference to consumer contracts, the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques. Consistency with Regulation (EC) No 44/2001 requires both that there be a reference to

the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that "for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities". The declaration also states that "the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor."

(25) Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities.

(26) For the purposes of this Regulation, financial services such as investment services and activities and ancillary services provided by a professional to a consumer, as referred to in sections A and B of Annex I to Directive 2004/39/EC, and contracts for the sale of units in collective investment undertakings, whether or not covered by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)[9], should be subject to Article 6 of this Regulation. Consequently, when a reference is made to terms and conditions governing the issuance or offer to the public of transferable securities or to the subscription and redemption of units in collective investment undertakings, that reference should include all aspects binding the issuer or the offeror to the consumer, but should not include those aspects involving the provision of financial services.

[9] OJ L 375, 31.12.1985, p. 3. Directive as last amended by Directive 2008/18/EC of the European Parliament and of the Council (OJ L 76, 19.3.2008, p. 42).

(27) Various exceptions should be made to the general conflict-of-law rule for consumer contracts. Under one such exception the general rule should not apply to contracts relating to rights in rem in immovable property or tenancies of such property unless the contract relates to the right to use immovable property on a timeshare basis within the meaning of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis[10].

(28) It is important to ensure that rights and obligations which constitute a financial instrument are not covered by the general rule applicable to consumer contracts, as that could lead to different laws being applicable to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering. Likewise, whenever such instruments are issued or offered, the contractual relationship established between the issuer or the offeror and the consumer should not necessarily be subject to the mandatory application of the law of the country of habitual residence of the consumer, as there is a need to ensure uniformity in the terms and conditions of an issuance or an offer. The same rationale should apply with regard to the multilateral systems covered by Article 4(1)(h), in respect of which it should be ensured that the law of the country of habitual residence of the consumer will not interfere with the rules applicable to contracts concluded within those systems or with the operator of such systems.

(29) For the purposes of this Regulation, references to rights and obligations constituting the terms and conditions governing the issuance, offers to the public or public take-over bids of transferable securities and references to the subscription and redemption of units in collective investment undertakings should include the terms governing, inter alia, the allocation of securities or units, rights in the event of over-subscription, withdrawal rights and similar matters in the context of the offer as well as those matters referred to in Articles 10, 11, 12 and 13, thus ensuring that all relevant contractual aspects of an offer binding the issuer or the offeror to the consumer are governed by a single law.

(30) For the purposes of this Regulation, financial instruments and transferable securities are those instruments referred to in Article 4 of Directive 2004/39/EC.

(31) Nothing in this Regulation should prejudice the operation of a formal arrangement designated as a system under Article 2(a) of Directive 98/26/EC of the European Parliament and of the Council of 19 May

[10] OJ L 280, 29.10.1994, p. 83.

1998 on settlement finality in payment and securities settlement systems[11].

(32) Owing to the particular nature of contracts of carriage and insurance contracts, specific provisions should ensure an adequate level of protection of passengers and policy holders. Therefore, Article 6 should not apply in the context of those particular contracts.

(33) Where an insurance contract not covering a large risk covers more than one risk, at least one of which is situated in a Member State and at least one of which is situated in a third country, the special rules on insurance contracts in this Regulation should apply only to the risk or risks situated in the relevant Member State or Member States.

(34) The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services[12].

(35) Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.

(36) As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.

(37) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of "overriding mandatory provisions" should be distinguished from the expression "provisions which cannot be derogated from by agreement" and should be construed more restrictively.

(38) In the context of voluntary assignment, the term "relationship" should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term "relationship" should not be understood as relating to any relationship that may exist between assignor and

[11] OJ L 166, 11.6.1998, p. 45. [12] OJ L 18, 21.1.1997, p. 1.

assignee. In particular, it should not cover preliminary questions as regards a voluntary assignment or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment or contractual subrogation in question.

(39) For the sake of legal certainty there should be a clear definition of habitual residence, in particular for companies and other bodies, corporate or unincorporated. Unlike Article 60(1) of Regulation (EC) No 44/2001, which establishes three criteria, the conflict-of-law rule should proceed on the basis of a single criterion; otherwise, the parties would be unable to foresee the law applicable to their situation.

