

**Choice of Law and Jurisdiction in E-commerce Contracts with Focus on B2C  
Agreements. A Comparative Analyses of EU, US and China Legal Frameworks**

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## **Table of abbreviations**

ADR – alternative dispute resolution

B2C – business to consumes

E-business – electronic business

ECJ – European Court of Justice

E-commerce – electronic commerce

E-contract – electronic contract

EU – European Union

ISP – internet service provider

ODR – online dispute resolution

US – United States

## **Abstract**

During the last few decades the world witnessed a rapid development of E-commerce transactions. Today, nearly 2 billion people are active users of online markets. E-commerce, in its unique way, is the only borderless market and this feature makes its regulation highly complicated as of today, states are not able to agree on uniform set of rules that will govern the immense online market.

The international nature of E-commerce constantly raises legal questions as the law struggles to catch up to a changing world. The non-geographical nature of E-commerce makes the traditional application of choice of law and jurisdiction rules difficult to apply, as these were designed for a pre internet age, based on connection factors, the strongest being geographical in nature. In E-commerce, it is highly complicated for the parties to identify the real location of the other as the transaction is based on informal declarations that are not all the time accurate, and even these geographical indicators can fail while talking about the contracts performed online.

In order to ensure predictability and certainty in E-commerce transaction instead of using connecting geographical indicators it would be more useful to identify proper law and jurisdiction based on party autonomy. However even in this hypothesis it is highly probable that improper law and jurisdiction will be applicable. Such risk emerges because of unequal bargain power of the parties, E-businesses are usually assisted by professional lawyers that are able to design the terms of an E-contract in the favor of their clients. At the same time consumers are less likely to be aware about the meaning and consequences of such clauses as choice of law and choice of jurisdiction, furthermore they are not even able to negotiate the terms before agreeing to them. Hence validity and enforceability of these clauses are of a primary importance, especially because of the fast growing online market.

This thesis will outline the main features of E-commerce contracts with specific references on choice of law and jurisdiction clauses. Also thesis will provide an overview of choice of law and jurisdiction laws in the EU, US, and Chinese legal system.

## **Introduction**

Traditionally, private international law does not prioritize consumer protection in cross-border contracts, first because of the neutral nature of this branch of law and secondly because in the pre internet age consumers were less likely to enter into international contracts. Today, with the wide spread adaption of international commerce, consumers are now entering cross-border contacts individually on a larger scale than ever before.

The traditional approach of private international law, where it is chosen in order to provide to a certain degree of protection to the parties and to bring justice in case of dispute, has proven to be inadequate in the modern world. The need for private international law to be reformed is crucial. Once consumers mostly made contracts within their state of origin, and their protection was treated as a national matter. But with the development of international, regional markets and improvement of technology, means of transportation, and communication consumers frequently become parties in international commercial contracts, hence the question of their protection in such circumstances goes beyond national matters.

Due to innovation in communication technology, consumers can now conclude contracts with foreign E-businesses in the borderless online market, thanks to fast, easy, and convenient E-contracts. Because of their convenience, such contracts are concluded with increasing frequency, hence the traditional approach offered by private international law become more and more challenged, specifically demands for more consumer oriented provisions in E-commerce. For this reasons it is crucial to establish a consistent, predictable, and efficient private international rules that will govern E-contracts and will offer an adequate protection to the consumers involved in such borderless transactions.

Despite having widely divergent legal traditions and approaches, the EU, US, and China all have rapidly growing online markets, as well as a significant population. Those three powers

are the greatest trade forces in the world, and their legal institutions should be examined in this changing world.

Consequently, this thesis will focus primarily on the EU and US legal systems, who have the most comprehensive E-Commerce legal frameworks in the world. The Chinese legal system will be considered, but will get less focus in the second chapter, due to lack of access to translated sources.

As regulation of E-commerce is a rising topic, the main goal of this thesis is to provide a clear analysis of the current legal approaches, to E-contacts in general, focusing specifically on choice of law and choice jurisdiction, in the EU, US and China. The approach in this thesis formed is around the identification of current solution to the issues raised by sui generis nature of the E-commerce and the evolution of consumer's protection in online commerce. The question of harmonization will also be approached, however due to the issue's sensitivity, and the immense effort required reaching an internationally acceptable agreement, any musings will be merely theoretical in nature.

