

Consumer Protection and Private International Law in Internet Contracts*

REINHARD SCHU**

Introduction

The popularity of the Internet is rapidly growing.¹ Until recently, the Internet was confined to academic use but now an increasing number of businesses set up their Internet sites and offer pages in the World Wide Web (WWW). They offer goods and services to customers, who usually pay by credit card or electronic cash. In the case of sale of goods the only physical transaction is the shipping of the goods. If the contract is for the supply of services on the Internet (e.g. supply of software or database access) no physical transaction takes place at all.

The vast majority of those contracts are consumer contracts, the supplier being a professional business and the purchaser being a natural person usually buying goods or services for private purposes.² In a considerable amount of contracts the purchaser might act in the course of business and will thus be in a position different from that of a genuine

* This paper was submitted in June 1996 as a dissertation by the author for his LL.M degree at the University of London. As noted by the author, the law has changed since then. For example, the Brussels Convention has now been replaced with an EU Regulation, which clarifies some of the issues discussed in the article. Meantime, the EU is also in the process of replacing the Rome Convention with a new Regulation. The readers are advised to consider the article as a discussion of principles, rather than an accurate reflection of the current law.

** The author is an Associate in the Law Firm of Morrison & Foerster in their London Office. M&F offers comprehensive, global services in business and litigation.

¹ The estimated number of users is 40 million; the estimated number of businesses is 21,000; Paul M. Eng, *Bus.Wk.*, 26 June 1995, 100.

² The notion of "consumer contract" will later be discussed in detail, see *infra*, 2.4.

consumer in terms of consumer protection. However, it is safe to assert that at present the "big business" is not done via the Internet due to the lack of security, but is rather done via closed systems such as SWIFTAmend.

The appearance of retail business on the Internet presents a factual pattern never seen before. Cross-border transactions used to be the concern of big enterprises and wholesalers, with retail sales confined to special areas and market niches. The Internet has changed that. Now thousands of consumer contracts are being made every day with the supplier and purchaser almost inevitably situated in different countries. Moreover, in a world-wide computer network, where it is not possible to trace the location of the other party to the contract,³ traditional choice-of-law terms such as "place of business", "place of performance", "place where the contract was made" seem to become meaningless.

What is the applicable law to consumer contracts for supply of goods and services made via the Internet? Which courts have jurisdiction to hear the case? These questions are not only of academic interest but their answers imply dramatic practical consequences both for the courts and for people doing business on the Internet. If the consumer receives defective goods or if she regrets having made the purchase, she wants to know where to sue the supplier and which law governs her right for damages or withdrawal respectively. The supplier, on the other hand, might find himself confronted with foreign consumer protection law which he does not know.

Uncertainty is an obstacle to economic activity. Thus the aim of this essay is to provide answers and solutions to the questions tackled above. First, I shall evaluate the status quo of consumer protection in cross-border sales. Then I shall apply the existing rules of private international law to consumer contracts made via the Internet with regard to some specific issues and find solutions concerning applicable law and

³ A computer's IP-Number or Domain Name Address does not necessarily tell its location, for instance three letter extensions like .com, .org and .net, and even a server with a ".us" or ".uk" domain name need not be located in those countries. Further, the place of business can also be different from the computer's location; see also Johnson & Post, at I.B. and n.11.

jurisdiction. Finally, I shall examine whether the general principles that underlie the consumer protection rules in private international law can be transplanted into the Internet environment. I shall find that a new set of basic rules is necessary to deal with the problem. The legal systems examined will be England in the context of the EC-Conventions⁴ and the United States of America. Considerable attention will also be drawn to international conventions relevant to cross-border consumer transactions.

Consumer Protection in International Sales

In most jurisdictions legislators have enacted consumer protection laws. They can generally be divided into two groups.⁵ The first group comprises all regulations that do not directly affect rights and duties between consumers and suppliers and/or manufacturers, e.g. safety or labeling regulations. They are part of the public law and are enforced by the authorities by means of fines, penalties or withdrawal of licenses. These rules are not subject to private international law, since, as a general rule, foreign public and penal laws are not enforced.⁶

The second group of consumer protection laws directly affects the legal relations between consumers, suppliers and manufacturers and are thus part of the private law. They can be further divided into laws dealing with contractual and non-contractual issues. In a sale of goods transaction a triangle of legal relations between manufacturer, supplier and consumer can be found. The contractual rights and duties between consumer and supplier and supplier and manufacturer respectively are subject to the doctrine of privity of contract.⁷ The legal relationship between purchaser and manufacturer is mainly concerned with torts⁸ and statutory liability.⁹

⁴ Rome Convention 1980, see *infra*, n.44; Brussels Convention 1968, see *infra*, n.231.

⁵ For a detailed discussion see Oughton, Chap.3; Goldring, para.7.

⁶ Morris, pp.46-50; That means that public laws will not be enforced extraterritorially by courts of a foreign country. Nevertheless, a person doing business in a country which has public law restrictions would usually have to comply with those rules, because that country will try to enforce them against him, for example by banning him from trading in that country or by seizure of his assets there.

⁷ See Oughton, p.35; *Preist v Last* [1903] 2 K.B. 148.

⁸ For instance *Donoghue v Stevenson* [1932] AC 562.

The circumstances under which a contract has been entered into, e.g. via the Internet, are crucial for the determination of the contractual rights and duties of the parties, but they are usually of little relevance for a liability under torts.

This paper is only concerned with the contractual relationship between purchaser and supplier in the context of private international law. Any further reference to "consumer protection" is made to contractual consumer protection issues affecting this relationship.

Such contract-related consumer protection issues are for example:

Protection against unfair contract terms, particularly those enshrined in standard-form documents, which result from inequality of bargaining power.¹⁰

Requirement of pre-contract disclosure of adequate information on finance agreements, with regard to consumers' lack of financial experience.¹¹

Giving consumers the right to cancel a contract during a cooling-off period, especially for agreements of long duration or for contracts made off trade premises as the result of unsolicited negotiations (e.g.

⁹ For instance in the UK: Consumer Protection Act 1987; In Europe: Directive 85/374/EEC of 25 July 1985 on product liability.

¹⁰ For instance in the UK Unfair Contract Terms Act 1977; Unfair Terms in Consumer Contracts Regulations 1994, S.I. No.59; in Germany Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen of 9 December 1976; In Europe Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L95/29); for further details see David W. Oughton, chap.5.

¹¹ For instance in the UK Consumer Credit Act 1974, ss.44,52, 55; in Germany Verbraucherkreditgesetz of 17 December 1990; in Europe Council Directive 87/102/EEC of 12 February 1987 on the approximation of the laws of Community States in respect of Consumer Credit (OJ L42/48); for further details see Oughton, pp.154-161.

doorstep selling)¹² or, most recently, for contracts concluded over a distance.¹³

A Basic Scenario

To illustrate the situation with which this paper is concerned, it is useful to describe a basic scenario that involves the typical problems arising from cross border Internet consumer contracts. Suppose a consumer located in the UK or any other EU Member State browses the World Wide Web and finds an interesting offer on a Web page of a supplier situated in the US. He might have been specifically looking for that supplier or generally for offers of that kind, or he might have discovered the offer accidentally by following a link or an advertisement on another page. The Web page itself might be on a server in the US, the UK or any other country. It is possible that the Web page gives specific information about the supplier and his place of business, but such information might as well be omitted. The content and appearance of the page could either clearly show that the supplier is foreign or it could lead the consumer to the assumption that the offer is specifically directed to consumers in the UK. The offer could be for goods to be shipped to the consumer's home address or for online services, like access to the supplier's database, which can again be physically located in any country.

The consumer will usually respond to the offer¹⁴ by email or by filling in a form on the supplier's web site, and a contract will eventually

¹² For instance in the UK Consumer Credit Act, s.67Amend; in Germany Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften of 16 January 1986; in Europe Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises (OJ L372/31).

¹³ Art.6 of the proposed EC Directive on the protection of consumers in respect of distance contracts, see Common Position (EC) No 19/95 of 29/06/95, O.J. C 288/01.

¹⁴ The "offer" will usually not be one in the contractual sense of "offer" and "acceptance", but an invitation to treat under the principle of *Pharmaceutical Society of Great Britain v. Boots Cash Chemists*, [1952] 2 Q.B. 795.

be made electronically.¹⁵ The supplier may have imposed his standard terms, which contain choice-of-law and choice-of-forum clauses. Any subsequent litigation arising from the contract, be it for breach of contract or specific consumer rights like the right to cancel the contract, will inevitably rise questions of jurisdiction and choice of law. The consumer, ready to sue the supplier, has to decide in which country to bring the action. Both in the US and in the UK the courts will first decide whether they have jurisdiction to hear the case. They will then determine the applicable law by applying their own choice-of-law rules, which can lead to different results. Thus a US court could apply English law and vice versa. The same applies for a supplier suing the consumer for payment of the agreed price or service fee.

The situation can be altered by reversing the locations with the consumer resident in the US and the supplier having his place of business in the UK. Of course, both can also be located in virtually any other country of the world.

Balancing Conflicting Interests and Party Expectations

It is apparent that in different jurisdictions consumer protection laws afford different levels of protection to the consumer. The level of consumer protection is a matter of balancing irreconcilable interests. Suppliers would like to trade without any restrictions and maximise their profits whereas consumers want to be protected against unfair terms, abuse of their inexperience etc. It is up to the legislator's discretion to find a balance between those interests and set up a sensible level of consumer protection in domestic law.

This conflict of interests is mirrored on the international level. In a cross-border transaction where supplier and consumer are resident in different jurisdictions, at least two domestic sets of rules on consumer protection can potentially be applied. In solving this "conflict of laws" the

¹⁵ This paper is not concerned with the question of how a valid contract is made by electronic means of communication. The formal validity of the contract will always be assumed.

conflicting interests of the parties as well as the involved legislators have to be balanced.

Two aspects have to be distinguished thereby: the parties' expectations and governmental interest.¹⁶ Parties will have reasonable expectations to which law applies to their transaction. The closer a contract is connected to a particular jurisdiction the more justified is the expectation of either party that the law of that jurisdiction apply. But distance selling contracts and contracts for the supply of services across borders are usually not unequivocally most closely connected to one jurisdiction, thus parties expectations might conflict: the consumer expects the protection of the law of the country where he is habitually resident whereas the supplier relies on the application of the law of the country where he has his place of business. The prime example for a solution to that problem in private international law is art.5(2) of the EC contractual obligations Convention,¹⁷ which makes mandatory consumer protection rules of the consumer's country of residence applicable in situations where the consumer can reasonable expect them to apply.

The second aspect, governmental interest analysis, has been subject to discussion especially in the US since Brainerd Currie's theory evolved,¹⁸ and has been widely followed in the United States¹⁹ and found its way into the Restatement 2d.²⁰ According to the theory, states have an interest in the application of their laws according to the underlying policies which the states seek to implement. A country, for instance, with strict consumer protection legislation is interested in having that legislation protect its residents when contracting with suppliers of countries with a more liberal regime on that issue. Conversely, the latter country seeks to have its more relaxed rules applied in order to shield its suppliers from too protective foreign consumer laws. Governmental

¹⁶ See for the same distinction Restatement 2d, § 6(2)(c),(d).

¹⁷ See *infra*, n.44.

¹⁸ Currie, *passim*; Cramton, D. Currie and Kay, pp.201-308; see on governmental interest analysis in general Scoles & Hay, pp.15-19; Morris, *Conflict of Laws*, pp. 450-455.

¹⁹ For an evaluation see Kay, 34 *Merc.L.Rev.* (1983), pp. 538-552.

²⁰ § 6(2)(c).

interest analysis is helpful in identifying the conflict issues and eliminating "false conflicts",²¹ but does not provide solutions for solving the real conflicts. Nevertheless, it is a consideration factor in determining the applicable law, especially in the US.

The conflict of expectations of the parties and of governmental interests is the fundamental basis for all problems occurring in the context of consumer protection and private international law. Solutions ought to be based on that principle.

Methods of consumer protection in international contracts

Whilst on the national level the interests of consumers and suppliers are balanced by the legislator, this task has to be fulfilled on the international level by supranational bodies with legislative power such as the European Union or by interstate agreements such as the Hague Conventions concluded under the aegis of the Hague Conference on Private International Law.²² In the absence of any international legislation or treaty the forum before which the case is heard will apply its conflict rules and by doing so it will eventually balance the conflicting interests.

There are a number of methods of dealing with consumer protection in the context of international contracts. Two principal approaches have to be distinguished:

The first is to implement supranational uniform substantive law on consumer protection. The main feature of this approach is that the uniform law applies immediately to the contract and private international law is excluded.²³

²¹ Currie, chap.2; Cramton, D. Currie and Kay, pp.222-251; *Babcock v. Jackson* 12 N.Y. 2d 473 (1963); For an overview on the issue of false conflicts see Cheshire and North, p.32.

²² Statute signed at the Hague on 31 October 1851, 220 U.N.T.S. 121. The texts of the conventions are published in the Collection of Conventions.

²³ However, sometimes a preliminary stage is invoked, where the conflict rules of the forum have to point to the law of one of the member states of the uniform law in order to make the uniform law applicable.

The second approach uses traditional methods of private international law and is, according to the main fields of private international law, twofold: Firstly, the consumer can be protected in the course of determining the applicable law of the contract by applying a law or single rules of a law that is more protective for the consumer or which is the law the consumer expected to be applied. This will often be the law of the consumer's habitual residence. Secondly, when the court has to decide whether it has jurisdiction to hear and decide the case, the consumer can be protected by enabling him to sue in the country of his habitual residence, as this is usually much more convenient and cheaper than to sue a supplier in a foreign country.

Again, within those two fields, two categories have to be distinguished. The presence and the absence of a choice-of-law and a choice-of-court clause respectively.

With regard to choice-of-court or arbitration clauses there is only one principal way to protect the consumer. If the consumer, by way of a choice-of-court clause, is deprived of his opportunity to sue the supplier at courts which would normally have jurisdiction, the clause may be void.²⁴

Where a choice-of-law clause is present, two different solutions are possible:²⁵ on one hand, the material validity of such a clause could be attacked.²⁶ On the other hand, one could accept that the contract is governed, in general, by the chosen law. Nevertheless the consumer might retain the protection of mandatory rules, particularly the consumer-protection rules, of his jurisdiction.²⁷

In the absence of a choice-of-law clause, the forum has to determine the applicable law according to its domestic conflict rules. All international conventions²⁸ and all modern western legal systems²⁹ use,

²⁴ For example art.15 of the Brussels Convention restricts the freedom to choose a forum. 1986; art.9(1) of the Inter-American Convention.

²⁵ See Hartley in *Contract Conflicts*, 113.

²⁶ Discussed *infra*, 2.5.2.

²⁷ The concept of mandatory rules will be discussed *infra*, 2.5.3.

²⁸ For example art.4(1) of the Rome Convention; art.8 of the Hague Convention

with differences in detail, the same flexible approach to determine the applicable law to a contract. It is the law of the country to which the contract has its closest connection. The principal matters to be taken into account in determining that country are the place of contracting, the place of performance, the place of residence or business of the parties respectively, and the nature and subject-matter of the contract.³⁰ The conflict of interests between consumer and supplier has to be taken into account as an additional factor.