(40) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, should not exclude the possibility of inclusion of conflict-of-law rules relating to contractual obligations in provisions of Community law with regard to particular matters.

This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)[13].

(41) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time when this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the Official Journal of the European Union on the basis of information supplied by the Member States.

(42) The Commission will make a proposal to the European Parliament and to the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude, on their own behalf, agreements with third countries in individual and exceptional cases, concerning sectoral matters and containing provisions on the law applicable to contractual obligations.

[13] OJ L 178, 17.7.2000, p. 1.

(43) Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to attain its objective.

(44) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified its wish to take part in the adoption and application of the present Regulation.

(45) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

(46) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,

Have Adopted This Regulation

Chapter I Scope

Article 1

Material scope

1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

   It shall not apply, in particular, to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:
   (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;
   (b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;
   (c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;

(d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
(e) arbitration agreements and agreements on the choice of court;
(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;
(g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;
(h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
(i) obligations arising out of dealings prior to the conclusion of a contract;
(j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance[14] the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Article 18.
4. In this Regulation, the term "Member State" shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.

Article 2

Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

[14] OJ L 345, 19.12.2002, p. 1. Directive as last amended by Directive 2008/19/EC (OJ L 76, 19.3.2008, p. 44).

Chapter II Uniform Rules

Article 3

Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.
3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.
5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

Article 4

Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
   (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
   (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
   (c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;
(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;
(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.
3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.
4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

Article 5

Contracts of carriage

1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.
2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the

second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:

(a) the passenger has his habitual residence; or
(b) the carrier has his habitual residence; or
(c) the carrier has his place of central administration; or
(d) the place of departure is situated; or
(e) the place of destination is situated.

3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

Article 6

Consumer contracts

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:
   (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
   (b) by any means, directs such activities to that country or to several countries including that country,

   and the contract falls within the scope of such activities.
2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.
3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.

4. Paragraphs 1 and 2 shall not apply to:
   (a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;
   (b) a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours[15];
   (c) a contract relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;
   (d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;
   (e) a contract concluded within the type of system falling within the scope of Article 4(1)(h).

Article 7

Insurance contracts

1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.
2. An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance[16] shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.

   To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

[15] OJ L 158, 23.6.1990, p. 59.
[16] OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2005/68/EC of the European Parliament and of the Council (OJ L 323, 9.12.2005, p. 1).

3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:
   (a) the law of any Member State where the risk is situated at the time of conclusion of the contract;
   (b) the law of the country where the policy holder has his habitual residence;
   (c) in the case of life assurance, the law of the Member State of which the policy holder is a national;
   (d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;
   (e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

   Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

   To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.
4. The following additional rules shall apply to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance:
   (a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;
   (b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.
5. For the purposes of paragraph 3, third subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.
6. For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2(d) of the Second Council

Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services[17] and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1)(g) of Directive 2002/83/EC.

Article 8

Individual employment contracts

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.
2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.
3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.
4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

Article 9

Overriding mandatory provisions

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

[17] OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 2005/14/EC of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 14).

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Article 10

Consent and material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.
2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

Article 11

Formal validity

1. A contract concluded between persons who, or whose agents, are in the same country 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 the country where it is concluded.
2. 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.
3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.
4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.

5. Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right in rem in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:
   (a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and
   (b) those requirements cannot be derogated from by agreement.

Article 12

Scope of the law applicable

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:
   (a) interpretation;
   (b) performance;
   (c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;
   (d) the various ways of extinguishing obligations, and prescription and limitation of actions;
   (e) the consequences of nullity of the contract.
2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

Article 13

Incapacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 14

Voluntary assignment and contractual subrogation

1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the

debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.

2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.
3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

Article 15

Legal subrogation

Where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

Article 16

Multiple liability

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.