This thesis is divided into three chapters. The first chapter on E-contracts is designed specifically for offering to the reader an understanding about the unique nature of E-contract. As the research in the following chapters will be focused on choice of law and jurisdiction it is crucial first to offer a clear basis about how E-contracts works and what are is their regulatory framework. The reader will get familiar with two main means of E-contract formation, via exchange of emails and website means.

Also, as the main topic of this thesis is focused around B2C transactions, a distinctive part of the research will be focused on consumer protection. Protection in EU and Chinese systems will be analyzed and the enforcement of US terms and conditions with consumers will be also be considered.

From the first chapter, the reader will see that one of the conditions of the formation of E-commerce contracts is that the consumers have to accept the terms and conditions of the E-business displayed usually on the website or send by email. Even if this is common practice with paper based contracts, with similar terms and conditions, due to the international character of E-commerce, there are two clauses from those contracts are often subject of debates. Choice of law clause and choice of jurisdiction are pretty sensible topics in E-commerce contracts, especially when the bargaining power of the parties is not equal.

Following with the second chapter, the topic will be narrowed to choice of law clauses in E-commerce contracts with consumers. Choice of law clauses are particularly important in commercial relations as these clauses establish the law that governs the whole E-contract, the duties and obligations of the parties will be based on that law, protection that consumers can claim will be limited to that law and mandatory provisions of that law will have to be respected. As the drafters of terms and conditions of the E-contracts, E-businesses tends to pick the law that will offer them a more favorable treatment, choosing the legal system that will require less from them and that will offer lower protections to consumers. Therefore, the analyses of such clauses in E-contracts is extremely important as the consumers are put in the situation of “accept it or leave it” without any opportunity to negotiate the clause. Furthermore, oftentimes consumers are not even aware of the meaning of this choice of law and the consequences that it might have.

The main focus of the second chapter will be dedicated to the validity of choice of law clauses in E-contracts and their integration of mandatory rules and public policy. Also as E-commerce is borderless, harmonization of legal provisions on choice of law is worth discussing, as it would lead to consistency within commercial relations. An example of the harmonization tentatively offered by the Rome I regulation will be presented.

The third chapter will be dedicated to the ongoing discussion of choice of jurisdiction clauses. E-businesses chose the jurisdiction closest to them within their terms and conditions, not the consumer. This is particularly inconvenient for the consumers as due to international character of E-commerce, they are frequently located in a different country and it forces them to travel abroad to seek justice, hence why the validity of such clauses are challenged.

In this chapter all three jurisdiction will be analyzed, including the Chinese. In addition, the chapter will provide enough information to get the reader familiar with Online Dispute Resolution and Alternative Dispute Resolution systems which, in the last decade, are more frequently used.

## CHAPTER I Electronic Contracts with Consumers

### *1. Formation and features of electronic contract with consumers*

#### 1.1 Identification and territorial connection of parties

E-contracts are agreements concluded online, and because of their international and private character private international law is applicable. For private international law the identification and legal location of the parties in E-contracts is essential. Specifically in states where mandatory rules provide a specific status for one of the parties, usually it protects the consumers. It is crucial to give proper qualifications of both parties in conformity with the applicable law to the E-contract in order to identify the existence of a consumer contract concluded online.<sup>1</sup> For instance, an E-business who is selling goods online, may receive orders from both, consumers and other businesses, but it will not always be clear for the seller if a B2C or B2B contract was concluded, hence if it was dealing with a professional/business or with someone who is acting outside his professional activity. The qualification becomes even more problematic with the development of online markets such as eBay and Amazon, where the difference between professional sellers and individuals is extremely difficult for the consumer to determine.<sup>2</sup>

As E-contracts reduce the visible difference between B2C and B2B contracts, a well-designed private international law which is adapted to special characteristics of E-contracts which will balance the conflict of interest that is ongoing between consumers and E-businesses is needed.<sup>3</sup> In a perfect scenario a harmonized supranational system that will govern E-commerce will be the best solution, but a hard to achieved one.