The following sections evaluate how these basic ideas and principles are implemented in international uniform law and private international law.

International Uniform Law

There are so far two uniform laws which might have some relation to consumer protection: the Hague Convention relating to Uniform Law on the International Sale of Goods³¹ and the United Nations Convention on Contracts for the Sale of Goods³² (CISG). Both conventions contain substantive rules and exclude rules of private international law for the purpose of the application of those rules,³³ provided the contract is within the scope of the respective convention.

²⁹ For the Common Law in England prior to the enactment of the Rome Convention see for instance *Bonython v. Australia* [1951] A.C. 201, per Lord Simonds at 209; For details see Morris, pp.254-256; For the US see Restatement 2nd, § 188.

³⁰ See for instance *Re United Railways of the Havana and Regla Warehouses Ltd.*[1960] Ch.51, 91.

³¹ De Hague 1 July 1964. On the same day a second Convention relating to Uniform Law on the Formation of Contracts for the International Sale of Goods was signed. Texts of both Uniform Laws can be found as Schedules to the Uniform Laws on International Sales Act 1967. Contracting states are at present Belgium, Gambia, Israel, Luxembourg, The Netherlands, San Marino and The United Kingdom.

³² Vienna 11 April 1980, 19 ILM (1980) 671. Up to date the Convention has been ratified by 28 states.

³³ Art.2 of the Hague Uniform Law; art.1(1) of the United Nations Convention.

The Hague Uniform law (ULIS) applies to the sale of goods, unless its application is excluded by the parties,³⁴ where the parties have their residence or place of business in different states³⁵ and one of the following conditions is fulfilled: The contract concerns the sale of goods which are to be carried from one state to another or the acts constituting offer and acceptance have been effected in different states or the goods are to be delivered to a state other than that where the acts constituting offer and acceptance have been effected.³⁶ The Uniform Law applies to all contracts of sale regardless of the commercial or civil character of the parties³⁷ and thus includes consumer contracts.

However, the Uniform Law's impact on consumer protection remains limited. The only rule dealing with that issue is Article 5(2), which provides that the uniform law shall not affect mandatory provisions of national law for the protection of the buyer if the price is to be paid by installments. This provision makes, within a uniform international law, use of a different means of consumer protection, the concept of mandatory rules, which will be discussed later. The Uniform Law only governs the obligations of buyer and seller arising from the contract. In particular it is not concerned with the material validity of the contract or of any of its provisions.³⁸ Hence, for consumer protection issues such as unfair terms or canceling periods the forum has to fall back to its private international law rules.

Moreover, ULIS is condemned to death since CISG, which is intended to supersede the unsuccessful Hague Uniform Law,³⁹ came into

³⁴ Art.3; In the UK and Gambia, however, the Uniform Law must be expressly chosen by the parties, s.1(3) Uniform Laws on International Sales Act 1967.

³⁵ Due to an option in the Convention these have to be contracting states in Gambia, Luxembourg, The Netherlands, San Marino and the UK. In Belgium and Israel they can be any states.

³⁶ Art.1(1).

³⁷ Art.7.

³⁸ Art.8.

³⁹ For the reasons see Ulrich Magnus, *European Experience with the Hague Sales Law*, (1979) 3 *Comp.L.Ybk.* 105.

force on 1 January 1988. Germany and Italy have already withdrawn from the Uniform law in favour of CISG and the remaining states are likely to follow eventually. Nevertheless, until then the Uniform law governs the obligations of seller and buyer where it is applicable.

The United Nations Convention does not apply to "sales of goods bought for personal, family or household use" unless the seller neither knew nor ought to have known that the goods were bought for any such use.⁴⁰ Thus, it does not apply to consumer contracts in the first place. But even where it is applied to a consumer contract either by contractual choice or because the seller neither knew nor ought to have known that he contracted with a consumer, the Convention, like the Hague Uniform Law, is only concerned with the obligations of the seller and the buyer and not with the material validity of the contract or its provisions.⁴¹

Private International Law

Since the existing uniform laws are of little significance for international consumer contracts⁴² and are only concerned with the immediate obligations of the parties, it is up to the private international law to provide methods of consumer protection in international transactions.

In this context, private international law is concerned with two major issues: determining the applicable law to the contract and deciding which courts have jurisdiction to hear the case. Unlike uniform law, private international law is in fact national law,⁴³ hence the forum will always apply its domestic private international law to determine the applicable law to the contract and to decide whether it has jurisdiction over the case. However, a number of international conventions to harmonise private international law exist; those relevant for consumer protection will be discussed below. Private international law conventions

⁴⁰ Art.2(a).

⁴¹ Art.4(a).

⁴² See also Dicey & Morris, p.1329.

⁴³ Morris, p.1.

are to be implemented by the national legislators, hence their provisions are national law and thus subject to differing interpretation.

International Conventions on private international law relevant to consumer contracts

There are a number of international conventions on private international law which are related to the supply of goods or services to consumers. They all share the same approach, which is to provide rules of private international law to be implemented by the member states and thus to harmonise rules of private international law.

The most important is the EC Convention on the Law Applicable to Contractual Obligations.⁴⁴ This Convention is in force in all Member States of the EU and supersedes the former private international law on contracts in the Member States.⁴⁵ According to art. 1(1) of the Convention, it applies to contractual obligations in any situation involving a choice between the laws of different countries and is thus not confined to situations where a choice between the laws of two Member states is in question⁴⁶ A number of issues are excluded from the Convention's scope, the most important of which are questions involving the status or legal capacity of natural persons.⁴⁷ Also excluded are insurance contracts which cover risks situated in the EC.⁴⁸ As it will be seen in more detail, the Convention confers to the parties the freedom to choose the law governing

⁴⁴ Rome, 19 June 1980, [1980] O.J. L266, hereinafter cited as Rome Convention; The accompanying Report may be taken into account for construction of the Convention's provisions, Contracts (Applicable Law) Act 1990, s.3(3)(a).

⁴⁵ In the UK it was implemented by the Contracts (Applicable Law) Act 1990 and has the force of law there since 1 April 1991.

⁴⁶ Art.2; Report, p.13.

⁴⁷ Art.1(2)(a).

⁴⁸ Art.1(3).

the contract, subject to mandatory rules of the law of the consumer's country for certain consumer contracts.⁴⁹

Of some impact to international consumer sales are the Conventions on international sales of 1955 and 1986⁵⁰ by the Hague Conference on Private International Law.⁵¹ The Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods⁵² is in force in nine states.⁵³ Like the Rome Convention, it excludes questions of capacity⁵⁴ and confers to the parties the freedom of choice of the applicable law.⁵⁵ Although the Convention applies to all sales contracts including consumer contracts,⁵⁶ no provisions concerning mandatory rules similar to those contained in art.5 of the Rome Convention are made.

The Hague Convention 1955 is to be replaced by the Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sales of Goods⁵⁷ for states which are party to both. Thus, the 1955 Convention will remain in force in states which are not party to

⁴⁹ Art.5(2).

⁵⁰ On them see Lando, *The 1955 and 1985 Hague Conventions on the Law Applicable to the International Sale of Goods* (1993) 57 *RabelsZ* 155.

⁵¹ See *supra*, n.22.

⁵² 1952) 1 *AJCL* 275; 510 *U.N.T.S.* 147, hereinafter cited as *Hague Convention 1955*; for detailed information see Lipstein, (1993) 42 *ICLQ* 553, pp.616-622; Kaye, pp. 367-368.

⁵³ Belgium, France, Denmark, Italy, Finland, Norway, Sweden, Switzerland and Niger; Luxembourg, Netherlands and Spain have signed the Convention but not yet ratified it

⁵⁴ Art.5(1).

⁵⁵ Art.2

⁵⁶ Lipstein, (1993) 42 *ICLQ* 553, 619 note 528; However, the Final Act of the 14th Session of 25 Oct. 1980 contains a declaration that the 1955 Convention does not prevent States Parties from applying special rules on the law applicable to consumer sales, for the text of the Declaration see (1982) 46 *RabelsZ*, 799.

⁵⁷ (1985) 24 *ILM* 1573, (1987) 51 *RabelsZ*, 196; hereinafter cited *Hague Convention 1986*; for detailed information see Lipstein, (1993) 42 *ICLQ* 553, pp. 616-622; Kaye, pp.367-368.

the latter. The 1986 Convention is not yet in force.⁵⁸ It also, under exclusion of questions of capacity,⁵⁹ confers freedom of contractual choice of law.⁶⁰ The Convention does, however, not apply to consumer Contracts.⁶¹

The 14th Hague Conference in 1980 produced a draft Convention on the Law applicable to certain Consumer Sales,⁶² which is worth mentioning, although it has never actually become a convention. One of the shortcomings of the Hague Convention 1955 was that insufficient attention had been given to mandatory rules and consumer protection.⁶³ Hence a set of rules contained in the Draft was produced which was aimed to be either included in the Hague Convention 1986 or to become a convention of its own. However, although the 1986 Convention excludes consumer contracts, the Draft Convention was not pursued further.⁶⁴ The Draft Convention applies to international consumer sales of goods,⁶⁵ but only if the contract is in some certain way closely connected to the country of the consumer's habitual residence.⁶⁶ Like the Rome Convention, the Draft Convention confers to the parties the freedom to choose the applicable law, but that choice is subject to the mandatory rules of the law

⁵⁸ Ratified by Argentina; signed by Czech Republic, Netherlands and Slovak Republic; comes into force after its fifth ratification.

⁵⁹ Art.5(a).

⁶⁰ Art.7(1).

⁶¹ Art.2(a).

⁶² Hereinafter cited Draft Consumer Sales Convention 1980; for the text see (1982) 46 *RabelsZ* 795; on the Draft Convention see Böhmer, *Die 14. Haager Konferenz über Internationales Privatrecht 1980*, (1982) 46 *RabelsZ* 643, pp.657-662; Hartley in *Contract Conflicts*, pp.122-123.

⁶³ Lipstein, (1993) 42 *I.C.L.Q.* 553, 619

⁶⁴ For more Information see Lando, *The 1985 Hague Convention on the Law Applicable to Sales*, (1987) 51 *RabelsZ* 60, pp.63-64.

⁶⁵ Art.1(1).

⁶⁶ Art.5; see *infra*, 2.5.3.2.

of the country of the consumer's habitual residence.⁶⁷ Interestingly, the choice must be express and in writing,⁶⁸ a requirement which could not be satisfied by Internet contracts.

Another convention on the private international law on contracts is the Inter-American Convention on the Law Applicable to International Contracts of 1994,⁶⁹ which is not yet in force but might eventually be ratified by 17 Latin American states as well as the US and Canada. Regarding the freedom of the parties to choose the applicable law, the provisions of the Convention are similar to those of the Rome Convention: the parties are free to express a choice of law,⁷⁰ subject to mandatory rules of the forum or another state with which the contract has close ties.⁷¹ Although the Convention does not exclude consumer contracts from its scope it does not contain any special provisions on such contracts.

Definition of "consumer contract"

Before examining the private international law on consumer contracts a definition of "consumer contract" for the purpose of this paper should be given. Definitions for "consumer contract" can be found in a number of provisions.⁷² Although they differ in terminology and some

⁶⁷ Art.6(1).

⁶⁸ Art.6(2).

⁶⁹ Done at Mexico City, 17 March 1994, by the Fifth Inter-American Specialised Conference on Private International Law (CIDIP-V) of the Organisation of American States (OAS); for the text see (1994) 33 I.L.M. 732; hereinafter cited Inter-American Convention; for further information see Juenger, (1994) 42 Am.J.Comp.L. 381.

⁷⁰ Art.7(1).

⁷¹ Art.11.

⁷² S.12 Unfair Contract Terms Act 1977; s.2(1) Unfair Terms in Consumer Contracts Regulations; Directive on unfair terms in consumer contracts, supra n.10, art.2(b),(c); art.5(1) Rome Convention; art. 13 Brussels Convention; art.2(c) Hague Convention 1986; art.1(1) Draft Consumer Sales Convention 1980; art.2(a) CISG; UCC § 2A-103(1)(e); draft § 2B-102(6).

details, the main features of a consumer contract can be identified as follows.⁷³

The contract is for the provision of goods or services for personal, family or household use or for the provision of credit for that.

The supplier is acting in the course of his business.⁷⁴

The purchaser is an individual acting outside his trade or profession.

Some ambiguity exists in some of the provisions⁷⁵ as to whether the supplier must know or ought to have known the purpose for which goods or services are wanted.⁷⁶ Nevertheless the definition given here can be used for reference to "consumer contracts" for the purposes of this paper.

Consumer Protection and choice-of-law

The freedom of the parties to choose the governing law and limitations thereon

The freedom of the parties to a contract to choose⁷⁷ the applicable law has been a long standing principle of private international law in both common law and civil law jurisdictions.⁷⁸ Its philosophical origins can be found in the dogma of laissez-faire.⁷⁹ That said, it is apparent that

⁷³ See also Hartley in *Contract Conflicts*, pp.124-125.

⁷⁴ That requirement is not contained in the wording of the Rome Convention but is made clear by the Report, p.23; see Morse, (1982) 2 *Ybk.Eur.L.* 107, 134.

⁷⁵ S.12 of the 1977 Act; art.5(1) Rome Convention.

⁷⁶ On that problem see Morse (1992) 41 *I.C.L.Q.* 1, 4; Report, p.23.

⁷⁷ That choice can be either express or implied. The issue of under what circumstances there is an implied choice can not be further pursued in this paper; on that issue see Stone, p.237 et seq.

⁷⁸ See Report, pp.15-16; Cheshire and North, p.476; Scoles and Hay, pp.659-662.

⁷⁹ Cheshire and North, p.476.

consumer protection, which always curbs contractual freedom, must put some limitations on the parties' freedom to choose the governing law.

Before the limitations of the parties' freedom to choose the applicable law can be examined, two major distinctions have to be made:

Firstly, two types of contracts have to be distinguished: commercial contracts, where there is equal bargaining power between the parties and contracts tainted with dirigisme, where the economically stronger party offers to enter the contract with its standard clauses on a "take it or leave it" basis.⁸⁰ The latter are characterised by an inequality or even absence of bargaining power, and thus the powerful party is able to dictate its conditions to the other party.⁸¹ National legislation deal with this issue would be worthless if the dictating party could simply include a choice-of-law clause in order to evade certain national consumer protection rules.⁸² Thus the freedom of choice of the parties, which is in fact freedom of only one party to choose the governing law, must be restricted in some way.

Secondly, a choice-of-law can either be made in favour of a legal system with which the contract has some connection, e.g. the place of business or residence of either party, or the choice can be made in favour of a legal system which has no such contacts. The latter case includes the "internationalisation" of domestic contracts by invoking a choice-of-law clause in a contract which has all its other connections with one country only.⁸³ In a commercial transaction, the choice of an apparently unconnected law can be acceptable, because the parties might have reasons for their choice, for example because the stipulated law contains provisions which suit the parties' needs, or the parties might simply be used to that law.⁸⁴ In contracts for the carriage of goods by sea, for instance, it is common to include a choice of law rule in favour of English

⁸⁰ Lando, *Int. Encyclopedia*, pp.26, 37.