Article 17

Set-off

Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

Article 18

Burden of proof

1. The law governing a contractual obligation under this Regulation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 11 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Chapter III Other Provisions

Article 19

Habitual residence

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

   The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.
2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

Article 20

Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

Article 21

Public policy of the forum

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

Article 22

States with more than one legal system

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall

be considered as a country for the purposes of identifying the law applicable under this Regulation.
2. A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

Article 23

Relationship with other provisions of Community law

With the exception of Article 7, this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

Article 24

Relationship with the Rome Convention

1. This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.
2. In so far as this Regulation replaces the provisions of the Rome Convention, any reference to that Convention shall be understood as a reference to this Regulation.

Article 25

Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.
2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

Article 26

List of Conventions

1. By 17 June 2009, Member States shall notify the Commission of the conventions referred to in Article 25(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. Within six months of receipt of the notifications referred to in paragraph 1, the Commission shall publish in the Official Journal of the European Union:
   (a) a list of the conventions referred to in paragraph 1;
   (b) the denunciations referred to in paragraph 1.

Article 27

Review clause

1. By 17 June 2013, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If appropriate, the report shall be accompanied by proposals to amend this Regulation. The report shall include:
   (a) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any; and
   (b) an evaluation on the application of Article 6, in particular as regards the coherence of Community law in the field of consumer protection.
2. By 17 June 2010, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced.

Article 28

Application in time

This Regulation shall apply to contracts concluded after 17 December 2009.

Chapter IV Final Provisions

Article 29

Entry into force and application

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

It shall apply from 17 December 2009 except for Article 26 which shall apply from 17 June 2009.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 17 June 2008.

For the European Parliament

The President

H.-G. Pöttering

For the Council

The President

J. Lenarčič

BIBLIOGRAPHY

Books and Journal Articles

Aciman, C. and Vo-Verde, D. (2002) "Refining the Zippo Test: New Trends on Personal Jurisdiction for Internet Activities", *Computer & Internet Law*, 19: 16.

Berman, P. S. (2002) "The Globalization of Jurisdiction", *University of Pennsylvania Law Review*, 151: 311.

Boone, B. D. (Spring 2006) "Bullseye!: Why a 'Targeting' Approach to Personal Jurisdiction in the E-commerce Context Makes Sense Internationally", *Emory International Law Review* 20: 241.

Burnett, R. and Klinger, P. (2005) *Drafting and Negotiating Computer Contracts* (Sussex: Tottel Publishing, 2nd edn.).

Cachia, P. (2009) "Consumer Contracts in European Private International Law: The Sphere of Operation of the Consumer Contract Rules in the Brussels I and Rome I Regulations", *European Law Review*, 34(3): 476.

Calliess, G. P. (2006) "Online Dispute Resolution: Consumer Redress in a Global Market Place", *German Law Journal*, 7(8): 647.

Chen, C. (Spring 2004) "United States and European Union Approaches to Internet Jurisdiction and their Impact on E-Commerce", *University of Pennsylvania Journal of International Economic Law*, 25: 423.

Chik, W. B. (Spring 2002) "U.S. Jurisdictional Rules of Adjudication Over Business Conducted Via the Internet – Guidelines and a Checklist for the E-Commerce Merchant", *Tulane Journal of International and Comparative Law*, 10: 243.

Cunard, J. P. and Coplan, J. B. (2001) "Developments in Internet and E-Commerce Law" PLI/P, 678: 935.

Deveci, H. A. (2006) "Personal Jurisdiction: Where Cyberspace Meets the Real World – Part II", *Computer Law & Security Report* 22: 39.

Dogauchi, M. and Hartley, T. C. (2004) "Hague Conference on Private International Law, Preliminary Draft Convention on Exclusive Choice of Court Agreements: Draft 6", available at www.hcch.net/upload/wop/jdgm_pd25e.pdf (last visited on 23 March 2009).

Efroni, Z. (2002) "The Anti-cybersquatting Consumer Protection Act and the Uniform Dispute Resolution Policy: New Opportunities for International Forum Shopping?" *Columbia Journal of Law & the Arts*, 26: 335.

Fawcett, J. J., Harris, J. M. and Bridge, M. (2005) *International Sale of Goods in the Conflict of Laws* (New York: Oxford University Press, 2005).

Geist, M. (2001a) "Is There a There There? Toward Greater Certainty for Internet Jurisdiction", PLI/PAT 661: 561, 575 / Berkeley Tech. L.J. 16: 1345.