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<sup>1</sup> Zheng Sophia Tang, *Electronic consumer Contracts in the conflict of law* (Second Edition, first published in 2009, Hart Publishing 2015) 50

<sup>2</sup> *Id.* at 13

<sup>3</sup> Edward Elgar, *Research Handbook on EU Internet Law* (Edward Elgar Publishing Limited 2014) 254

Traditionally the applicable law issue is solved by the private international law referring to the territory of the country where contractual relationship is based, to the parties intention or to objective connecting factors.<sup>4</sup> E-contracts brought challenges to traditional connecting factors in contracts,<sup>5</sup> but a contractual party needs to be aware about the domicile or habitual residence of the other party in order to have the possibility to predict which country potentially will have jurisdiction and which law is most likely to be applicable.<sup>6</sup> Even if E-contracts can provide some clues about the territorial connection of the parties by the website domain, the Internet Protocol address, the email address and the statements of the parties, such data can still be inaccurate and misleading.

For example, if an E-business established in Spain and whose main activity is in Spain, registered a domain name ending with “fr”, in this case the consumers will have the reasonable belief that they are entering into a contractual relation with a French entity, however they will be mistaken. Also, some email addresses have generic top level domains instead of a specific country code top level domains, the same option is available for websites too. The only clear indicator that could lead to the avoidance of the inaccuracy of the territorial connection could be the Internet Protocol address or so called IP address.<sup>7</sup> The only issue is that the recognition of an IP address is not available for ordinary users as it requires more than ordinary knowledge and technology and that in essence it helps to identify the location of the computer but it does not provide exact information about the domicile, habitual residence or other personal connection factors of another party in a E-contract.<sup>8</sup> Also while referring the declaration of the parties it is important to keep in mind that some

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<sup>4</sup> James Fawcett, *Private International Law* (14<sup>th</sup> Edition, Oxford University Press 2009) 20

<sup>5</sup> Jonathan Hill, *Cross Border Consumer Contracts* (Oxford University Press 2008) 149

<sup>6</sup> *Supra* at 2

<sup>7</sup> *Id.*

<sup>8</sup> *Supra* at 1, 14

consumers are not aware about such legal notions as domicile or habitual residence, hence they might unconsciously provide misleading and inaccurate information.

The E-commerce Directive<sup>9</sup> requires E-businesses to provide easily accessible and clear information to the consumers about its real identity, geographical location or email address.<sup>10</sup> Even if such an approach might partially solve the problem in regards to E-businesses activity within the territorial limits of the European Union, unfortunately it is not applicable in regard with non-EU E-Businesses. For instance, in the case of business from the Russia Federation or Republic of Moldova because in conformity with the Recital 58 of the same Directive the duty to provide information is applicable only in regard with E-businesses from the EU.<sup>11</sup> Also the consumers are not bound by such obligation to inform.

Despite the aforementioned issues raised, it is important to highlight that the mandatory conflict of law rules are based in the principle of targeting, hence if an E-business targets specific consumers at their domicile or habitual residence the E-business will have to comply with the jurisdiction and domestic law of the consumer's home, it automatically become the subject of those laws, and even the applicability of traditional private international law approach will be limited despite the party autonomy.<sup>12</sup>

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<sup>9</sup> Council Directive (EC)2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L 178

<sup>10</sup> *Id.* at art 5 (2)

<sup>11</sup> *Supra* at 10, Recital 58 “*This Directive should not apply to services supplied by service providers established in a third country; in view of the global dimension of electronic commerce, it is, however, appropriate to ensure that the Community rules are consistent with international rules*”

<sup>12</sup> Council Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177, art 6 (2): “*Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.*”

The principle of targeting should not be seen through the unlimited and international reach of E-commerce as it would lead to particular conflicts. Once an E-business establishes a website it can be accessed by an almost unlimited number of consumers from many countries.<sup>13</sup> A broad interpretation based on the accessibility from the country of origin of the consumer will lead to that the E-business being exposed to a high level of risk.