⁸¹ Ehrenzweig, (1953) 53 *Colum.L.Rev.* 1072.

⁸² Hartley in *Contract Conflicts*, p.113.

⁸³ This is dealt with for instance by art.3(3) of the Rome Convention.

⁸⁴ Stone, p.233; *Restatement 2d*, § 187 comment f.

law, even when there is no other connection to England.⁸⁵ As long as there is a reasonable basis for the parties' choice, there is no reason why the reference to an unconnected law should not be valid. In contrast, in a contract where the choice-of-law clause was imposed by one party, it can hardly be seen why the parties should have a reasonable basis for choosing an unconnected law. The reason for the stronger party would rather be to evade the protective rules of any law connected to contract. Thus, in a typical consumer transaction a choice-of-law clause which chooses an unconnected law should prima facie be void or overridden by mandatory consumer protection rules. On the other hand, where in a consumer transaction a law of a state which has some connection to the contract is chosen, it can not be said without further consideration whether such a choice should be upheld. As discussed before,⁸⁶ it is a matter of balancing the conflicting interests of consumer and supplier in such a case.

As it was seen earlier,⁸⁷ restrictions of the freedom to choose the applicable law can be achieved in two different ways: either by rendering the choice-of-law clause itself void or by applying the chosen law in general but overriding it with mandatory consumer-protection rules of a different law.

The formation and material validity of a choice-law-clause

The Law governing formation and existence

Before it can be examined whether a choice-of-law clause in a consumer contract is materially valid or to be overridden by mandatory rules, it must be shown that the consumer has given consent to the clause, which will typically be included in standard contract terms. That issue is one of domestic law of contract and cannot be further pursued in the

⁸⁵ *Vita Food Products v. Unus Shipping Co.*, [1939] A.C. 277, at p.290 per Lord Wright.

⁸⁶ *Supra*, 2.2.

⁸⁷ *Supra*, 2.3.

context of this paper, for it is a large legal area which raises a considerable number of problems.⁸⁸

The existence and material validity of a choice-of-law clause is to be examined in two stages. First, it has to be decided, which law governs that question and, secondly, under that law the formation and material validity of the clause has to be tested. It is generally agreed that the question of formation and validity of a choice-of-law clause has to be separated from the formation and validity of the contract as a whole and that the validity of the contract does not necessarily imply the validity of the choice-of-law clause.⁸⁹ Thus the law governing formation and validity of the choice-of-law clause can be different from that governing the formation and validity of the contract.

There are four possibilities as to which law governs the formation of the choice-of-law clause: the law of the forum, the law chosen in the choice-of-law clause, the law which would apply in the absence of a choice of law or, by rejection of a fixed rule, the law determined by the court's discretion.⁹⁰

The international conventions on the conflict of laws on contracts follow the second approach.⁹¹ According to the respective articles⁹² the existence and material validity of a choice-of-law clause is determined by the law chosen. The Rome Convention contains an important exception to that rule concerning the existence of the clause: to establish that he did not consent to the choice of law, a party can rely on the law of the state where he has his habitual residence, if in the circumstances it is not reasonable to determine the issue of consent to the clause under the chosen law.⁹³ Under

⁸⁸ For a comparative study see H. Otto, *Allgemeine Geschäftsbedingungen und Internationales Privatrecht* (1984).

⁸⁹ Lando, *Int. Encyclopedia*, p.44.

⁹⁰ See Lando, *Int. Encyclopedia*, p.44-45.

⁹¹ Rome Convention art.3(4), art.8(1); Hague Convention 1955 art.2 Par.3; Hague Convention 1986 art.10(1). Inter-American Convention, art.12(1).

⁹² *Ibid.*

⁹³ Arts.3(4), (2); See also art.10(3) of the Hague Convention 1986.

the Inter-American Convention the judge has the power to determine the applicable law to establish that one party has not duly consented. In the US, there is no clear answer to the question,⁹⁴ but some cases seem to apply the *lex fori* to the question of formation and validity.⁹⁵ The following sections examine the material validity of a choice-of-law clause in some legal systems.

English Common Law

In English Common Law prior to the Rome Convention, the parties had the freedom to choose the law applicable to the contract.⁹⁶ The only restriction thereto was set up in *Vita Food Products Inc. v Unus Shipping Co.*,⁹⁷ where it was held that a choice-of-law clause was valid unless it was not *bona fide* or illegal.⁹⁸ *Vita Food* was concerned with a commercial contract where a choice-of-law clause referring to English law was upheld, even though the contract had no local contact with England. Therefore, no conclusions could be drawn from this case as to whether consumer contracts, particularly those imposing standard clauses, would be subject to a stricter test. Despite an academic argument for an English doctrine invalidating a choice-of-law if its purpose was to evade mandatory rules of the law most closely connected with the contract,⁹⁹ there were no indications that the English courts would, subsequently to

⁹⁴ See Scoles & Hay, p.662.

⁹⁵ *Fricke & Isbrandtsen*, 151 F.Supp. 465; *Siegelman v. Cunard White Star*, 221 F.2d 189 (1955).

⁹⁶ See per Lord Atkin in *R v. International Trustee* [1937] A.C. 500, 529; per Lord Wright in *Vita Food Products Inc. v. Unus Shipping Co.* [1939] A.C. 277, 289; per Lord Diplock in *Amin Rasheed v. Kuwait Insurance Co.* [1984] 1 A.C. 50, 61.

⁹⁷ [1939] A.C. 277.

⁹⁸ At p.290 per Lord Wright.

⁹⁹ Dicey and Morris 9th ed. (1973), p.730.

Vita Food, treat consumer contracts differently from commercial contracts.¹⁰⁰

However, in the seventies a number of statutes which dealt with the issue were enacted.¹⁰¹ The Unfair Contract Terms Act 1977 deals with standard contract terms in consumer contracts and one might expect to find a provision there that renders choice-of-law clauses invalid. However, the only provision dealing with that matter¹⁰² follows the mandatory rules approach, i.e. the choice of law clause is valid in general and only overridden by the mandatory rules of the Act. Even before the 1977 Act, in the Scottish case of *English v. Donnelly*¹⁰³ a choice-of-law clause in favour of English law in a consumer contract was not held invalid but a Scottish mandatory provision was applied. Other statutory provisions dealing with the issue¹⁰⁴ also follow the mandatory rules approach.

It may thus be concluded that in the UK choice-of-law clauses in consumer contracts have not been rendered invalid but have been subject to the mandatory rule approach. This was, in principle, not changed by the enactment of the Rome Convention.

International Conventions

The Rome Convention and the other International Conventions confer to the parties the freedom to choose the applicable law. According to Art. 3(1) of the Rome Convention, "a contract shall be governed by the law chosen by the parties." The Convention does not contain any provision which would render a choice-of-law clause void. Even where all relevant elements are connected with only one country and the parties have chosen the law of a different country the choice is upheld in

¹⁰⁰ Lando, *Int. Encyclopedia*, p.17.

¹⁰¹ Supply of Goods (Implied Terms) Act 1973, s.13; this was replaced by the Unfair Contract Terms Act 1977, s.27(2); Sale of Goods Act 1979, s. 56(1).

¹⁰² S.27(2).

¹⁰³ 1958 S.C. 494; 1959 S.L.T. 2.

¹⁰⁴ *Supra* n.101.

principle, but Art. 3(3) provides that the choice does not prejudice the application of the mandatory rules of the country with which the contract has its only connection.

It is uncertain whether the freedom of choice conferred by the Rome Convention means that the bona fide test no longer applies in English law. Giving the parties the freedom to choose the applicable law in principle is surely a matter of private international law. Hence, this issue is now entirely governed by the Rome Convention. It is another question, however, whether the choice-of-law clause, as a matter of contract law, should be invalidated because consent to it was obtained by improper means, particularly as part of a standard contract.¹⁰⁵ This issue is dealt with by the law which governs the material validity of the choice-of-law clause.¹⁰⁶ Since the Rome Convention excludes Renvoi,¹⁰⁷ this can only be the substantive law on contracts of that law. A court applying the Rome Convention must, therefore, test the validity of the choice-of-law clause under the contract law of the chosen law first, and then move on to the Convention's provisions on mandatory rules. If the chosen law is English law, this could mean that the bona fide test has to be applied if the rule in *Vita Food* is one of contract law rather than one of private international law.¹⁰⁸ There is no authority on this point but it could be argued that the bona fide test, which has never been further developed, is now obsolete because the Rome Convention provides a set of provisions concerning mandatory rules in order to protect parties from unjust results. This argument can be supported by two recent instruments of legislation by the European Union on contract law. The Council Directive on unfair terms in consumer contracts¹⁰⁹ contains an annex of terms which are normally deemed unfair in standard contracts. This list does not comprise choice-of-law clauses. Instead, Member States are required to ensure that the consumer does not lose the protection of the Directive by virtue of the

¹⁰⁵ Scoles and Hay, p.662; Restatement 2d, § 187 comment b.

¹⁰⁶ Art.3(4), art.8(1).

¹⁰⁷ Art.15.

¹⁰⁸ See Kaye, p.52.

¹⁰⁹ See *supra*, n.10.

choice of a non-Member country's law.¹¹⁰ Accordingly, s.7 of the Unfair Terms in Consumer Contracts Regulations 1994¹¹¹ operates similarly to s.27(2) of the Unfair Contract Terms Act by retaining the protection of the Regulations even if another law governs the contract by virtue of a choice-of-law clause. The same approach is taken by the proposed Directive on Distance Selling,¹¹² again assuming that a choice-of-law clause even in consumer contracts is valid.¹¹³ A different situation might arise if the chosen law contains rules which render a choice-of-law clause invalid because it is part of a consumer or standard contract. In Germany, for instance, prior to the enactment of the Rome Convention on 1 September 1986¹¹⁴ a choice-of-law clause in a purely domestic contract was void if included in standard terms.¹¹⁵ This provision was expressly repealed by the act incorporating the Rome Convention into German law in order to harmonise national law with Art.3(3) of the Convention. If the chosen law is US law it is quite possible that the choice-of-law clause is to be held void.¹¹⁶

United States of America

In the US, party autonomy to choose the applicable law is now commonly accepted,¹¹⁷ although this attitude was developed much later than in the European countries.¹¹⁸ § 187 (2) of the Second Restatement

¹¹⁰ Art.6(2).

¹¹¹ See *supra*, n.10.

¹¹² See *supra*, n.13.

¹¹³ Art.12.

¹¹⁴ BGBl. 1986 II 809.

¹¹⁵ AGBG § 10 Nr.8; This provision was repealed by the 1986 Act.

¹¹⁶ See *infra*, 2.5.2.3.

¹¹⁷ See Scoles and Hay, p.661.

¹¹⁸ See Lando, *Int. Encyclopedia*, p.24-25; Blom (1979) 17 *Can.Ybk.Int.L.* 206, 207-212.

provides that the local law of the state chosen by the parties will be applied even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement. Similarly, § 1-105(1) of the Uniform Commercial Code provides that the parties may agree that the law of the state or nation of their choice shall govern their rights and duties. This freedom of choice is, however, subsequently limited by two restrictions:

Firstly, the chosen law must bear a substantial relationship to the parties or the transaction or there must be another reasonable basis for the parties' choice.¹¹⁹ In a sales contract, this means that the law chosen must ordinarily be that of a jurisdiction where a significant enough portion of the making or performance of the contract occurs.¹²⁰ This restriction refers to the case of selection of a law to which the contract has no local contact. As it was seen earlier,¹²¹ there is usually no reasonable basis for that in a consumer contract. Thus, unlike under the Rome Convention,¹²² a choice-of-law clause in a consumer contract selecting a law which does not bear any relationship with the contract, a situation which scarcely occurs in practice,¹²³ is likely to be held void by American courts.¹²⁴

The second restriction to the freedom of choice of law is much more important. The law chosen by the parties will not be applied if the application of that law would be contrary to a fundamental policy of the state of the forum or the state which would be the state of the applicable law in the absence of an effective choice of law by the parties if that state

¹¹⁹ Restatement 2d, § 187 (2)(a); UCC § 1-105(1); *Seeman v. Philadelphia Warehouse Co.*, 274 U.S. 403, 408 (1927); *Davidson Oil Country Supply v. Klockner*, 908 F2d 1238 (1990).

¹²⁰ UCC Official Comment § 1-105 comment 1.

¹²¹ See *supra*, 2.5.1.

¹²² See art.3(3).

¹²³ Bloom (1979) 17 *Can.Ybk.Int.L.* 206, 230.

¹²⁴ See *Lauritzen v. Larsen*, 345 U.S. 571, 589 (1953).

has a materially greater interest than the chosen state in the determination of the particular issue.¹²⁵

To examine the impact of this restriction on choice-of-law clauses in consumer contracts it has to be known which rules of the otherwise applicable law are deemed to express a fundamental policy of that state. The commentary to the Restatement suggests that a fundamental policy may be embodied in rules that are designed to protect the weaker party to a contract against the oppressive use of superior bargaining power.¹²⁶ For insurance contracts, there are special provisions in the Restatement,¹²⁷ and effect will not be given to a choice-of-law clause in such a contract designating a law which would give the insured less protection than the law otherwise applicable.¹²⁸ The reason for this is that there is a great amount of state legislation on insurance contracts to protect the insured and, at the same time, insurance contracts are usually unilaterally drafted and offered on a "take it or leave it" basis.¹²⁹ By using choice-of-law clauses in the standard terms, the insurer could evade stricter protection legislation in the state of the insured's domicile. This concept of "adhesion contracts" has therefore been extended by courts and commentators to a general principle.¹³⁰ Thus, a choice-of-law clause which is contained in a unilaterally drafted contract which is imposed upon a party which has only weak or, as most consumers, no bargaining power may be disregarded. In

¹²⁵ Restatement 2d, § 187 (2)(b); see Scoles & Hay, p.663-665; *Davis v. Jointless Fire Brick Co.*, 300 Fed. 1, 4 (1924); *May v. Mulligan*, 36 F.Supp. 596, 599 (1939); *Turner v. Aldens*, 433 A.2d 439, 442 (1981).

¹²⁶ Restatement 2d, § 187 comment g

¹²⁷ §§ 292-293.

¹²⁸ Restatement 2d, § 192 comment e; *New York Life Insurance Co. v. Cravens*, 178 U.S. 389 (1900); *Mutual Life Insurance v. Mullen*, 69 A. 385 (1908); *Nelson v. Aetna Life Insurance Co.*, 359 F.Supp. 271, 290-292 (1973).

¹²⁹ See Lando, *Int. Encyclopedia*, p.27.

¹³⁰ See Ehrenzweig, (1953) 53 *Colum.L.Rev.* 1072, 1083; Scoles & Hay, p.666.; Lando, *International Encyclopedia*, p.26; *Fricke v. Isbrandtsen Co.*, 151 F.Supp. 465, 467-468 (1957); *Siegelman v. Cunard White Star*, 221 F.2d 189, 204-206 (1955) Frank J, dissenting; *Boase v. Lee Rubber & Tire Co.*, 427 F.2d 527 (1970).