(2001b) *Internet Law in Canada* 69 (Canada: Captus Press, 2nd edn.).

Goode, R., Kronke, H., and McKendrick, E. (2007) *Transnational Commercial Law: Text, Cases and Materials* (Oxford University Press).

Hartley, T. and Dogauchi, M. (2007) "Explanatory Report on the 2005 Hague Choice of Court Agreements Convention", HCCH Publication, available at www.hcch.net/upload/expl37e.pdf (last visited on 21 August 2009).

Herrmann, G. (2001) "Some Legal E-flections on Online Arbitration", in Briner, R., Fortier, L., Berger, K. and Bredow, J. (eds.), *Law of International Business and Dispute Settlement in the 21st Century* (Cologne: Carl Heymanns Verlag KG) pp. 267–76.

Hill, J. (2005) *International Commercial Disputes in English Courts* (Oxford and Portland, OR: Hart Publishing, 3rd edn.).

Katsh, E. M. and Rifkin, J. (2001) *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco, CA: Jossey-Bass).

Kruger, T. (April 2006) "The 20th Session of the Hague Conference: A New Choice of Court Convention and the Issue of EC Membership", *International and Comparative Law Quarterly*, 55: 447.

Lando, O. (1987) "The EEC Convention on the Law Applicable to Contractual Obligations", *Common Market Law Review*, 24: 159.

Maloney, Mark M. (1993) "Specific Jurisdiction and the 'Arise From or Relate To' Requirement . . . What Does it Mean?" *Wash. Lee L. Rev*. 50: 1265.

Mazzotta, F. G. (Summer 2001) "A Guide to E-Commerce: Some Legal Issues Posed by E-Commerce for American Businesses Engaged in Domestic and International Transactions", *Suffolk Transnational Law Review* 24: 249.

McClean, D. and Beevers, K. (2005) *Morris – The Conflict of Laws* (London: Sweet & Maxwell, 6th edn.).

McLachlan, C. (1990) "Splitting the Proper Law in Private International Law", BYIL 61: 311.

Merrett, L. (2009) "Article 23 of the Brussels I Regulation: A Comprehensive Code for Jurisdiction Agreements?", *International and Comparative Law Quarterly* 58: 545.

Moss, G. C. (2008) "Arbitration and Private International Law", *International Arbitration Law Review* 11(4): 153.

Motion, P. (2005) "Article 17 ECD: Encouragement of Alternative Dispute Resolution On-line Dispute Resolution: A View From Scotland", in Edwards, L. (ed.), *The New Legal Framework for E-commerce in Europe* (Oxford: Hart Publishing) pp. 137–69.

Nimmer, R. T. (2001) "Understanding Electronic Contracting: UCITA, E-Signature, Federal, State, and Foreign Regulations 2001", PLI/PAT 649: 15.

Ponte, L. M. (2001) "Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?" *Tulane Journal of Technology and Intellectual Property* 3: 55.

Rabinovich-Einy, O. (Spring 2006) "Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation", *Harvard Negotiation Law Review* 11: 253.

"Recent International Agreement: Private International Law – Civil Procedure – Hague Conference Approves Uniform Rules of Enforcement for International Forum Selection Clauses – Convention as Choice of Court Agreements, concluded June, 30, 2005" (January 2006) *Harvard Law Review* 119: 931, available at h/r.rubystudio.com/media/pdf/hague_conference.pdf.

Reese, W. L. M. and Green, R. S. (1953) "That Elusive Word, 'Residence'", *Vanderbilt Law Review* 6: 561.

Reidenberg, J. (2005) "Technology and Internet Jurisdiction", 153 *University of Pennsylvania Law Review* 1951.

Rice, D. T. (Fall 2000) "Jurisdiction in Cyberspace: Which Law and Forum apply to Securities Transactions on the Internet?", *University of Pennsylvania Journal of International Economic Law* 21: 585.

(2004) "Problems in Running a Global Internet Business: Complying with the Laws of Other Countries", PLI/PAT 797: 11.