Even if the modern technology allows the limitation of the territorial accessibility of the website such extra expenses are unreasonable for small and medium E-businesses.<sup>14</sup> Also a narrow interpretation of the targeting principle will not benefit the consumers as they might be required to bring legal action in a foreign country or even to argue their rights and obligation under a foreign legal regime just because they will not be able to benefit by legal protection of their country of origin with which they have territorial connection. It is an ongoing issue that lacks uniform interpretation, but it too urgent as the protective approach of targeting for consumers is very infrequently used. Most E-commerce contracts are of low value, which makes litigation or arbitration in the home state of the consumer or in a foreign country simply unnecessarily or even unreasonable. Hence the concerns about the negative effect of the protective private international law based on territorial location of the consumer in the E-contracts are not necessarily very realistic.<sup>15</sup>

## 1.2 Formation of E-contracts

In principle, the rules of contract formation with a general character are also applicable to E-contracts. All contractual elements must exist for the formation of a valid contract, even if in the E-commerce space, identification of all this elements is not always as easy, like in typical contracts. Parties must have a common legal intention and full or limited legal capacity in

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<sup>13</sup> Dan Svantesson, *Private International Law and the Internet* (4<sup>th</sup> Edition, first published in 2002, Kluwer Law International 2016) 133

<sup>14</sup> *Id.* at 134

<sup>15</sup> *Supra* at 4, 2

order to conclude the E-contract. The contract formation is based on a valid electronic offer and electronic acceptance which must be communicated in order to be considered effective.<sup>16</sup>

The formation of E-contracts has specific challenges, such contracts are concluded in a unique form and by a different procedure which can lead to validity questions. From the prospective of Private International Law the validity of the E-contract or contractual terms can be addressed by choice of law or, even in a better scenario, by the approach of uniform law. But even this can be challenged, in case of choice of law rules, the law designated by that rules might not provide specific references to E-contracts and the contract risks to be unreasonable invalidated despite the agreement of the parties. Also it is questionable if the countries can agree on uniform rules for E-contracts as it involves a high level of compromise.<sup>17</sup>

Due to that fact that E-contracts are concluded in different ways and the principles of these ways are very different from paper transaction the topic of formation of E-contracts is still an ongoing discussion. There are two most popularly recognized ways of E-commerce contract formation. First by exchange of emails and submission of attachments and second by website means.<sup>18</sup> Formation of electronic contracts raise at least two issues, it is not clear from evidential prospective how the electronic communication ought to be authenticated. Also such details as when and where E-contract was concluded; which can solve the choice of law and jurisdictional issues, lacks clarity. This problem can be approached through legal provisions that deal with traditional form of contracts.<sup>19</sup>

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<sup>16</sup> Maryke Silalahi Nuth, *Electronic contracting in Europe* (Senter for rettsinformatikk Postboks 6706 St. Olavs plass 0130 Oslo, Complex nr. 2/2008) 33

<sup>17</sup> *Supa* at 1, 65

<sup>18</sup> Wolters Kluwer Portal "*Computabel contracts/ E-contracting*" (2014) <<https://goo.gl/5YAtBq>> accessed 11 March 2018

<sup>19</sup> Mindy Chen-Wishart, *Formation and Third Party Beneficiaries* (Oxford University Press 2018) 72

### 1.2.1. Formation by exchange of emails and submission of attachments

General perception about the contracts is that they are agreements between parties that are expressed in written form and signed on paper. However the majority of contracts in the modern era are not written anymore and are perfectly enforceable even without court assistance. A contract is an agreement between two or more parties, on basic level a contract exists if there is an offer from one party and acceptance from the other party, hence there are no reasonable grounds why a contract entered into through email should not be enforceable as it is also a meeting of the offer and acceptance.<sup>20</sup> In US courts have a long lasting practice of recognition of correspondence as an enforceable agreement,<sup>21</sup> in fact, the courts went even further by recognizing the validity of the agreements concluded via email messages.<sup>22</sup>

Commercial advertisement is a must for any type of businesses, including E-business. Consumer's attention to the services and products offered online must be drawn.<sup>23</sup> The simplicity of the advertisement and their forms usually makes it difficult for consumers to identify the E-business true intention. It can be difficult to differentiate a simple advertisement via mail address without any binding intentions opposed to an actual offer to conclude an E-contract. There are three essential criteria identified by scholars that help the identification of an email as an advertisement, the promotional purpose, public communication and financial interest. An email that contains detailed information about the