*Fricke v. Isbrandtsen Co.*¹³¹, for instance, a choice-of-law clause in favour of US law printed on a steamship ticket bought in Germany by a German was held invalid. The authorities seem to suggest, however, that a choice-of-law clause will not be void for that reason alone.¹³² The commentary to the Restatement requires that a choice-of-law provision results in substantial injustice to the adherent,¹³³ and in many cases suggest that the chosen law will only be ignored if its application was unfair or unjust to the weaker party.¹³⁴

Whether it would be unjust to the weaker party to uphold a choice-of-law clause depends on two issues: how closely the contract is linked to the chosen state and, secondly, how fundamental the policy of the state of the otherwise applicable law is.¹³⁵ If the contract has only a weak connection with the chosen law but is closely linked to the state whose law would be applicable, it is likely that the policy behind simple consumer protection legislation of that state would be sufficient to invalidate the choice-of-law clause. Conversely, the more closely the contract is related to the state of the chosen law, the more fundamental must be the policy of the state of the otherwise applicable law.¹³⁶

A reflection of the general approach towards choice of law in consumer contracts in US-law can be found in § 2A-106(1) UCC, which applies to leases, and in § 106 of the draft article 2B on licenses. § 2A-106(1) invalidates a choice-of-law clause in consumer leases unless the choice relates to the consumer's residence or the place in which the goods

¹³¹ 151 F.Supp. 465 (1957).

¹³² See Scoles & Hay, p.666; Hartley in *Contract Conflicts*, p.114.

¹³³ § 187 comment b.

¹³⁴ *Boase v. Lee Rubber & Tire Co.*, 427 F.2d 527 (1970); *Siegelman v. Cunard White Star*, 221 F.2d 189 (1955); *Fricke v. Isbrandtsen Co.*, 151 F.Supp. 465 (1957); *Burbank v. Ford Motors Co.*, 703 F.2d 865 (1983); *Jones v. Dressel*, 623 P.2d 370 (1981); *Sall v. G.H. Miller & Co.*, 612 F.Supp. 1499, 1505-1506 (1985).

¹³⁵ Restatement 2d, § 187 comment g.

¹³⁶ *Ibid.*

are to be used. The draft article 2B¹³⁷ applies to most forms of licensing of information and transactions involving software contracts, whether conceived of as a license or a sale.¹³⁸ Within this scope are the various forms of online services contracts relating to information, all software transactions and other forms of information licensing.¹³⁹ According to the draft provision in § 2B-106(a), a choice of law clause, although normally valid, is not enforceable in a mass market license involving an individual as a licensee if it chooses a law other than that of the place where the individual resides or the law that would be applicable in the absence of a choice. The additional requirement that the chosen law substantially disadvantage the individual as compared to rights created under the law that would govern in the absence of a choice is now omitted in the latest version of the draft.

It may thus be concluded that under US law a choice-of-law clause in a consumer contract will be disregarded if it is contained in an adhesion contract and if the application of the chosen law would cause injustice to the consumer by depriving him of essential consumer protection legislation of the state whose law would be applicable in the absence of a choice of law, depending on how closely the contract is connected to the chosen law.

This provides a much more flexible approach than the "mandatory rule" approach, which will be discussed next, because that approach relies on fixed connection factors and invokes all mandatory rules, regardless how fundamental the underlying policy is, once the contract has certain connections to the country whose law would otherwise be applicable.

¹³⁷ Available at <http://www.law.upenn.edu/library/ulc/ulc.htm>.

¹³⁸ Draft § 2B-103 comment 1.

¹³⁹ Within the scope will therefore be, for instance, a contract for access of a database in the Internet or the sale of software which is to be downloaded from an Internet site.

The concept of mandatory rules

The concept of mandatory rules is an approach taken by the more recent conventions on private international law on contract¹⁴⁰ and by the EC. It is the counterpart to the principally unlimited freedom of choice conferred to the parties by those conventions.¹⁴¹ The general principle of the mandatory rule approach is as follows: the parties are generally free in choosing the applicable law, however, where the contract has a sufficiently close connection to another country, mandatory rules of that country can be invoked to override the applicable law which remains applicable outside the scope of those mandatory rules.¹⁴²

A definition of the expression "mandatory rules" can be found in art.3(3) of the Rome Convention. According to that, mandatory rules are rules of the law which cannot be derogated from by contract. However, two types of mandatory rules have to be distinguished:¹⁴³ Firstly, there are mandatory rules in a domestic sense. That means they cannot, according to the definition, be avoided by contract within their own legal system, however, they do not claim effect if the law of which they are part of is not the applicable law to the contract. Thus, mandatory rules in a domestic sense allow themselves to be contracted out of by virtue of a choice of law. The second type of mandatory rules are those in a conflict sense. Like the first type of mandatory rules they cannot be avoided by a domestic contract, but they cannot be avoided by choice of law either, because they themselves purport to be applicable even though the parties have chosen another law. Examples of such mandatory rules in a conflict sense are the provisions referred to by s.27(2) of the Unfair Contract Terms Act 1977 and s.7 of the Unfair Terms in Consumer Contract Regulations 1994. Art.12(2) of the proposed Distance Selling Directive will be implemented in a similar way.

¹⁴⁰ Art. 17 of the Hague Convention 1986; arts.3(3),5(2),7(1),7(2) of the Rome Convention;art.6(1) of the Consumer Sales Convention; art.11 of the Inter-American Convention.

¹⁴¹ For the relevant articles of the respective conventions see *supra*, 2.3.2.1.

¹⁴² On the concept of mandatory rules see Jackson in *Contract Conflicts*, p.59 et seq.; Cheshire & North, p.469 et seq.

¹⁴³ Jackson in *Contract Conflicts*, p.65; Kaye, p. 72.

English conflict-type mandatory rules

The two different types of mandatory rules are invoked in favour of the consumer in different ways. The conflict-type mandatory rules will always be applied by the forum where they are part of the *lex fori*.¹⁴⁴ In fact, the court often has to apply those rules because they do not confer discretion in that respect to the court. Hence, an English court, for instance, would always apply s.27(2) of the Unfair Contract Terms Act 1977 and s.7 of the Unfair Terms in Consumer Contracts Regulations 1994, where these provisions so require. The domestic-type mandatory rules, on the other hand, are usually invoked where there is a close connection to the country whose law they are part of.

There are a number of provisions in the relevant conventions which deal with conflict-type mandatory rules. Art.7(2) of the Rome Convention provides, that "[n]othing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract." Similar provisions are contained in art.17 of the Hague Convention 1986 and in art.11(1) of the Inter-American Convention. These provisions can be regarded as a safeguard in order to preserve the application of the existing national conflict-type mandatory rules, notably, among others, rules on consumer protection,¹⁴⁵ which the forum would have to apply, whether art.7(2) was contained in the Convention or not.¹⁴⁶

In addition, in art.7(1) the Rome Convention¹⁴⁷ allows for the application of conflict-type mandatory rules of the law of another country being neither the *lex fori* nor the applicable law to the contract, provided that country has a close connection to the situation. This provision is,

¹⁴⁴ Kaye, p.262.

¹⁴⁵ Report, p.28.

¹⁴⁶ Kaye, p.248; Morse, (1982) 2 Ybk.Eur.L. 107, 144; Report, p.28; Cheshire & North, p.499; See also *The Hollandia* [1982] 2 Q.B. 872 (CA); [1982] 3 W.L.R. 1111 (HL) where, prior to the Rome Convention, the provisions of the Carriage of Goods by Sea Act 1971 were applied even though the applicable law was Dutch law.

¹⁴⁷ Art.11(2) of the Inter-American Convention contains a similar provision.

however, inapplicable in the UK.¹⁴⁸ On the other hand, a French court, for instance, could apply s.27(2) of the Unfair Contract Terms Act to a contract governed by German law, if there was a close connection to England.

The two most important provision on conflict-type mandatory rules concerning consumer contracts in the UK are s.27(2) of the Unfair Contract Terms Act 1977 and s.7 of the Unfair Terms in Consumer Contracts Regulations 1994.¹⁴⁹

S.27(2) of the 1977 Act provides that "[t]his Act has effect notwithstanding any contract term which applies or purports to apply the law of some country outside the UK, where (either or both) (a) the term appears [...] to have been imposed [...] for the purpose of enabling the party imposing it to evade the operation of the Act; or (b) in the making of the contract one of the parties dealt as consumer, and he was then habitually resident in the UK, and the essential steps necessary for the making of the contract were taken there".

These two conditions reflect the distinction made earlier¹⁵⁰ between a choice of law in favour of a legal system with which the contract has some connection and a choice of a law which has no such contacts, the latter being represented by paragraph (a) and the former by paragraph (b). Thus the scope of paragraph (a) seems to be limited to the internationalisation of a domestic contract, which is also covered by art.3(3) of the Rome Convention, and to the choice of a wholly unconnected law. Paragraph (b) represents the typical situation of a consumer situated in the UK ordering goods from a foreign supplier.¹⁵¹ According to the general concept of mandatory rules,¹⁵² the consumer retains his protection if there is a sufficient connection with his place of

¹⁴⁸ Art.22(1)(a); Contracts (Applicable Law) Act 1990, s.2(2); Germany, Ireland and Luxembourg have also made use of the reservation under art.22(1)(a).

¹⁴⁹ See supra, n.10.

¹⁵⁰ See supra, 2.5.1.

¹⁵¹ Hartley in Contract Conflicts, p.120.

¹⁵² See supra, 2.5.3

habitual residence, whereas paragraph (b) sets up the requirements for such a sufficient connection. Although not entirely made clear by s.27(2)(b), it is only the steps taken by the consumer for the making of the contract which must be in the UK,¹⁵³ because otherwise an order received by the supplier abroad would make the provision inapplicable. A standard Internet consumer transaction seems to be caught by s.27(2) at least where the consumer is resident in the UK and uses a terminal there.¹⁵⁴

S.7 of the 1994 Regulations provides that "[t]hese Regulations shall apply notwithstanding any contract term which applies or purports to apply the law of a non member State, if the contract has a close connection with the territory of the member States." Interestingly, s.7, unlike s.27(2)(b) of the 1977 Act and art.5(2) of the Rome Convention, does not set up any specific requirements for a "close connection". It is, therefore, unclear whether a close connection would already result from the fact that the consumer is habitually resident in a Member State, or if additional connection factors similar to those set up in s.27(2)(b) and art.5, e.g. previous advertising or steps taken by consumer in his country, are required. With regard to the chosen law, s.7 only applies if a law of a non Member State is chosen, because it is assumed that the substantive law introduced by the Directive on unfair terms in consumer contracts is now harmonised in the E.U. countries.

The proposed Distance Selling Directive¹⁵⁵ contains a provision in art.12(2) identical to art.6(2) of the Directive on unfair terms in consumer contracts,¹⁵⁶ the provision that underlies s.7 of the 1994 Regulations. Thus it can be anticipated that s.12(2) of the Directive will be implemented in the same way as s.7.

¹⁵³ Hartley in *Contract Conflicts*, p.121.

¹⁵⁴ See *infra*, 3.1.3.

¹⁵⁵ See *supra* n.13.

¹⁵⁶ See *supra* n.10.

Domestic conflict-type mandatory rules applied to international contracts

The domestic-type mandatory rules of a law other than the chosen law would, by their very definition, not normally be invoked to override the rules of the chosen law. However, the Rome Convention and the Draft Consumer Sales Convention 1980 contain provisions which convert the domestic-type mandatory rules into conflict-type mandatory rules.¹⁵⁷ if the contract is in some way connected to the country of the consumer's habitual residence. By virtue of this mechanism the domestic consumer protection rules of the consumer's residence are lifted into the sphere of international contracts.

Art.5(2) of the Rome Convention provides, that "a choice of law made by the parties shall not [deprive] 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." The mandatory rules referred to in that provision are domestic-type mandatory rules¹⁵⁸ but only those related to consumer protection.¹⁵⁹ The provision is subject to three conditions, one of which must be fulfilled: The first requires that the contract was made in the country of the consumer's habitual residence preceded by a specific invitation addressed to him or by advertising, and he took in that country all the steps necessary on his part for the conclusion of the contract. This condition is much narrower than s.27(2)(b) of the 1977 Act because the latter provision does not require previous advertising or a specific invitation. The requirement of previous advertising also appears in art.13 of the Brussels Convention. The second condition is fulfilled where the consumer's order was received in the country of his habitual residence by the supplier or his agent. The last condition set up by art.5(2) refers to organised travel sale and is not of relevance in the context of this paper. These conditions represent the general requirement of the mandatory rules concept that the contract must be closely connected to the country of the consumer's habitual residence in order to invoke domestic-type mandatory

¹⁵⁷ Kaye, p.247.

¹⁵⁸ Morse, (1982) 2 Ybk.Eur.L. 107, 136; Kaye, p.160.

¹⁵⁹ Morse, *ibid* and (1992) 41 I.C.L.Q. 1, 8; Kay, p.210.

rules. Whether a standard Internet consumer transaction will be caught by art.5 depends mainly on whether one or both of the two conditions are fulfilled.¹⁶⁰

Articles 6(1) and 5 of the Draft Consumer Sales Convention 1980¹⁶¹ operate in a very similar way to art.5(2) of the Rome Convention. A close connection of the contract to the country of the consumer's habitual residence is defined by four conditions, three of which are almost identical to those of art.5(2) of the Rome Convention. The additional condition provides for a close connection to the country of the consumer's habitual residence if the negotiations were mainly conducted in that country and the consumer took there the steps necessary on his part for the conclusion of the contract.¹⁶² The condition on previous advertising or specific invitation contains an additional clause not contained in the Rome Convention, that is "other marketing activities undertaken in, or directed to," the country of the consumer's habitual residence.¹⁶³

The Inter-American Convention, although it is applicable to consumer contracts, does not contain any provisions similar to those just described. However, art.11, which is similar in structure to art.7 of the Rome Convention, provides, that "the provisions of the law of the forum shall necessarily be applied when they are mandatory requirements", and that "it shall be up to the forum to decide when it applies the mandatory provisions of the law of another state with which the contract has close ties". Unlike art.7 of the Rome Convention, this art.11 does not require the mandatory rules to be of conflict-type. If art.11 is interpreted as referring to domestic-type mandatory rules, it will provide the courts with a very flexible instrument to invoke those rules in order to protect consumers.

¹⁶⁰ This will be discussed *infra*, 3.1.2.

¹⁶¹ See *supra*, n.62.

¹⁶² Art.5(1).

¹⁶³ Art.5(3).