Rice, D. T. and Gladstone, J. (2003) "An Assessment of the Effects Test in Determining Personal Jurisdiction in Cyberspace", *Business Lawyer* 58: 601.

Rosner, N. (2004) "International Jurisdiction in European Union E-Commerce Contracts", in Kinsella, N. S. and Simpson, A. F. (eds.), *Online Contract Formation* (New York, NY: Oceana Publications, Inc.), p. 481.

Scoles, E. F., Hay, P., Borchers, P. J. and Symeonides, S. C. (2000) *Conflict of Laws* (St. Paul, MN: West Group, 3rd edn.).

Smith, G. J. H. (2002) *Internet Law and Regulation* (London: Sweet & Maxwell, 3rd edn.).

Spencer, B. (2006) "Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts', *University of Illinois Law Review* 71.

Stone, R. (2005) *The Modern Law of Contract* (London: Cavendish Publishing Limited, 6th edn.).

Sun, N. S. and Du, T. (eds.) (2006) *Contemporary Private International Law Research: China and Private International Law in the 21st Century* (Shanghai: Shanghai People Publishing). 孙南申与杜涛主编，当代国际私法研究：21世纪的中国与国际私法 (上海：上海人民出版社，2006).

Symeonides, S. C. (Fall 2006) "Choice of Law in the American Courts in 2006: Twentieth Annual Survey", *American Journal of Comparative Law*, 54: 697.

Takahashi, K. (2002) "Jurisdiction in Matters relating to Contract: Article 5 (1) of the Brussels Convention and Regulation", *European Law Review* 27(5): 530.

Tan, P. (2001) "E-com Legal Guide Hongkong" (Baker & McKenzie) available at www.bakerinfo.com/apec/hongkong_main.htm (last visited on 6 February 2005).

Tao, J. (2005) *Resolving Business Disputes in China, Asia Business Law Series* (Netherlands: Kluwer Law International).

Traynor, M. and Pirri, L. (2002) "Personal Jurisdiction and the Internet: Emerging Trends and Future Directions", PLI/Pat 712: 93.

Trooboff, P. D. (23 July 2001) "International Law: the Hague Conference", *The National Law Journal*, available at www.cptech.org/ecom/jurisdiction/Covington.pdf (last visited on 17 August 2009).

Tu, G. (Spring 2007) "The Hague Choice of Court Convention: A Chinese Perspective", *American Journal of Comparative Law*, 55: 347.

Tunkel, D. and York, S. (2000) *E-commerce: A Guide to the Law of Electronic Business* (London: Butterworths, 2nd edn.).

Wang, F. (April 2006) "Domain Names Management and Legal Protection", *International Journal of Information Management*, 26(2): 116.

(2008) "Obstacles and Solutions to Internet Jurisdiction: A Comparative Analysis of the EU and US Laws", *Journal of International Commercial Law and Technology*, 3(4): 233.

(2009) *Online Dispute Resolution: Technology, Management and Legal Practice from an International Perspective* (Oxford: Chandos Publishing, 2009).

Wei, C. K. and Suling, J. C. (2006) "United Nations Convention on the Use of Electronic Communications in International Contracts – A New Global Standard", *Singapore Academy of Law Journal*, 18: 116.

Wilderspin, M. (2008) "The Rome I Regulation: Communitarisation and Modernisation of the Rome Convention", *ERA Forum* 9: 259 (ERA: Academy of European Law).

Yeo, T. M. (2004) *Choice of Law for Equitable Doctrines* (New York, NY: Oxford University Press, 2004).

Zhang, M. (Winter 2006) "Choice of Law in Contracts: A Chinese Approach" *Northwestern Journal of International Law and Business*, 26: 289.

List of Official Publications

A European Initiative in Electronic Commerce, COM (97) 157 at I (7).

Additional Procedures for On-line Arbitration (On-line Rules), Arbitration Court, the Czech Republic, available at www.arbcourt.cz/en_index.php?url=rady/en_rad_online_od_20040601.htm (last visited on 26 September 2009).

"Adoption of Two Commission Proposals is a Vital Step in Completing the European Law-Enforcement Area for Individuals and Firms" IP/05/1605, Brussels", 15 December 2005.