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<sup>20</sup> Peter Clarke, "Are Emails Legally Binding as Contracts?" (2017) <<https://goo.gl/X4YkTx>> accessed 11 March 2018

<sup>21</sup> *Williamson v. Delsener*, 59 A.D.3d 291 (1st Dep't 2009); *Palmo v. Straub*, 45 A.D.3d 1090 (3d Dep't 2007); *Wronka v. GEM Community Mgt.*, 49 A.D.3d 869 (2d Dep't 2008); *Roberts v. Stracick*, 13 A.D.3d 1208 (4th Dept 2004)

<sup>22</sup> *Forcelli v. Gelco Corp.*, 109 AD3d 244 (2013 NY Slip Op 05437); *Brighton Inv., Ltd. v. Har-Zvi*, 88 A.D.3d 1220 (3d Dep't 2011); *Williamson v. Delsener* 59 A.D.3d 291 (1st Dep't 2009)

<sup>23</sup> Thomas Russell, *Commercial Advertising (RLE Advertising)* (first published in 1919, 7th Volume, Routledge 2013) 97

E-business and its product or service may represent at the same time an advertisement while simultaneously including an offer to conclude a contract.<sup>24</sup>

In most cases the sender of the advertisement/offer via email is not the same person as the one that will be the party in the E-contract and such circumstances lead to inconvenience for the consumer, specifically that it is unknown which legal system the future contacted party operates within.<sup>25</sup>

The moment when the will of the parties meet is considered the moment when the E-contract is concluded via email. Time of conclusion of the E-contract via email and place in conformity with Electronic data interchange Directive<sup>26</sup> in Europe is the moment when message constituting acceptance of an offer reaches the computer system of the offeror.<sup>27</sup> The same approach is used in the American legal system, specifically in the Model contract regarding the data exchange information of the American Bar Association.<sup>28</sup>

### 1.2.2 Formation by website means

Cyber advertisements presented on websites are not direct offers to the consumers, they are only invitation to treat. The website owners who are intending to sell their goods or to offer their services online will have to carefully construct the advertisement in a way that will offer clarity for the consumers that it is not an offer but instead an invitation to treat.<sup>29</sup> Such an approach gives to the E-business the option to accept or to refuse to deal with specific, identified customers, American law defines it as freedom of contract. Everyone is free to choose their own contract partner, offers do not have to be always accepted. Hence the E-

<sup>24</sup> Emilia Cotoi, "The conclusion of electronic contract" (2011) <<https://goo.gl/Janv8s>> accessed 11 March 2018

<sup>25</sup> Alexandra Bleoanca, "Earlier stage in the electronic contract conclusion" [2010] ISSN 1220- 8515

<sup>26</sup> Council Directive (EC) 94/820 relating to the legal aspects of electronic data interchange [1994] OJ L 338

<sup>27</sup> *Id.* at art 3 (3) "*A contract effected by the use of EDI shall be concluded at the time and place where the EDI message constituting acceptance of an offer reaches the computer system of the offeror*"

<sup>28</sup> *Supra* at 25

<sup>29</sup> Denis Keenan, *Law for Business* (13th edition, Longman 2006)

contracts formed by website means should pass a three step process. First, the E-business displays the advertisement of goods or services on the website consisting of an invitation to treat. The offer is, in fact coming from the consumer who explores the website. By offering to purchase the advertised goods or services the consumer communicates an offer, such communication is usually done on the website. The contract is considered finally concluded only after the vendor will express to the consumer an acceptance of the offer.<sup>30</sup>

### 1.3 E-contracts with consumer in Private International Law

American system of law has a long history of protection of weaker party by private international law in a contract. The typical methodology of conflict of laws generally depends on such factors as value free connections and localization of the contractual relations between the parties in the territory of a country regardless of the position of the parties, their interests and even substantive value of the possible applicable law.<sup>31</sup> Presently, the conflict of laws revolution switched the approach referring to the weaker party in a contract however there are no specific considerations on consumer protection as a distinctive issue.<sup>32</sup>