Interaction of conflict-type and domestic-type and "self-limiting" mandatory rules

The conflict-type provisions in English law, particularly s.27(2) of the 1977 Act and s.7 of the 1994 Regulations set up requirements different from art.5(2) of the Rome Convention. For example s.27(2), unlike art.5(2), does not require previous advertising or an invitation to trade. S.7 of the 1994 Regulations renders the Regulations applicable notwithstanding any choice-of-law clause in favour of a non-Member State of the E.U. The only requirement is that the contract has a close connection with the territory of the Member States. Since these provisions have to be applied by English courts by virtue of art.7(2) and can be applied by foreign courts by virtue of art.7(1) there seems to be a situation of overlap between conflict-type and domestic-type mandatory rules. If the contract falls within the scope of art.5, the UK consumer retains the protection of all mandatory rules of the respective UK law relating to consumer protection. But even if the contract is outside the scope of art.5, she might still enjoy the protection of the 1977 Act and/or the 1994 Regulations. Assume, for instance, an English consumer orders goods from a US supplier, the contract contains a choice-of-law clause in favour of US-law and an exclusion clause which would be void under the 1977 Act, and the requirements of art.5 are not fulfilled because there was no previous advertising. If the case were brought before an English court, art.5(2) would not be applied, but the 1977 Act would still be applicable by virtue of art.7(2) of the Rome Convention and s.27(2) of the 1977 Act, because s.27(2) does not require previous advertising. Similarly, the 1994 Regulations might be invoked by virtue of art.7(2) of the Rome Convention and s.7, which requires a close connection to the E.U., if the fact that the consumer is habitually resident in an E.U. Member State and has placed his order from there is deemed to be a close connection. This seems to contradict the convention's aim of harmonisation. It has therefore been suggested that s.27(2), although not expressly repealed by the Contracts (Applicable Law) Act 1990, is no longer applicable to consumer contracts, whether within the scope of art.5 or not, because, it is argued, art.5 is designed to establish a definitive solution for consumer contracts under exclusion of art.7 and any national legislation relating to choice-of-law.¹⁶⁴ That, however, is not reconcilable with the fact that s.27(2) is still

¹⁶⁴ Stone, pp.234, 265, 269-270.

in force. Not only has Parliament not repealed ss.26-27, but s.27(1) was even technically amended by the 1990 Act.¹⁶⁵ Most writers also assume that ss.26-27 still apply.¹⁶⁶ If the view were taken that art.7(2) cannot be used in respect of mandatory rules whose aim and effect is consumer protection, s.27(2)(b) could never be applied, since the cases covered by art.5(2) would be dealt with by that article and cases falling outside art.5(2) would not be allowed to be dealt with by art.7(2) and s.27(2). Further, other more recent E.U. legislation or draft legislation, such as the Directive on unfair terms in consumer contracts¹⁶⁷ and the Distance Selling Directive¹⁶⁸ require Member states to include provisions similar to s.27(2).¹⁶⁹ Although that approach is ill-formed, because the new directives would have been caught by art.5 of the Rome Convention, it shows that even in the view of the EC art.5 does not form a definitive solution with respect to mandatory rules of consumer protection. Other Member States also have additional legislation on choice of law outside art.5(2).¹⁷⁰

Another problem arises from so called "self-limiting" rules:¹⁷¹ that is, where a legal system chooses not to apply certain domestic mandatory rules to all or certain international contracts. The first rule of that kind contained in the 1977 Act is s.26, which excludes international contracts for the supply of goods from the ambit of the Act. The definition of such

¹⁶⁵ Sch.4 para.4.

¹⁶⁶ Dicey & Morris, pp.1296-1297; Cheshire & North, pp.500-501; Lasok & Stone pp.380-384; Hartley in Contract Conflicts, pp.118-121; Kaye, p.242.

¹⁶⁷ See supra, n.10, art.6(2).

¹⁶⁸ See supra, n.13, art.12(2).

¹⁶⁹ See supra, 2.5.3.1.

¹⁷⁰ For instance in Germany, § 12 AGBG; It is common opinion that § 12 is still to be applied in cases not falling under art.5 of the Rome Convention, MüKo-Martiny, 2.Aufl., EGBGB Art.29, Rdn.1.

¹⁷¹ See Stone, p.265; Dicey & Morris, pp.19-21 and 25-26; Hartley in Contract Conflicts, pp.118-121; Mann, (1978) 27 I.C.L.Q. 661,664.

an international contract is taken from art.1 of ULIS¹⁷² and includes a situation where goods are to be sent by a foreign supplier to an English consumer. This seems to contradict the protection afforded by s.27(2), since its scope also covers the same situation and thus the consumer would lose the protection of the Act by virtue of s.26 although s.27(2) purports to protect her.¹⁷³ Nevertheless, there is no doubt from the wording of both sections that s.27(2) does not apply to international contracts as defined in s.26.¹⁷⁴

The situation is different, however, as far as the interaction between art.5 of the Rome Convention and s.26 is concerned, for there would be odd results if that section were applied to a situation falling under art.5. If, for example, a British consumer orders goods from a supplier in the US under circumstances which satisfy the conditions set up in art.5 of the Rome Convention and the contract contains a choice-of-law clause in favour of US-law, the consumer will, according to art.5, not be deprived of the protection afforded to him by the mandatory rules of English law. However, s.26 of the 1977 Act would make the Act inapplicable, hence the consumer would actually be deprived of the protection of the 1977 Act. Similarly, in the absence of a choice-of-law clause, art.5(3) would make English law the applicable law, which then in turn would refuse the application of the 1977 Act by virtue of s.26. An English court could not even apply US mandatory rules on unfair contract terms, because the 1990 Act excludes the application of art.7(1) of the Rome Convention.¹⁷⁵ In fact, the consumer would be better off without art.5 altogether, because then US-law would be applicable by virtue of art.4(2) and the consumer would at least benefit from US-law on unfair contract terms. These results were not intended by the legislator. According to the Law Commission's Report the main reason for ss.26 was to exclude British exporters from the operation of the Act,¹⁷⁶ rather than

¹⁷² See for those conditions in detail *supra* 2.3.1.

¹⁷³ See Hartley in *Contract Conflicts*, p.120.

¹⁷⁴ Cheshire & North, p.501; Dicey & Morris, p.1297, n.78; Kaye, p.160.

¹⁷⁵ S.2(2).

¹⁷⁶ Law Com. No.24 (1969), para.120; No.69 (1975), para.228.

depriving British Consumers of its protection. One solution could, therefore be, in the light of the Law Commission's Report, to confine s.26 to situations which involve a British supplier and a foreign consumer.¹⁷⁷ That is, however, hardly reconcilable with the wording of s.26 and thus not a solution English courts would be likely to apply. A better approach to solve the problem is by way of construction. The 1990 Act clearly and explicitly gives the force of law to the Rome Convention and ss.26-27 are subject to that. Since it is the clear intention of art.5 to apply the mandatory consumer protection rules of the country of the consumer's habitual residence, art.5 should be construed as eliminating any self-limiting rules contained in a law which the Article makes applicable, which would deny on territorial grounds the operation of substantive consumer protection rules of that law.¹⁷⁸

The second self-limitation rule contained in the 1977 Act, s.27(1)¹⁷⁹, excludes the operation of ss.2-7 and 16-21 of the 1977 Act "where the law applicable to a contract is the law of any part of the UK only by choice of the parties and apart from that choice would be the law of some country outside the UK." This provision has been subject to severe criticism,¹⁸⁰ which is perfectly justified, as the following illustration will show. Assume, in the last example of an English consumer ordering from a US supplier, the contract did not fall within the scope of art.5, but the supplier, as part of his friendly service, included a choice-of-law clause in favour of the law of the consumer's habitual residence. In that case the 1977 Act would be excluded by s.27(1), because the applicable law without the choice would be US-law by virtue of art.4(2) of the Rome Convention. Thus the consumer would not enjoy any protection against unfair contract terms.¹⁸¹ Even worse, once the legal news had

¹⁷⁷ Hartley in *Contract Conflicts*, pp.120-121 seems to favour that solution in principle, but he also acknowledges that the wording of s.26 prevents that view.

¹⁷⁸ Stone, pp.265, 270 without expressly saying so, seems to take the view that art.5 excludes the application of s.26.

¹⁷⁹ As amended by Sched.4, s.4 of the 1990 Act.

¹⁸⁰ Mann, (1978) 27 I.C.L.Q. 661 and (1977) 26 I.C.L.Q. 903, 907-909.

¹⁸¹ Whether s.7 of the Unfair Terms in Consumer Contracts Regulations 1994 would apply is doubtful, because is not clear whether a contract falling outside the scope of art.5

spread, all Internet suppliers would choose the respective law of the UK as the applicable law when dealing with UK customers, in order to avoid any controls on unfair contract terms. Unlike s.26, s.27(1) cannot be construed away by art.5 of the Rome Convention, because it only involves cases falling outside its scope, for the applicable law to a contract caught by art.5 involving an English consumer is English law by virtue of art.5(3) in the absence of a choice, hence it is not "only by choice of the parties"¹⁸² that English law is the applicable law to the contract. Although s.27(1) is "almost perverse in character"¹⁸³ it is still part of the law in the UK. The provision might not have been of great practical impact yet but this will change rapidly in the course of the development of retail business on the Internet. Parliament should repeal s.27(1) as soon as possible.

As a conclusion it can be said that art.5(2) of the Rome Convention is not exclusive in respect to consumer contracts and allows national conflict-type mandatory rules to be invoked by virtue of art.7(2) and 7(1)¹⁸⁴, whether the contract falls within the scope of art.5 or not. However, self-limiting rules such as s.26 of the 1977 Act are incompatible with art.5 and to be disregarded as far as they deny the application of domestic consumer protection legislation which art.5 purports to be applied. Outside the scope of art.5, the application of self-limiting rules is not restricted, hence s.27(1) of the 1977 still applies, although it produces highly undesirable results.

The governing law in the absence of a choice of law by the parties

If the parties have not made a choice, either express or implied,¹⁸⁵ to which law governs their contract or if a choice-of-law clause is found to be invalid, it is up to the forum to choose the applicable law. As it has

of the Rome Convention would be deemed to have a 'close connection' to the country of the consumer's habitual residence.

¹⁸² S.27(1).

¹⁸³ Mann (1978) 27 I.C.L.Q. 661.

¹⁸⁴ In Member States where art.7(1) is in force.

¹⁸⁵ See *supra*, n.77.

already been mentioned,¹⁸⁶ the general approach taken in most legal systems in the absence of an effective choice-of-law by the parties is to apply the law of the country most closely connected to the contract. Naturally, this general rule is applied with differences in detail, namely with regard to the factors which determine the country with the closest connection to the contract. The fact that a consumer is involved at one side of the transaction can have some influence on that decision, because the consumer would usually be interested in the application of the law of his habitual residence.

English Common Law

Under English common law prior to the 1990 Act in the absence of an express or implied intention of the parties with regard to the governing law, the contract was governed by the system of law with which the contract had its closest and most real connection.¹⁸⁷ Remarkably, the reference was made to the law rather than the country most closely connected, although it is not entirely clear what difference that would make in practice.¹⁸⁸ That approach was quite flexible, and presumptions like those introduced by the Rome Convention did not have a place in common law choice of law rules. The factors taken into account were the place of residence or business of the parties, the place where the relationship between the parties was centered, the place where the contract was made or was to be performed, or the nature or the subject-matter of the contract.¹⁸⁹ There were no signs that the courts would treat consumer contracts in a special way.

¹⁸⁶ See *supra*, 2.3. and references n.29.

¹⁸⁷ See Young, [1991] L.M.C.L.Q. 314, 321; Dicey & Morris (11th ed. 1987), pp.1190-1191; *Bonython v. Australia* [1951] A.C. 201, per Lord Simonds at 209; *Amin Rasheed v. Kuwait Insurance* [1984] 1 A.C. 50, per Lord Wilberforce at 69.

¹⁸⁸ See Young, *ibid*; Stone, p.239; Cheshire & North, p.489; *James Miller & Partners v. Whitworth Street Estates*, [1970] A.C. 583.

¹⁸⁹ See Cheshire & North, p.488.

International Conventions

The Rome Convention¹⁹⁰ deals with the determination of the applicable law in the absence of choice under art.4. As a general rule, the contract is governed by the law of the country with which it is most closely connected.¹⁹¹ That rule is supported by two special presumptions for contracts concerning immovable property and for carriage contracts¹⁹² and one general presumption which introduces the "characteristic performance" test.¹⁹³ Finally, all three presumptions can be rebutted if it appears from the circumstances as a whole that the contract is more closely connected with another country.¹⁹⁴ Under the general presumption the contract is presumed to be most closely connected with the country in which the party obligated to render the characteristic performance is habitually resident, or, if that party is acting in the course of his trade or profession, where that party has his principal place of business. Although it is not obvious from the wording of the provision, the Report¹⁹⁵ makes clear that it is the supply of goods or services, rather than the receipt or payment for them, which constitutes the characteristic performance.¹⁹⁶ This test has attracted criticism,¹⁹⁷ especially because the characteristic performance can not always be easily ascertained. Nevertheless, for the purposes of this paper and the examples set out in the basic scenario, which are concerned with the supply of goods or services, the presumption

¹⁹⁰ See Young, *ibid*; Morse (1982) 2 Ybk.Eur.L. 107 ;Cheshire & North, pp.487-495, Kaye p.171 et seq.

¹⁹¹ Art.4(1).

¹⁹² Art.4(3),(4).

¹⁹³ Art.4(2).

¹⁹⁴ Art.4(5).

¹⁹⁵ Report, p.20.

¹⁹⁶ See also Kaye, p.181; *Machinale Glasfabriek De Maas v. Emaillerie Alsacienne*, [1984] E.C.R. 123.

¹⁹⁷ Lasok & Stone, pp.362-363; Cheshire & North, pp.491-492; Morse (1982) 2 Ybk.Eur.L. 107, 126-132; Juenger in *Contract Conflicts*, pp.300-302; Kaye, pp.187-191.

establishes the firm basic rule that, subject to art.5 discussed below, in the absence of a choice the contract is governed by the law of the country in which the supplier has his place of business. If the supplier has more than one place of business, the place of business through which the characteristic performance is to be effected determines the applicable law.¹⁹⁸

Art.5(3) on consumer contracts provides for an exception from the general presumption. A contract which is entered into in the circumstances described in art.5(2)¹⁹⁹ is, in the absence of a choice, governed by the law of the country where the consumer has his habitual residence. Thus, where a contract falls within the scope of art.5 and no choice of law is made, the consumer does not only retain the protection of the mandatory rules of his country but, unlike in the presence of a choice-of-law clause, the law of the country of his habitual residence is made the applicable law.²⁰⁰

Both the 1955 and the 1986 Hague Convention call for the law of the seller's place of business as the applicable law as general rule.²⁰¹ Neither Convention contains any specific consumer provisions.²⁰² Under Art.3(2) of the 1955 Convention, similar to one of the conditions in art.5(2) of the Rome Convention, the law of the purchaser's residence is the applicable law if the order has been received in his country by the vendor or his agent.

Under the Inter-American Convention, in the absence of an effective choice by the parties the contract is governed by the law of the state with which it has the closest ties.²⁰³ Unlike in the Rome Convention, there is neither presumption that this is country of the supplier's place of business, nor are there any special rules on consumer contracts. It will,

¹⁹⁸ Art.4(2).

¹⁹⁹ See *supra*, 2.5.3.2.

²⁰⁰ See Kaye, p.219.

²⁰¹ Hague Convention 1955, art.3(1); Hague Convention 1986, art.8(1).

²⁰² The Hague convention 1986 does not apply to consumer contracts anyway. Therefore, the exceptions to art.8(1) are not discussed here.

²⁰³ Art.9(1).

therefore, be a matter of construction of the "closest ties" test to establish such rules.