Agenda of the Seventh Inter-American Specialized Conference on Private International Law, AG/RES. 2527 (XXXIX-O/09), adopted at the fourth plenary session, held on 4 June 2009, available at www.oas.org/dil/AG-RES_2527_XXXIX-O-09_eng.pdf (last visited on 20 September 2009).

American Arbitration Association, ICDR Online Protocol for Manufacturer/Supplier Disputes, American Arbitration Association, available at www.adr.org/icdr (last visited on 26 September 2009).

American Bar Association Recommendation adopted by the House of Delegates, 7–8 August 2006, that the American Bar Association urges the United States government promptly to sign, ratify and implement the Hague Convention on Choice of Court Agreements, available at abanet.org/intlaw/policy/investment/hcca0806.pdf (last visited on 19 August 2009).

American Bar Association, "Recommended Best Practices by Online Dispute Resolution Service Providers", available at www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf (last visited on 18 June 2009).

American Bar Association Task Force on E-Commerce and ADR, "Addressing Disputes in Electronic Commerce, Final Report and Recommendation", available at www.abanet.org/dispute/documents/FinalReport102802.pdf (last visited on 29 July 2009).

Arbitration Fairness Act 2009, US, 111th Congress 1st session, H.R. 1020, 12 February 2009, available at www.govtrack.us/congress/billtext.xpd?bill=s111-931 (last visited on 22 September 2009).

Arbitration Law of the People's Republic of China, adopted at the 8th session of the standing committee of the Eighth National People's Congress and promulgated on 31 August 1994, available at english.sohu.com/2004/07/78/article220847885.shtml (last visited on 4 September 2009).

Arrangement between the Mainland and the Hong Kong Special Administrative Region on Reciprocal Recognition and Enforcement of the Decisions of Civil and Commercial Cases under Consensual Jurisdiction in 2008, No. 9 [2008] of the Supreme People's Court in the People's Republic of China, available at www.chinacourt.org/flwk/show.php?file_id=128128 (last visited on 16 August 2009).

Arrangement between the Mainland and the Macao Special Administrative Region on the Mutual Recognition and Enforcement of Civil and Commercial Judgments in 2006, No. 2 [2006] of the Supreme People's Court in the People's Republic of China, available at www.chinacourt.org/flwk/show.php?file_id=128128 (last visited on 16 September 2009).

Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (consolidated version), OJ C 027, 26.01.1998 p. 1–27, europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:41998A0126:EN:HTML (last visited on 13 November 2009).

China International Economic and Trade Arbitration Commission, Online Arbitration Rules, promulgated 8 January 2009, effective 1 May 2009.

Civil Procedure Law of the People's Republic of China, promulgated on 9 April 1991, available at en.chinacourt.org/public/detail.php?id=2694 (last visited on 27 August 2009).

Computer Information Network and Internet Security, Protection and Management Regulations, available at www.woodmedia.com/cinfolink/netregs.htm (last visited 31 August 2009).

Contract Law of the People's Republic of China, adopted and promulgated by the second session of the Ninth National People's Congress on 15 March 1999, available at cclaw.net/ (last visited 27 August 2009).

Convention on the Law Applicable to Contractual Obligations ("The Rome Convention 1980"), latest consolidated version, OJ C 334/1, 30.12.2005.

Convention between Belgium and France on Jurisdiction and the Validity and Enforcement of Judgment Arbitration Awards and Authentic Instruments (Paris 1899).

Convention between Belgium and the Netherlands on Jurisdiction, Bankruptcy, and the Validity and Enforcement of Judgements, Arbitration Awards and Authentic Instruments (Brussels 1925).

Council Decision of 26 February 2009 on the signing on behalf of the European Community of the Convention on Choice of Court Agreements (2009/397/EC), OJ L 133/1, 29.5.2009.

Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Regulation"), OJ L 012, 16.01.2001, pp. 1–23, available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001R0044:EN:HTML (last visited on 16 September 2009).