A similar but a bit different approach can be seen in Europe, the continental European countries went even further than the American ones and brought consumer protection as a distinctive section of the private international law. Some scholars argue that such changes were indirectly influenced by the American conflicts of law revolution.<sup>33</sup> However, the European approach of the protective conflict of laws rules mostly originated from debates between lawyers in the twentieth century, they were paying specific attention to the social

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<sup>30</sup> Adam J. Mambi, *ICT Law Book: A Source Book for Information and Communication Technologies & Cyber Law in Tanzania & East African Community* (African Books Collective, 2010) 47

<sup>31</sup> Symeon Symeonides, *The American Choice of Law Revolution: Past, Present and Future* (The Hague Academy of International Law Monographs, 2006) 3-11

<sup>32</sup> *Supra* at 18, 4

<sup>33</sup> Eduardo Vitta, The impact in Europe of the American "Conflicts revolution" (AJCL 1982) 30 <<https://goo.gl/vY33mU>> accessed 31 March 2018

policy requirements and to the social necessity of a properly functioning international private law. Also the continuous development of consumer market, frequent consumer transactions and the awareness of protection of human rights after the war had a crucial impact on the development of private international law that will embrace the protective role.<sup>34</sup>

Traditional private international law helps to identify the jurisdiction and applicable law based on the existence of specific connections between the contractual relation and a particular state, it leads to reasonable results as identified applicable law and jurisdiction has substantial and real connection with the contractual relation. Unfortunately, despite the efficiency of the connecting factors, the consumers might be affected by the identified jurisdiction and law, as most cases have the contractual relation be closer to the country of the business and not the consumer. Even in conformity with the provisions from Rome I Regulation, it is presumed that the country which has the closest connection with a concluded contract is the country of the party that has the duty of specific performance.<sup>35</sup>

Clearly, the neutral conflict of laws is not suitable for the consumer contracts, specifically if it is an E-contract.<sup>36</sup> The E-commerce brought new challenges for private international law. E-commerce excluded the traditional borders between the countries and brought a borderless virtual market.<sup>37</sup> The E-market usually is an anonymous platform, where in the absence of specific legal provisions the parties can barely have a clear knowledge about the other's identity, which is crucial for private international law. E-contracts increasingly involve an

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<sup>34</sup> *Supra* at 18, 5

<sup>35</sup> Recital 21 “*In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts*”

<sup>36</sup> Puurunen T., *The judicial jurisdiction of states over international Business to Consumer electronic commerce from the prospective of legal certainty* (Kluwer 2002) 143

<sup>37</sup> *Alta Vista Corp., Ltd. v. Digital Equipment Corp.* [1998] 44 F. Supp. 2d 72

intermediary, who is the so called the Internet Service Provider (ISP). The status of such intermediaries is uncertain in private international law and creates new challenges.<sup>38</sup>

E-market can't exist without involvement of a server which works as an intermediary which facilitates the communication between the internet users. A server is a computer or a chain of computers that is used for hosting websites, mail addresses and online data. A server is crucial in the case of E-commerce and conclusion of E-contracts as it acts as storage for all digital products advertised online. Also its status is crucial because almost all the internet transactions are carried out through the server, however the importance of the server for private international law can be debatable, as many times it has only superficial connection with an E-contract. Scholars still question the value of the legal qualification of servers and if it can become a new connecting factor for private international law, the issue is that location of servers can be easily changed. An E-business can very easy change its server or to have more servers at the same time located in different places for its commercial activity. For instance, one server can be used to host the website where advertisements are displayed, another server can be used for the purpose to receive orders and payments and the E-business can even host a mirror server in another location that will provide easier access to more consumers on the website.<sup>39</sup>

Even if the existence and increased practice of E-contracts has challenged various traditional elements of private international law, it does not mean that this law should be useless for E-markets. The performance of the E-contracts that involve the delivery of physical goods or execution of services is the same their paper counterparts, only the means and the formation procedure of the contract has been altered.<sup>40</sup>

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<sup>38</sup> Dan Swantesson, *Private International Law and the Internet* (Kluwer law International 2007) 72