The Draft Consumer Sales Convention 1980, which is only applicable if the contract is closely connected to the consumer's country as described in art.5,²⁰⁴ calls in the absence of a contractual choice for the application of the law of the country of the consumer's habitual residence.²⁰⁵

United States of America

In contrast to the Rome and Hague Conventions with a set of rules and exceptions, US-law offers a different and much more flexible approach to choice of law. First, it must be pointed out again, that American conflicts law is dominated by the rule-selection approach,²⁰⁶ i.e. the applicable law is determined with respect to the issue in question.²⁰⁷ Thus not all contractual issues are necessarily decided under the local law of one single country.²⁰⁸ This involves a way of thinking different from the European choice of law tradition. Rather than determining the applicable law by a set of rules and then applying that law to the issue in question, the starting point under US conflicts law is the very issue in question. Considering all relevant factors the most appropriate law to decide that issue is then determined. Secondly, it has to be noted that governmental interest analysis as well as the analysis of party expectations

²⁰⁴ See supra, 2.5.3.2.

²⁰⁵ Art. 7.

²⁰⁶ See Morris, p.447; Cheshire and North, p.31; Blom, (1979) 18 Can.Ybk.Int.L. 161, pp.212-226.

²⁰⁷ Scoles & Hay, p.688; Restatement 2nd, § 188(1).

²⁰⁸ Restatement 2nd, § 188 comment d.

are part of the American choice-of-law process,²⁰⁹ which may override general rules such as the most significant relationship test.²¹⁰

§ 188 of the Second Restatement provides that "[t]he 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", and § 1-105(1) UCC provides for the application of forum law if the transaction bears an appropriate relation to the forum.²¹¹ The reference to § 6 in § 188 of the Second Restatement allows to take into consideration the general principles laid down there, which are mainly a result of the American conflicts law revolution.²¹² According to § 6(2) the factors relevant to the choice of the applicable law include the needs of the interstate and international systems, the relevant policies of the forum and other interested states, the protection of justified expectations, the basic policies underlying the particular field of law, certainty predictability and uniformity of result, and ease in the determination and application of the law to be applied. With respect to contracts, § 188(2) sets up contacts to be taken into account when applying the principles of § 6. These include the place of negotiation, contracting and performance and the location of the subject matter of the contract, and the domicile, residence, place of incorporation and place of business of the parties.

With regard to the subject-matter of consumer contracts typically concluded over the Internet, supply of goods and rendition of services, the Second Restatement and the case law provide some more specific choice-of-law rules. The First Restatement reflected a set of inflexible rules, which either applied the law of the place of contracting or of the place of

²⁰⁹ Restatement 2nd, § 6(2)(c)(d).

²¹⁰ A leading example is *Lilienthal v. Kaufman*, 395 P.2d 543 (1964) where Oregon law was applied to the issue of capacity of the defendant who had been declared a spendthrift in Oregon, although all other relevant factors connected the contract with California.

²¹¹ Both provisions are usually interpreted and applied in accordance, see Scoles & Hay, p.699.

²¹² See Scoles & Hay, pp.15-33; Cramton, D. Currie and Kay, chap.2.

performance. These rules are generally still being applied by the courts.²¹³ The main change brought by the American conflicts revolution and the Second Restatement is that these rules are now based on the "center-of-gravity" approach and are thus more flexible

For the sale of interests in chattels § 191 of the Second Restatement provides that in the absence of a choice by the parties the validity of a contract and the rights created thereby are determined by the law of the state where the seller is to deliver the chattel unless, with respect to the particular issue, some other state has a more significant relation to the contract and the parties under the principles stated in § 6. Where the courts do not cite § 191 but rather apply center-of-gravity notions the results are mostly the same.²¹⁴ In Internet Sales the goods will typically not be delivered by the supplier to the purchaser but rather be sent or shipped to her. In that case, according to § 2-401 UCC, which is applicable for the purpose of determining the place of delivery under the choice-of-law rule,²¹⁵ the supplier completes his performance with reference to the physical delivery of the goods at the time of dispatch or shipment. Thus, the applicable law to a typical Internet sales contract will normally be the law of the place of the seller's business if the goods are dispatched from there. If the goods are dispatched from another place, the center-of-gravity of the contract may be found elsewhere by the courts.

For the rendition of services, § 196 of the Second Restatement calls for the application of the law of the state where the services, or a major portion of them, are to be rendered, unless there is a more significant relation to another state according to the principles in § 6. The case law mostly reaches similar results, either specifically referring to the place where the service is to be performed²¹⁶ or by applying the most

²¹³ See Scoles & Hay, p.691; Lando, (1982) 30 Am.J.Comp.L. 19, p.31.

²¹⁴ *Bowles v. Zimmer Manufacturing*, 277 F.2d 868, 873 (1960); *Neville Chemical v. Union Carbide*, 422 F.2d 1205, 1211 (1970); *Westerman v. Sears, Roebuck & Co.*, 577 F.2d 873, 879 (1978); *Collins v. Radio Co. of Dallas v. Bell*, 623 P.2d 1039, 1047, 1048; see Scoles & Hay, pp.700-701.

²¹⁵ *Autrey v. Chemtrust Industries*, 362 F.Supp. 1085; See Scoles & Hay, p.700.

²¹⁶ *Zimmerman v. Board of Publications of Christian Reformed Church*, 598 F.Supp 1002 (1984); *Nasco v. Gimbert*, 238 S.E.2d 368 (1977); *S&S Chopper Service v. Scriptor*, 394 N.E.2d 1011 (1977).

significant relationship test.²¹⁷ The problem of determining the place of performance of Internet services will be discussed *infra*.²¹⁸

These rules apply to most contract issues such as validity or the contractual rights and duties of the parties.²¹⁹ However, for consumer protection issues, for instance the right to cancel the contract during a cooling-off period, the applicable law might be different. The principal rules explained above are subject to the principles laid down in § 6 of the Second Restatement, which involves governmental interests and party expectations. As mentioned earlier,²²⁰ a consumer might often reasonably expect the consumer protection laws of his place of residence to be applied and the policy of a country whose law contains consumer protection rules to protect the weaker party will usually purport to protect the residents of that country.²²¹ This approach is also reflected in § 192 of the Second Restatement as well as the case law²²², both of which refer for life insurance contracts to the law of the insured's domicile in order to afford the insured with the protection of the legislation of the country of his residence.²²³ Similarly, with respect to instalment purchases, there is some authority for applying the law of the debtor to afford him protection against the economically stronger lender,²²⁴ although § 195 of the Second Restatement calls for the application of the law of the place where the promissory note is payable, usually the location of the lender.

²¹⁷ *Berryhill v. Marshall Exploration*, 420 F.Supp 198 (1976); *Bonham v. Dresser Industries*, 424 F.Supp 891 (1976); see *Scoles & Hay*, p.708.

²¹⁸ See *infra*, 3.4.

²¹⁹ See *Lando* (1982) 30 *Am.J.Comp.L.* 19, 29.

²²⁰ *Supra*, 2.2.

²²¹ *Lando* (1982) 30 *Am.J.Comp.L.* 19, 35; see also *Cavers*, p.181.

²²² *Zogg v. Penn Mutual Life Insurance*, 276 F.2d 861, 863 (1960); *Strassberg v. New England Mutual Life Insurance*, 575 F.2d 1262 (1978).

²²³ See *Scoles & Hay*, p.704.

²²⁴ *Weintraub*, p.398 et seq.; *Western*, (1967) 55 *Cal.L.Rev.* 123; *Currier v. Truck*, 287 A2d. 625 (1972).

The draft provision of § 2B-106 UCC²²⁵ differs remarkably from the concepts outlined above and introduces a concept similar to that in the various conventions which make the law of the supplier's place of business the applicable law.²²⁶ Unless a physical copy of the information is to be supplied, in which case the law of the place where the copy is to be received governs,²²⁷ the rights and duties of the parties are determined by the law of the state where the licensor is located.²²⁸ This approach was preferred to the place where the information resource is located, which was rejected for being fortuitous and often not known to the licensee in an online environment, and to the place of residence of the licensee, which would often be unknown to the licensor.²²⁹

Conclusively, under US-law the law governing validity and the rights and duties of the parties is generally the place where the goods are to be dispatched or delivered or where services are to be rendered, especially if that place coincides with the place of residence or business of one party. The flexibility of the American approach allows for deviation from that rule if the contract is more closely connected to another jurisdiction or if governmental interest or party expectations call for the application of a different law with regard to consumer protection issues.

Consumer Protection and Jurisdiction

Jurisdiction is, from the consumer's perspective, concerned with the question where she can sue the supplier or where he can be sued by him. A consumer will usually only be prepared to sue a foreign supplier in a court in a country of the consumer's residence, because the cost of litigation abroad will be too high in relation to the claim. But it is still most important what the applicable law to the contract is, because

²²⁵ See *supra*, n.137.

²²⁶ See art.4(2) of the Rome Convention, art.3 of the Hague Convention 1955 and art.8(1) of the Hague Convention 1986.

²²⁷ Draft § 2B-106(c).

²²⁸ Draft § 2B-106(b).

²²⁹ Draft § 2B-106 comment 2.

litigation will still be too expensive, even if the consumer can sue at his residence, if foreign law applies. That is because foreign law is in common law jurisdictions a matter of fact and has to be pleaded and proved.²³⁰ Thus, a consumer with a small claim will only find it worth suing if a court at his residence has jurisdiction over the supplier and if the *lex fori* is the applicable law. Even then will usually only sue if the supplier has assets in the consumer's country or if enforcement in the supplier's country is very easy to obtain.

For a consumer in England, two situations have to be distinguished: The supplier is situated in a Contracting State to the Brussels Convention,²³¹ in which case that Convention and the Civil Jurisdiction and Judgement Act 1982 apply, or the supplier is outside the territorial scope of the Convention, e.g. in the U.S. In the latter case the traditional English law rules apply.²³² Under them the defendant must be present in England and served with a writ there or he must have submitted himself to the jurisdiction of English courts. Nevertheless, permission for service out of the jurisdiction can be granted under the Order 11 of the Rules of Supreme Court for any claim in contract, if the contract was made in England or through an agent resident there, if the applicable law is English law, or if the contract contains a choice-of-forum clause in favour of English courts.²³³ Leave will also be granted for a claim for breach of contract, regardless where contract was made, if the breach was committed in England.²³⁴ In a contract for the sale of goods, however, where the duty of the seller is only to dispatch them, the breach is committed abroad if he

²³⁰ *Fremoult v. Dedire* (1718) 1 P.Wms. 429; *Mostyn v. Fabrigas* (1774) 1 Cowp. 161, 174; see Morris, pp.36-40; US: *Church v. Hubbart*, 6 U.S. 187, 236 (1804); see Scoles & Hay, pp.418 et seq.; in civil law, however, it is mostly treated as a matter of law, see Scoles & Hay, p.421.

²³¹ 27 September 1968 as amended by the Lugano and San Sebastian texts; for the current text see S.I. 1990 No.2591 Sch.1; on the history and current status of the Convention see Morris, pp.74-75.

²³² On them see Morris, pp.60-74.

²³³ Ord.11, r.1(1)(d).

²³⁴ Ord.11, r.1(1)(e).

fails to do so.²³⁵ Leave under Order 11 will be refused, however, if the contract contains a choice-of-forum clause in favour of a foreign court. In a consumer contract such a clause is subject to the Unfair Terms in Consumer Contract Regulations 1994²³⁶ and is likely to be void.²³⁷

Under the Brussels Convention, if the defendant is domiciled²³⁸ in a Contracting state, he can be sued there.²³⁹ For a claim in contract the defendant can also be sued in another Contracting state where the place of performance of the contractual obligation in question is.²⁴⁰ That place is to be determined by the *lex fori*.²⁴¹ If the contract qualifies as a consumer contract under art.13, the consumer has a choice to sue either in the Contracting State in which he is domiciled or in the courts of the defendant's domicile, he can only be sued in the court's of his domicile,²⁴² and a Choice-of-forum clause is disregarded.²⁴³

Internet Sales and Current Private International Law

The private international law on consumer protection issues as it has been evaluated in the previous chapter applies at present to Internet transactions, regardless of whether the rationales behind the respective rules are reflected in an Internet environment or not. In the following sections I shall examine some particular issues arising from Internet

²³⁵ *Johnson v. Taylor* [1920] A.C. 144.

²³⁶ *Supra*, n.10.

²³⁷ S.5(1),4(1),Sch.3(1)(q).

²³⁸ The concept of domicile in the Convention is different from that of English common law, see *Morris*, p.77

²³⁹ Art.2.

²⁴⁰ Art.5(1).

²⁴¹ *Tessili v. Dunlop AG*, Case 12/76 [1976] E.C.R. 1473.

²⁴² Art.14.

²⁴³ Art.15.

consumer contracts and develop solutions for the application of the private international rules previously outlined to Internet contracts.

Previous specific invitation or advertising in the country of the consumer's residence and necessary steps taken by the consumer in that country

The requirement that the contract was preceded in the country of the consumer's residence by a specific invitation addressed to the consumer or by advertising can be found in a number of important provisions on consumer protection that have been discussed previously. These are art.5(2) of the Rome Convention, art.13(3)(a) of the Brussels Convention and art.5(3) of the Draft Consumer Sales Convention 1980.²⁴⁴ All these provisions also require that the consumer has taken the steps necessary for the conclusion of the contract in the country of his habitual residence. S.27(2) of the Unfair Contract Terms Act 1977 only sets up the latter requirement without calling for a specific invitation or advertising.

The rationale of these provisions is to specify a close connection of the contract with the country of the consumer's residence in order to make the law or mandatory rules of the law of that country applicable or to enable the consumer to bring action against the supplier in the courts of that country. Why the consumer should be protected if there is such a close connection to his country has been explained in the first chapter.²⁴⁵ Where the trader markets goods or services in the consumer's country and the consumer places her order there, she can reasonably expect her domestic consumer protection laws to apply. The cited provisions protect that justified expectation.²⁴⁶

²⁴⁴ Hereinafter referred to as 'arts.5 and 13'.

²⁴⁵ See *supra*, 2.2.

²⁴⁶ Kaye, p.215.

Specific Invitation addressed to the consumer

In an online environment like the Internet a specific invitation²⁴⁷ will usually be sent to the consumer by email.²⁴⁸ The principal problem with the wording of the respective provisions is that they require that the specific invitation precede the contract in the country of the consumer's residence. Although not expressed in the wording of the provision this means that the invitation must be received by the consumer in that country. Email is normally received and stored by the email server where the consumer has his email account and is later automatically or manually accessed by him. Often the email server is physically located near the consumer's location, e.g. at a college or a local Internet service provider, and thus in the same country as the consumer. But that is not necessarily the case. Nation- or worldwide service providers like Compuserve store all user mail in a central server, which might well be situated in a different country.²⁴⁹ Also a consumer might have moved to another country but still use his old e-mail account. In those cases it is crucial whether the invitation is received when the mail is stored on the email server or when the user actually accesses it. Regarding offer and acceptance to a contract, in many jurisdictions a message is deemed to be received when it is available to the recipient,²⁵⁰ which would in the case of email be the time it is available on the mail server. However, this rule, meant to prevent the recipient from avoiding reception by ignorance, is not appropriate for an invitation as required in the mentioned provisions, because it is an essential part of marketing that the recipient actually becomes aware of the invitation. Thus, for these purposes, an email invitation is received when it

²⁴⁷ This will normally be an invitation to trade rather than a contract offer, see *Pharmaceutical Society of Great Britain v. Boots Cash Chemists*, [1952] 2 Q.B. 795.