Council Regulation (EC) No. 1791/2006 of 20 November 2006 adapting certain Regulations and Decisions in the fields of free movement of goods, freedom of movement of persons, company law, competition policy, agriculture (including veterinary and phytosanitary legislation), transport policy, taxation, statistics, energy, environment, cooperation in the fields of justice and home affairs, customs union, external relations, common foreign and security policy and institutions by reason of the accession of Bulgaria and Romania, OJ L363 20.12.2006.

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.07.2000, pp. 1–16.

Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136/5, 24.5.2008, available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:EN:PDF (last visited on 25 May 2009).

Draft Model Law for Choice of Law Rules for Consumer Contracts, November 2006, by Canada for CIDIP, available at www.oas.org/dil/esp/Choice_of_Law_Rules_for_Consumer_Contracts%20_nov_2006.pdf (last visited on 20 September 2009).

Draft Model Law of Jurisdiction for Consumer Contracts, October 2006, by Canada for CIDIP, available at www.oas.org/dil/esp/propuesta_canada_pc_draft_model_law_on_jurisdiction.pdf (last visited on 20 September 2009).

Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims, CIDIP VII, draft / borrador 15 August 2008, available at www.oas.org/dil/Legislative_Guidelines_for_Inter-American_Law_on_Availability_of_Consumer_Dispute_Resolution_Annex_B_United_States.pdf (last visited on 26 September 2009).

Draft of Proposal for a Model Law of Jurisdiction and Applicable Law for Consumer Contracts, by Canada for CIDIP VII, in May 2008, available at www.oas.org/dil/Draft_of_proposal_for_a_Model_Law_on_Jurisdiction_and_Applicable_Law_for_Consumer_Contracts_Canada.pdf (last visited on 20 September 2009).

EuroISPA Position Paper "Green Paper on the Conversion of the Rome Convention into a Community Instrument: COM(2002)654", September 2003, available at ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/euroispa_en.pdf (last visited 25 August 2009).

Examination by the European Community of Existing Hague Conventions – Note drawn up by the Secretary General of the Hague Conference on Private International Law, p. 6, available at www.hcch.net/upload/wop/genaff_note-ec.pdf (last visited on 19 August 2009).

Explanatory Note on the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), p. 43, www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf (last visited 24 August 2009).

"Feasibility Study of the Choice of Law in International Contracts: Report on Work Carried Out and Suggested Work Programme for the Development of a Future Instrument", Note prepared by the Permanent Bureau, Preliminary Document No. 7 of March 2009, The Hague Conference on Private International Law, available at www.hcch.net/upload/wop/genaff2009pd07e.pdf (last visited on 30 September 2009).

General Principles of Civil Law of the People's Republic of China, promulgated on 12 April 1986.

Giuliano–Lagarde Report, [1980] OJ C282/1, p. 17, available at www.rome-convention.org/instruments/i_rep_lagarde_en.htm (last visited on 23 August 2009).

Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM (2002) 654 final, Brussels 14.1.2003, Commission of the European Communities, p. 25, available at eur-lex.europa.eu/LexUriServ/site/en/com/2002/com2002_0654en01.pdf (last visited on 25 August 2009).

Green Paper on the review of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final, Brussels, 21.4.2009, Commission of the

European Communities, available at www.ipex.eu/ipex/cms/home/Documents/doc_COM20090175FIN (last visited on 20 September 2009).

Hague Convention on Choice of Court Agreements, concluded 30 June 2005, available at hcch.net/index_en.php?act=conventions.text&cid=98 (last visited on 16 August 2009).

"ICC Comments on the European Commission's Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization", Department of Policy and Business Practices, Commission on Commercial Law and Practices, 3 October 2003 JA/ef, Document 373–33/8, p. 1, available at ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/international_chamber_commerce_en.pdf (last visited on 25 August 2009).

International Chamber of Commerce, «Incoterms 2000», available at www.iccwbo.org/incoterms/preambles/pdf/EXW.pdf (last visited 12 January 2009).

Law of the People's Republic of China on Electronic Signature, 28 August 2004, Eleventh Meeting of the Standing Committee of the Tenth National People's Congress of the People's Republic of China, available at www.law-bridge.net/english/LAW/20064/0221374918883.shtml (last visited on 28 September 2009).