<sup>39</sup> *Supra* at 18, 15

<sup>40</sup> *Id.* at 17

### 1.3.1 Why US agreement terms do not always work in Europe?

Starting with the decision court of Appeals from Versailles in *AOL* case,<sup>41</sup> U.S. E-business received a strong message that unfair E-contracts concluded with consumers localized in Europe may be declared invalid. The consumer protection policy in EU, specifically from the prospective of the unfair terms in consumers contracts,<sup>42</sup> is designed with the intend to enshrine the social objectives rather than economic ones. A high level of protection is offered to the consumers by the EU. By comparison, US E-contracts law on protection of the consumers is less demanding then the European one, designed to simulate innovation in E-commerce.

Most European states have adopted laws on unfair contract terms during the last twenty century, and once the Directive on unfair terms entered into force, the European Court of Justice become the final decisional institution in regard with the interpretation of that legal provisions.

The extensive application of the Directive on unfair terms<sup>43</sup> was started by the *Oceano Grupo* case.<sup>44</sup> For the first time the legal consequence of the “unfairness of contractual terms” was addressed, the Court stated that the national courts, in the spirit of the Directive should be entitled to decide on the unfairness of the terms. The protective position in favor of the consumers was continued by *Cofidis* case,<sup>45</sup> this case brought light on that the analyses of the unfair clause can be done by national courts even after expiry of certain limited period of examination.

Google, Facebook, Instagram and Twitter are online service providers established abroad, in order to use their services consumers are compelled to agree to their terms and conditions.

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<sup>41</sup> *AOL France v. UFC Que Choisir* [2005] , R.G. 04/05564

<sup>42</sup> Council Directive (EEC) 93/12 on unfair terms in consumer contracts [1993] OJ L95

<sup>43</sup> *Supra* at 43

<sup>44</sup> Case C-244/98 *Océano Grupo Editorial SA v. Murciano Quintero* [2000] ECR I-04941

<sup>45</sup> Case C-473/00 *Cofidis v. Fredout* [2002] ECR I-10875

The applicability of the directive can be justified by that fact that this service providers or any other E-business operates through EU.<sup>46</sup> Also, the Directive is applicable only in relation to contractual terms<sup>47</sup>, the notion of contractual terms is not elaborated in the directive but it can be identified in conformity with the interpretation based on private law principles, hence contractual terms in E-commerce are binding provisions that are offering sinalagmatic rights and obligations to the parties. In case when standard terms and conditions of the online services provide right and obligations on behalf of both parties they should be considered as contractual terms in the meaning of the Directive.<sup>48</sup> For this reasons, the contractual terms of American E-businesses fall within the scope of application of the Directive and can be declared invalid even if that terms are in conformity with the American law.

### 1.3.2 Regulations on E-Commerce Consumer Protection Rules in China and Europe

The legislative framework of consumer protection experienced changes as a consequence of the rapid evolvement of E-commerce. E-commerce is distinct, it has a specific information flow which represents the means of trading, cash flow which is about conditions of trading and commodity flow which is the result of trading.<sup>49</sup>

In order to address the question of consumer protection in E-commerce several distinctive features of this type of commerce should be identified. First, the E-commerce is unique due to its vitality, it is carried out via E-markets which are online markets where E-business and consumers do not conclude face-to-face contracts. The consumer uses a computer in order to identify the advertisements of the E-business, its products and services, terms and prices. E-commerce has no boundaries, online transactions can be performed almost anywhere in the world where the internet connection is available. It gives an advantage for consumers as they

<sup>46</sup> Marco Loos, "Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers" (2015) <<https://goo.gl/gUAj3q>> accessed 12 March 2018

<sup>47</sup> *Supra* at 43, art 2 (a) "'unfair terms' means the contractual terms defined in Article 3"

<sup>48</sup> *Supra* at 47

<sup>49</sup> Michael Lehmann, *Electronic Business in Europa* (Buch 2002)

are not constrained by time or space. In an E-commerce trading process an additional number of actors is involved, besides the seller and buyer.<sup>50</sup>