²⁴⁸ It would also be possible to send an invitation online, for instance in the IRC (Internet Relay Chat). This is, however, at present not a common practice, especially because IRC-server operators as part of their policy often prohibit commercial activities. Receiving a specific invitation on the IRC would involve similar problems as with email.

²⁴⁹ Compuserve's central computer is situated in the United States.

²⁵⁰ Art.1335 Italian Civil Code; US: Restatement 2d of Contracts, § 56 comments a, b; Germany: case RGZ 144, 292.

is actually accessed by the consumer, regardless of where it is physically stored.

Normally, the consumer will access his email from the place of his habitual residence and thus receive the invitation there. Problems can, however, occur where the consumer accesses his email from abroad, e.g. while travelling, because he would, according to the conclusions just made, not receive it in the country of his habitual residence. That seems to be true even if the mail is stored at an email server in that country. An extreme example would be a German consumer accessing his mail, stored in the US, from France, finding a specific invitation, taking a note of the supplier's address, deleting the message and later dispatching an order from Germany. It could hardly be said that the consumer had received the invitation in Germany. However, an appropriate solution can be found by two considerations: Firstly, it is a common habit among email users, not to delete messages they might later still be interested in. Such messages are stored either on the user's PC or they remain on the mail server. The German consumer in the example would read the invitation mail later again in Germany in order to get hold of the details for his order. Nothing in the wording of the provisions prevents a construction that regards a second access to the invitation as reception in the country of the consumer's country. This rule should also apply if the consumer saves the message to a disk or prints it, because it cannot reasonably make any difference on which medium the consumer eventually receives the invitation in his country. Secondly, as a matter of law of evidence, it can be presumed that the consumer received the email invitation in the country of his habitual residence, if he dispatches the order from there. It would be up to the supplier, pleading that the respective provision invoking a specific invitation does not apply, to prove circumstances like the ones given in the example.

Previous advertising

The question of previous advertising in an Internet context occurs where the supplier in some way appears on the World Wide Web (WWW). The World Wide Web is a non-coordinated and non-organised distributed worldwide database to which anybody can add information on any computer connected to the Internet. The user retrieves information he

requires by using "browser" software,²⁵¹ which allows, from an arbitrary starting point, to follow links and perform searches. Using that software, he does usually not know (and is not interested in) where the information he is accessing is stored.

For a supplier who has set up a site²⁵² on the Internet it is crucial under which circumstances this will be deemed as advertising. For the following examination it will be assumed that a supplier has stored readily accessible information about his products or services on a site in the World Wide Web and offers them to potential customers, who can place an order by WWW-form, email, telephone, ordinary mail or other means of communication.

The problem can be divided in two issues: the question as to which acts constitute advertising and where that act takes place. With respect to the first question, the commentaries to arts.5 and 13²⁵³ do not define the term but usually name acts such as advertising in the press, radio, television or cinema or by catalogue.²⁵⁴ For the world outside the Internet, the crucial point seems to be the location of the advertising. It has to take place in the country of the consumer's habitual residence. This does not mean the place where the advertising was initiated but where it was perceived. This is demonstrated by the example of advertising on satellite television,²⁵⁵ which is initiated in space, and if that location were decisive, arts.5 and 13 would not apply, because nobody is habitually resident there. However, it is not sufficient that the consumer has somehow received the advertising at the place of his residence. The commentaries to arts.5 and 13 suggest that the advertising must have been specifically directed to the

²⁵¹ Netscape is the most popular one.

²⁵² A site is not necessarily identical with a computer. A site can be understood as a number of WWW-pages, which in some way appear to form a unit, e.g. all WWW-pages of company one. A site is only a virtual unit, since, in theory, every page contributing to the unit could be physically stored on a different computer in different places.

²⁵³ See *supra*, n.244.

²⁵⁴ Report, p.24; Lasok & Stone, p.383; Morse, (1992) 41 I.C.L.Q. 1, 6.; art.5(3) of the draft Consumer Sales Convention also mentions "other marketing activities".

²⁵⁵ See Kaye, p.216.

country of the consumer's habitual residence,²⁵⁶ or, at least, that the supplier could reasonably foresee that the advertisement would reach consumers resident in a particular country.²⁵⁷ Hence, the decisive issue is not the kind of marketing activity but its direction.

Here lies the major problem with the issue of previous advertising in the Internet. The World Wide Web, in that respect, presents a new form of medium not comparable to any other medium. A web page is accessible from everywhere in the world. Even if the supplier primarily intends the web page containing the advertisement to be read by consumers of certain countries, e.g. by using a certain language, it is always foreseeable that the advertisement will come to the attention of consumers, who, for instance, also happen to understand that language, in any country. Marketing activity in the World Wide Web seems always to be directed globally.²⁵⁸ An analogy can be found in the theory of the "stream of commerce", under which a product once put in that stream constitutes a sufficient contact with all jurisdictions in which the product is eventually marketed.²⁵⁹

Since everything that can be regarded as advertising on the Internet is directed globally, closer scrutiny is necessary as to which activity on the World Wide Web can be seen as advertising for the purpose of art.5 and 13. It has been suggested that the mere presence of a business site on the World Wide Web is per se to be seen as advertising in the sense of arts.5 and 13. This must, on close scrutiny, be wrong. It is necessary to evaluate the possible levels of communication of the existence of an Internet business to the world. In an unreal scenario, a supplier sets up a web site, but does not make any efforts to be get that site linked to by another site.

²⁵⁶ Report, p.24; Kaye, p.216; Anton & Beaumont, *Civil Jurisdiction*, p.139.

²⁵⁷ Morse, (1992) 41 *I.C.L.Q.*, 1, pp.6-7; Morse, (1982) 2 *Ybk.Eur.L.* 107, pp.135-136; Lasok & Stone, p. 383; according to Stone, p.267 it is sufficient that the advertisement reached the consumer in his country through normal commercial channels.

²⁵⁸ It is of course possible that the supplier will not accept offers from countries to which he did not intend to direct the marketing, in which case there is no problem, because no contract to which the applicable law would have to be determined will be formed. However, in the Internet the supplier will usually be interested in the global market.

²⁵⁹ *Asahi v. Superior Court*, 480 US 102, 117 (1987) Brennan J, White J, Marshall J, Blackmun J concurring; see also Perritt, near footnote 20.

Since the whole structure of the World Wide Web consists of links the user follows, nobody would ever reach the supplier's site.²⁶⁰ This imaginary zero level of communication can hardly be called advertising, thus the mere presence of a WWW-site is certainly not the decisive factor in constituting advertising. Since the website is the shopping area itself, it can be compared to a real shop having a display window, which would not normally be considered as advertising.

The supplier, in order to make his site known to the WWW-public will probably seek to be added to some of the various WWW-directories²⁶¹ Such directories hold a database of links to WWW-sites and provide the user of the database with search functions and listings by subject. Links to the supplier's website will now appear in specialised listings Internet-users can browse, e.g. "computer accessories", or a link will be shown if a user of the directory enters a search key that matches keywords the supplier submitted to the directory. This situation can be compared with entries in telephone or business directories, like Yellow Pages. Another effort the supplier could make is to be attached to a virtual market place in the WWW. These are, like real markets or shopping malls, collections of businesses in which the user can browse around and look for products he is interested in. Virtual market places are either another form of specialised directories with links to suppliers, usually in a more attractive layout, or they provide all information about the supplier themselves and merely communicate orders to the seller.

It is very difficult to say whether these activities constitute advertising. Whether the supplier has paid for the directory entry cannot be decisive, because some of these services are free on the Internet while others are not. Nor can it be argued that the mere presence in directories or virtual malls is passive with the consumer taking the first step towards the supplier. An entry in ordinary Yellow Pages will qualify as advertising even though the consumer specifically seeks information on certain products and ultimately approaches a business. The answer to the question

²⁶⁰ It is, of course, possible for the supplier to publish the WWW-address (URL) of his site in other media. Advertising of the URL in other media, for instance magazines, would of course be advertising under arts.5 and 13, and this discussion is obsolete in such cases.

²⁶¹ For instance: Yahoo, Infoseek, Lycos.

depends on how one regards the World Wide Web. It could be seen as a virtual world, where supplier and customer are not physically but virtually present, and compare it to the real world. If that view were taken, the supplier's presence on Internet directories and virtual shopping malls could be compared with a real shopping mall or high street which is entered by the consumer, who pops into shops he finds interesting.²⁶² The Giuliano and Lagarde Report, too, concedes that an order placed at a fair or exhibition does not fall under the first indent of art.5(2) requiring previous advertising.²⁶³ The World Wide Web could, on the other hand, in a more restrictive view be seen as a mere means of transportation of information, a medium like any other. Taking that view, the Internet directory entry would be comparable with an entry in Yellow Pages or an advertisement in specialised magazines such as Exchange & Mart or Loot. Despite the interactivity and the virtually instantaneous communication in the World Wide Web, the second view seems to be more realistic and is more likely to be taken by the courts, which will probably very reluctant to adopt a "virtual world" view. It is also questionable what would constitute the element making the Internet different from other media in that respect. A consumer can open a magazine, see an advert, call the company and place an order. Not too much of a difference seems to be there to a mouse click in the Internet.

Another factor should be taken into consideration: Once the site of the supplier is listed in some Internet directories, the information about that site will spread further in the Internet without the supplier's contribution. This is due to the structure of the Internet, where anybody can place a link to another site on his own page. This could be done by individuals, who, for instance, find that the offers presented on the supplier's web pages are attractive and who place a link to them on their own sites. The vendor's pages, once linked into the Internet, will also be

²⁶² See also Perritt, near footnote 19, who, in the context of jurisdiction, asserts that "the act resulting in the receipt of the message in a particular place is the act, not of the publisher, but of the retriever."

²⁶³ Report, p.24.

caught by so-called "web-crawlers"²⁶⁴, which systematically scan the Internet and save all information in a database, which can, again, be browsed by Internet-users for information and offers they are looking for. This is a dynamic process over which the vendor loses control, once the site is linked into the World Wide Web. The supplier, by linking his site into the Internet, sets this process in motion and certainly welcomes it, because his intention is to make his site well known in the World Wide Web.

Thus, after linking in a commercial site into the Internet with the intention of communicating the information about its existence over the net, all links resulting from that act must be deemed as advertising. This is an inevitable but undesirable result, because for the purpose of arts.5 and 13 it should be the expectations of the consumer that determine applicable law and jurisdiction. This will be discussed in the next chapter.

Steps taken in the country of residence

In connection with both advertising and specific invitation as well as in s.27(2) of the 1977 Act is required that the consumer took the steps necessary on her part for the conclusion of the contract. This wording was adopted in the Rome Convention to avoid the problem of determining the place where the contract was concluded.²⁶⁵ Thus, as the Report also makes clear by referring to "writing or any action taken"²⁶⁶ by the consumer, it is the factual not the legal steps the consumer has to take in his country.²⁶⁷ Hence, it does not matter, for the purpose of this issue, when and where the consumer's offer becomes legally effective.²⁶⁸

²⁶⁴ They are often identical to or connected with Internet directories. For an explanation of crawlers, spiders, robots etc. see <http://info.webcrawler.com/mak/projects/robots/robots.html>.

²⁶⁵ Report, p.24; see Morse (1982) 2 Ybk.Eur.L. 107, 135.

²⁶⁶ Report, p.24.

²⁶⁷ Morse, (1992) 41 I.C.L.Q, 1, 7; Kaye, p.217.

²⁶⁸ That may differ depending on the respective jurisdiction. Whereas in English law the postal rule governs, in civil law the offer normally must actually reach the other party.

In the World Wide Web the consumer can place his offer either by email or by filling in and posting an order form directly onto the supplier's web server. The former is equivalent to posting an offer by ordinary mail, which is seen to be all the steps necessary to be taken by the consumer.²⁶⁹ Although the posting of a form to a World Wide Web server involves immediate factual changes on that server, no distinction should be made with posting an email, because the location of the server is fortuitous and the means of communication should not be crucial. The emphasis concerning the issue of steps taken by the consumer is to be put on his typing on the keyboard and posting the mail or form by pressing the appropriate button.

Difficulties can still occur where the consumer has posted the offer electronically from another country while temporarily there. If, in the example given earlier,²⁷⁰ the German consumer posted his order from France, it can not be said that he took the steps necessary for the conclusion of the contract in Germany, even though he used his email server there.

Order received in country of consumer's habitual residence

The requirement that the consumer's order was received in the country of his habitual residence by the supplier or his agent can be found in art.5(2) of the Rome Convention, art.5(2) of the Draft Consumer Sales Convention 1980 and art.3(2) of the Hague Convention 1955²⁷¹, but not in art.13 of the Brussels Convention. Again, the rationale of these provisions is to establish rules for a close connection of the contract with the country of the consumer's residence in order to make the law or mandatory rules of the law of that country applicable.

The provisions were meant to apply mainly in situations where the consumer has addressed himself to a foreign firm at a fair or exhibition or

²⁶⁹ Report, p.24; Stone, p.267; Kaye, p.217.

²⁷⁰ Supra, 3.1.1.

²⁷¹ Hereinafter referred to as 'arts.5 and 3'.

at its branch in the consumer's country.²⁷² Their application in an online environment causes considerable difficulties.

First, the notion of reception of the consumer's order has to be construed for the purpose of arts.5 and 3. An order placed by email or posted onto a website may be saved there or on an email server respectively but may be accessed and processed later, either manually or automatically, from a different location. In a different context, where the reception of a specific invitation addressed to the consumer was in issue, it was seen that reception meant the actual act of accessing the invitation. Similarly reception is not necessarily the point where the order becomes legally effective, but for the purpose of construction of art.5 and 3 the place of reception must be the location to which the consumer addresses the order. This is because the rationale of the provisions is to protect the consumer's expectations that the contract is somehow closely connected to the country of her residence because she addressed the order to a supplier or his agent present in that country.²⁷³ How the order is subsequently processed is beyond the consumer's control and can therefore not be taken into account when determining the place of reception. Undoubtedly, the consumer will often not know the physical location of the site where the email or WWW-form is posted to, and that location is fortuitous. Nevertheless, this problem can not be solved by construction of the wording of the relevant provisions but only by doing away with such rules not suitable for an online environment.

In practice, application of arts.5 and 3 will have the following results: An order by email is, for the purpose of those articles, received by the supplier at the server where the email is stored. If that place happens to be in the country of the consumer's residence, the conditions of arts.5 and 3 are satisfied. Similarly, a form posted immediately onto a World Wide Web site is received at the physical location of that site, which might, again, be situated in the consumer's country, although the supplier's place of business might be elsewhere. If the supplier trades through a virtual marketplace where, from the consumer's perspective, the transaction takes place there and orders are forwarded to the supplier by the provider of the marketplace, the order is received by the marketplace-provider as an agent

²⁷² Report, p.24.

²⁷³ See Kaye, p.217.

for the seller and reception takes place at the location of the site of the virtual marketplace.