Legislative Guidelines for Inter-American Law on Availability of Consumer Dispute Resolution and Redress for Consumers, available at www.oas.org/dil/CIDIPVII_documents_working_group_consumer_protection.htm (last visited on 26 September 2009).

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, status, available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited on 19 June 2009).

Online Arbitration Rules, 2009, China International Economic and Trade Arbitration Commission (CIETAC).

Organic Law of the People's Courts, promulgated by the National People's Congress in 1979.

Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM 1999/348, 99/0154), on 14 July 1999, available at eur_lex/europa.eu/LexUriServ/LexUriServ.do? uri=COM:1999:0348:FIN:EN:PDF (last visited on 12 January 2010).

Proposal for a Directive of the European Parliament and of the Council on consumer rights, Commission of European Communities, Brussels, 8.10.2008, COM (2008) 614 final, 2008/0196 (COD), available at ec.europa.eu/consumers/rights/docs/COMM_PDF_COM_2008_0614_F_EN_PROPOSITION_DE_DIRECTIVE.pdf (last visited on 29 June 2009).

Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), Brussels, 15.12.2005, COM (2005) 650 final 2005/0261 (COD).

Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligation (Rome I), Council of the European Union, 13853/06, LIMITE, JUSTCIV 224, CODEC 1085, Brussels, 12 October 2006.

Provisional Regulations of the People's Republic of China Governing the Management of Computer Information Networks Hooked Up With International Networks, available at www.fas.org/irp/world/china/docs/internet_960201.htm (last visited on 31 August 2009).

Recommendation regarding the interpretation of article II(2) and article VII(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), A/RES/61/33, 18 December 2006, available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2006recommendation.html (last visited on 16 September 2009).

Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation"), OJ L 177, 4.7.2008, pp. 6–16, available at eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:177:0006:01:EN:HTML (last visited on 16 September 2009).

Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Brussels, 21.4.2009, COM(2009) 174 final, Commission of the European Communities, available at www.ipex.eu/ipex/cms/home/Documents/doc_COM20090174FIN (last visited on 16 September 2009).

Rules for CNNIC Domain Name Dispute Resolution Policy, available at www.du.hkiac.org/cn/cne_rules_procedure.html (last visited on 25 May 2008).

"Study to Inform an Impact Assessment on the Ratification of the Hague Convention on Choice of Court Agreements by the European Community", Directorate-General Justice, Freedom and Security, Final Report submitted by GMK on 7 December 2007, available at ec.europa.eu/dgs/justice_home/evaluation/docs/final_report_071207.pdf (last visited on 20 September 2009).

Supreme People's Court Opinions on Certain Questions on the Application of the Foreign Economic Contract Law 1987.

UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules"), 2 February 2009, A/RES/63/122, available at www.uncitral.org/pdf/english/workinggroups/wg_3/res122e.pdf (last visited on 16 September 2009).

UN Convention on Contracts for the International Sale of Goods (CISG), 11 April 1980, UNCITRAL, available at www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf (last visited on 30 September 2009).

UN Convention on the Use of Electronic Communications in International Contracts, 9 December 2005, A/RES/60/21, UNCITRAL, available at daccessdds.un.org/doc/UNDOC/GEN/N05/488/80/PDF/N0548880.pdf?OpenElement (last visited on 30 September 2009).

UNCITRAL Model Law on Electronic Commerce, on the report of the Sixth Committee (A/51/628) 16 December 1996, available at www.lexmercatoria.org (last visited on 16 August 2009).

UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adepted in 2006, A/RES/61/33, 18 December 2006, available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html (last visited on 16 September 2009).

Uniform Computer Information Transactions Act (UCITA) with prefatory notes and comments, available at www.law.upenn.edu/bll/ulc/ucita/2002final.htm (last visited on 30 April 2009).

"US Signs Hague Choice of Courts Convention", 22 January 2009, Opinio Juris, available at opiniojuris.org/2009/01/22/us-signs-hague-choice-of-courts-convention/ (last visited on 16 August 2009).

WIPO eUDRP Initiative, available at www.wipo.int/export/sites/www/amc/en/docs/icann301208.pdf (last visited on 19 June 2009).

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