Place of business of supplier

The place of business of the supplier is presumed to determine the applicable law according to art.4(2) of the Rome Convention, which applies in the absence of a choice of law by the parties and if the contract does not fall under the provision of art.5 on certain consumer contracts. Similarly, art.3(1) of the Hague Convention 1955 calls for the application of the law of the country where the vendor has his habitual residence.²⁷⁴ The location of the licensor also determines the applicable law under the draft § 2B-106(b) UCC.

The main question in connection with an Internet context is whether a World Wide Web location through which the contract is made or services are performed can be a place of business as such. The answer must be negative, because the connecting factor of the place of business is intended to introduce certainty and to avoid the difficulties in seeking the place of performance.²⁷⁵ In *Cleveland Museum of Art v. Capricorn Art*²⁷⁶ it was held that an established place of business in Great Britain requires an identifiable place at which the business is carried on with some physical indication that the business has a connection with particular premises, a condition which could not be fulfilled by a virtual place of business in the World Wide Web.

Two implications result from this finding: First, a website through which services are provided and not located at the principal place of business can not be a branch or ancillary place of business and as such determine the applicable law. Under arts.4 and 3 a physical branch through which the contract is performed would determine the applicable law. Secondly, it is possible that an Internet supplier has in fact no place of business, because a supply of electronic services on the World Wide Web can be run without any offices or other form of business premises. The

²⁷⁴ Both articles hereinafter cited as 'art.4 and 3'.

²⁷⁵ Report, p.21; UCC § 2B-106 comment 2.

²⁷⁶ [1990] 2 Lloyd's Rep. 166, 169.

draft § 2B-106(e) has anticipated that and refers in the absence of a physical place of business to the place of incorporation or other charter authorization, or, in the absence of that, to the primary residence of the individual running the business. Art.4(2) of the Rome Convention seems to assume that if the contract is entered into in the course of one party's trade or profession there will always be an ascertainable place of business. As a matter of construction, art.4(2) should, similar to the draft § 2B-106(e), be interpreted as falling back to the individual's residence in the absence of a place of business.

Place where electronic services are to be rendered

The place where services are to be rendered is crucial for § 196 of the Second Restatement, which makes the law of that place the applicable law in the absence of a choice or another close connection and for art.5(4)(b) of the Rome convention. The latter provision makes art.5 on consumer protection inapplicable to a contract for services to be supplied exclusively in a country different from that of the consumer's habitual residence. It is asserted that the contract in that case is more closely connected to that country²⁷⁷ and that the consumer cannot reasonably expect the law or mandatory rules of his country to apply.²⁷⁸ Neither the Brussels Convention nor the Draft Consumer Sales Convention 1980 contain a similar provision.

Electronic services in an online environment comprise provision of information, e.g. database access or online journals, provision of software or other material stored in computer files, e.g. by allowing access to a download server and provision of resources, e.g. disk space on a web server to make the customer's homepage available in the net.²⁷⁹ Unlike physical services their location is difficult to ascertain. There are three main possibilities: the physical location of the database, web server,

²⁷⁷ Report, p.25.

²⁷⁸ Kaye, p.208; see Morse, (1992) 41 I.C.L.Q. 1, 5 for a contrary view.

²⁷⁹ It should be noted, that this discussion does not apply to contracts providing for access to the Internet, the suppliers of which are often called 'service providers'. Such contracts are usually concluded outside the Internet with a local or national service provider, hence they are domestic contracts not involving private international law.

resource etc., the location of the customer when accessing the service or the place from which the supplier runs and organises the service.²⁸⁰

In the case of the customer accessing information stored in the Internet or using resources provided to him, it is difficult to assert that the location of the service is not the actual location of the used resource²⁸¹. It could be argued that the user has to transfer the information to his terminal in order to use it, and therefore the service is only complete when the information actually arrives there, hence the location of the service would be the place from where the resource is accessed. The supplier will, however, usually not undertake to deliver the information to the user but only promise to make the resource ready for access in the Internet, because he has no control over the transport of data in the net. The situation can be compared to a video rental shop, which only undertakes to have a videotape collection ready for access, but the customer, who cannot watch the tape there, has to take care of his journey to and from the shop. Even where the information is to be sent by email, the supplier will only undertake to dispatch the mail, hence the actual delivery of the mail will not be part of his service.

Both the location of the resource and the location of the user when accessing it are absolutely fortuitous and can even change, for instance if the supplier switches to a new server or uses several servers with the same contents²⁸² or if the user accesses the data from different locations. It could therefore be argued that the place where the services are rendered is in fact the place from where the supplier controls and organises the service. That place can be different from the location of the information resource, for instance where the supplier hires space on a website, which is technically maintained by a third party, and only provides the information to that party, which ultimately makes it available on the net. A parallel could be drawn to data protection law, where a similar dualism exists between a computer bureaux/processor, which processes data on behalf of

²⁸⁰ See draft UCC § 2B-106 comment 2.

²⁸¹ See *Plus System v. New England Network*, 804 F.Supp. 111, 119; *Pres-Kap v. System One, Direct Access*, 636 So.2d 1351, 1354 (1994) Barkdull J, dissenting.

²⁸² So-called 'mirror' servers.

the data user/controller, who actually controls the data.²⁸³ Unlike a data subject in the context of data protection, the user of a service is not concerned with the internal structure of the provision of the service. From his perspective, it is only relevant that he can access the service where and how the supplier undertook to provide it.

Locating the service at the place from which it is controlled would in effect substitute the connecting factor of the place where services are rendered for the place of the supplier's business, and doing so would go beyond the wording of provisions using the place of services as connecting factor. The last paragraphs have shown that the location of services is not an appropriate connecting factor in an online environment²⁸⁴ and should therefore not be used to determine the applicable law. That has been recognised by the draft UCC article 2B, which will use the location of the licensor as a connecting factor. The current flexible approach in American law under § 196 of the Second Restatement allows to disregard the place of rendition of services in favour of a more appropriate connection like the locations of supplier or consumer. The unfortunate and fortuitous results produced by art.5(4)(b) of the Rome Convention, which was primarily intended to apply where the consumer travels to another country to receive services there,²⁸⁵ can be avoided by a strict construction of the wording which requires that the services must be supplied exclusively outside the consumer's habitual residence. Since the slightest element taking place in the consumer's country makes art.5(4)(b) inapplicable, it could be argued that the provision does not apply where the consumer accesses the service from her home country.

²⁸³ Data Protection Act 1984, s.1(5),(6); Data Protection Directive 95/46/EC, O.J. [1995] L281/31, art.2(d),(e).

²⁸⁴ See also draft UCC § 2B-106 comment 2 and *Pres-Kap v. System One, Direct Access*, 636 So.2d 1351, 1353 (1994), where it was held that the defendant's use of a database in Florida did not provide sufficient contact to exercise personal jurisdiction over him there.

²⁸⁵ See Report, p.24; Morse, (1992) 41 I.C.L.Q. 1, 5; Lasok & Stone, p.383.

Concepts of Consumer Protection and Internet Sales

As it could be seen in the previous chapter, the application of current concepts of private international law on Internet contracts causes difficulties, such as fortuitous locations of connecting factors. This is partly caused by the fact that the Internet works on the basis of logical rather than not geographical locations,²⁸⁶ and that consequently neither the parties nor the performance of the contract are easy to locate.

Parties' Expectations in an Internet Environment

It is necessary to examine the principles that underlie the concepts of private international law on consumer contracts and to see if these principles are still valid in an Internet context. In the first Chapter²⁸⁷ the conflicting expectations of the parties and the conflicting governmental interests have been identified as the basis for the conflict of laws in cross-border consumer contracts. This is also true in an Internet context. Attempts to promote a "cyberlaw", based on self-regulation or creation of new authorities within the net, and hence replacing the national borders by a border dividing the "online world" from the outside world,²⁸⁸ are, at least at present, not practicable. Nation states will insist on their powers²⁸⁹ and, with regard to consumer protection, will always purport to have their consumer protection legislation applied to their residents unless substantial international consumer protection legislation is made or national consumer protection laws are harmonised.²⁹⁰

Whilst the basic conflict of expectations and interests still exists, it might be questioned whether the parties' expectations are different in a virtual environment such as the Internet. If true, that means that rules of

²⁸⁶ Johnson & Post, at I.B. near n.22.

²⁸⁷ See *supra*, 2.2.

²⁸⁸ Johnson & Post, at. II.

²⁸⁹ See also Goldring, *passim*.

²⁹⁰ As it is now happening in the EU.

private international law, although based on the same basic concept, will have to differ in a worldwide online environment.

The concept of private international law on consumer contracts, as it was seen in previous chapters, is to use certain connecting factors to determine the applicable law or to override a choice of law by the parties. These connecting factors are based on the parties' expectations. Where the consumer can reasonably expect the consumer protection rules of his country to apply, it is likely that they will be applied. Conversely, in a situation where such an expectation is not justified, the consumer will have to accept that other rules govern the contract. Private international law in Europe, particularly in the Rome Convention and the draft Consumer Sales Convention 1980, has defined these situations in more detail by enumerating situations in which the consumer will typically expect the consumer protection rules of her residence to apply.²⁹¹ Their protection cannot normally be expected by a consumer who travels to another country to purchase goods or services there. Similarly, a consumer staying in his country but ordering from a foreign supplier must accept that foreign law might be involved. Only if the contract is concluded in the consumer's country or at least preceded by marketing there, the threshold is reached at which he can reasonably expect his consumer laws to apply.

This concept could only be transplanted into an Internet environment, if the conditions there were the same. That this is not the case, is already obvious from the difficulties, discussed in the previous chapter, that are encountered when the concept is applied to contracts made in the World Wide Web. Since the Net is structured logically, not geographically, notions relying on geographical locations, such as "contract made with supplier or his agent in country of consumer's residence", "marketing in consumer's country", "services rendered outside consumer's country" must be meaningless for the determination of the parties' expectations. A consumer who enters the virtual world, knowing it is operating globally, does not change her expectations regarding the applicable law once she has seen an advertisement on a web page or received an invitation by email. Nor do her expectations change with the location of a website which provides online services. Expectations do change, however, where the marketing in the Internet by its content,

²⁹¹ Art.5(2) of the Rome Convention; art.13 of the Brussels Convention; art. 5 of the draft 1980 Convention.

regardless of its form or location, induces the assumption that the supplying business has submitted itself to the jurisdiction and its mandatory rules of the consumer's residence. An example might be a supplier designing websites specifically for certain countries by using the language of that country, stating the address of a physical branch in that country or quoting prices in the country's currency. It is the substance of the marketing that matters in the virtual world where locations are meaningless.

Expectations and interests of consumer and supplier are different inside the online world from those when contracting in the real world. A consumer shopping in cyberspace knows that the other party to the contract will most likely be foreign. But unless the supplier provides the physical address of his place of business, the consumer is not even able to find out which is, apart from the law of her residence, the other potentially applicable law. There seems to be a duty of the supplier at least to inform the consumer about the physical location of the business. The supplier, on the other hand, faces similar problems. Unless the contract is for the shipment of goods to the purchaser's residence, that place might be difficult for the supplier to ascertain.²⁹² But the problem of not-knowing-each-others-physical-location is far better controllable by the supplier. He is able to inform the consumer of his physical address and he can require customers in electronic order forms to supply their address of habitual residence. Another difficulty for the supplier is that would have to deal with the law of all countries where Internet customers are situated.²⁹³ But the consumer faces the same problem vice versa, and a person deciding to do business on the Internet is in a better position to evaluate the different laws or to reject offers coming from countries whose law he does not know or does not want to deal with.

A Concept for Choice-of-law Rules on Internet Consumer Contracts

It has been seen that the place where services are to be rendered or the place and form of marketing activity in the net are not appropriate as connecting factors to determine the applicable law or even override a

²⁹² See draft UCC § 2B-106 comment 2.

²⁹³ Draft UCC § 2B-106 comment 2.

choice of law. Relevant connecting factors are the places of business or residence of the parties and, additionally, the substantial content of any marketing in the net. On the basis of these connecting factors a set of basic rules for consumer contracts made in the Internet can be established:

Where the contract is for the supply of goods to a delivery address coincident with the consumer's residence, a strong connection of the contract to that place exists. The supplier knows in which country delivery will occur,²⁹⁴ whereas the purchaser might not know the vendor's place of business. The connection is strong enough to place the applicable law in the country of the consumer's residence in the absence of a choice of law.

Nevertheless, a choice-of-law clause, if indicated clearly, in the contract for the supply of goods in favour of the law of the supplier's place of business should normally be valid and not be overridden by mandatory rules of the consumer's country. This is for several reasons: With the World Wide Web the consumer has a huge information resource at hand. Obtaining information about competing suppliers is very simple. In such an environment, the consumer is not forced to accept a choice-of-law clause on a take-it-or-leave-it basis.²⁹⁵ She can actually leave it and look for other suppliers in other countries or in the country of her residence or for suppliers who allow the law of the consumer's residence to apply. Further, while being online, she can readily obtain information about consumer protection or contact consumer protection agencies or discussion groups.²⁹⁶ Finally, as a result from the analysis of expectations, a consumer entering the virtual world can not reasonably expect the consumer protection laws of her residence to override any other law she might get in contact with, unless the supplier subjects himself to them by the substantial content of his marketing as described previously. Only in that case a choice-of-law clause in favour of a law other than that of the consumer's residence should be disregarded.

For a contract for the supply of online services, the connection with the country of the consumer's residence is weak, for there is no physical delivery to that place and the services are rendered at the

²⁹⁴ See also draft UCC § 2B-106 comment 3.

²⁹⁵ See *supra*, 2.5.1.

²⁹⁶ Johnson & Post, at II.B.3.

fortuitous location of the information resource. Therefore, it is the place of business of the supplier which has the most substantial connection to the contract and the law of that country should apply in the absence of a choice, provided the supplier has informed the consumer about that place. If he fails to do so, the burden of ascertaining a physical location from a network address can not be placed on the consumer, thus the law of his residence should be applied despite its weak connection. Again, where the supplier has, by the substantial content of his marketing, caused the impression that he subjected himself to the law of the consumer's residence, that law should apply and the parties should not be allowed to derogate from that by a choice-of-law clause.

The approach presented here could be reconciled with the Restatement 2d because of its flexibility, which would allow for the "center of gravity" of Internet contracts to be placed in deviation from the general rules. Similar results could be achieved by the application of the Inter-American convention. The conventions of European origin, however, are incompatible with the suggested approach, because they rely on form and location of marketing as connecting factors. The proposed UCC § 2B-106, which was drafted with an online environment in mind, draws a distinction similar to the approach presented here between licence contracts where delivery of a physical copy of the information to the licensee is required and contracts where the information is only provided online. In the former case the law of the licensee's location governs, whereas in the latter case it is the law of the licensor's location for the sake of certainty.²⁹⁷ § 2B-106 does not refer to the licensor's marketing but unilaterally protects US-residents against substantially less protective provisions of the law of the country of a foreign licensor.²⁹⁸

Whilst American conflicts law seems to be flexible enough to face the challenges of new problems caused by the Internet, and the approach in the draft UCC § 2B-106 seems acceptable, the European approach of fixed and narrow connection factors with regard to consumer contracts is inappropriate for an online environment.

²⁹⁷ Draft § 2B-106 comments 2,3.

²⁹⁸ Draft § 2B-106(d).