An E-contract comprises, as discussed above three main stages and each of this stages raise certain risks for the consumers. At the pre-contractual stage the consumers might be misinformed about the identity of the E-business and the characteristics of the goods and services offered. At the contractual stage consumers are usually facing misunderstandings about the contractual term, specifically in case of pre-checked boxes. Such questions as validity of consent and privacy also appear during the contractual stage. On the post-contractual stage the issues that can face the consumer are similar as in case of traditional contracts, as instance the goods or services might not be delivered or not delivered in time or even damaged.<sup>51</sup>

#### a) The Legal System of Consumer Protection Rules in E-Commerce in the EU

European laws offers a strong protection for the consumers who enter in E-contracts, the Consumer Rights Directive<sup>52</sup> covers the protection offered to consumers when they conclude commercial contracts with E-businesses based in EU, hence it is important for consumer to be aware about the place where their counterparty is based in a Member State. The Consumer Rights Directive supports the Digital Single Market strategy, also one of its purposes is to improve access to distance selling, hence E-market.<sup>53</sup> But a more detailed protection of E-commerce consumers is needed. As instance while looking at the matters that are excluded by article 3 from the scope of application it is clear that the protection is only a sectorial one. Consumers lack protection when they are concluding travel or transport E-contracts via a website

<sup>50</sup> Emad Abdel Rahim Dahiyat, "Towards new recognition of liability in the digital world: should we be more creative?" (2011) <<https://goo.gl/L3oN1o>> accessed 12 March 2018

<sup>51</sup> Jörg Binding and Kai Purnhagen, "Regulations on E-Commerce Consumer Protection Rules in China and Europe. Compared – Same Same but Different?" [2011] <<https://goo.gl/hTcrCz>> accessed 31 March 2018

<sup>52</sup> Council Directive (EC) 2011/83 on consumer rights [2011] OJ L 304

<sup>53</sup> *Id.* at Recital 5

or email, however their protection in such situation is crucially needed because they are in a detrimental position and exposed to a high risk to make fast and wrong wrong decisions because of unique and sophisticated marketing techniques, misleading calculation and display of prices and discounts of E-businesses.<sup>54</sup>

The Directive impose in the traders the obligation to provide information about the main characteristics of the goods or services, to the extent appropriate to the medium and to the goods or services.<sup>55</sup> During the recent years the number of E-contracts concluded via various online platforms increased considerable, the issue is that existence of online platforms and intermediaries creates an uncertainty for the consumer is the platform is the party to the E-contracts, if it can be considered a trader or acting on behalf of the trader<sup>56</sup> in conformity with the directive.<sup>57</sup> It is still unclear what are the information obligation of the platform towards the consumer and what are the consequences in case when inaccurate information is provided. However the directive generically regulates the protection of consumers in case of purchase of digital content, it does not have specific provisions in regard with such type of content, moreover the informing obligation is even more uncertain in case of this products which are other the object of majority of E-contracts.

More and more E-businesses offer their products or services instead of data as a mean of remuneration, the Directive lacks to provide clarity if products, services or digital content exchanged for data which represent the counter-performance fall under the scope of its application. If consumers execute their counter-performance with data then data protection

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<sup>54</sup>Europa Consumer Organisation, *Review of the Consumer Rights Directive* (BEUC 2016) 5 <<https://goo.gl/r415dQ>> accessed 31 March 2018

<sup>55</sup> *Supra* at 46, art 6 (1) a)

<sup>56</sup> *Supra* at 46, art 2 “‘trader’ means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by the Directive”

<sup>57</sup> *Supra* at 47, 6

legislation should be applicable too.<sup>58</sup> Such circumstances leads to that a smooth transition should be done between consumer protection and data protection legal provisions.<sup>59</sup>

#### b) Regulation on Consumer Protection in E-Commerce in China

It will not be an exaggeration to mention that E-commerce is widely practiced in China. The Chinese contract law have special provisions related to the E-contracts, specifically conclusion, form, jurisdiction and validity of digital signatures. The main problems for the consumers that arise from E-contracts in China are contract fraud and non-performance, incomplete or inappropriate performance of the contract. The Chinese amended Law on the Protection of the Rights and Interests of Consumers offers a more comprehensive protection to the online consumers then the European framework. The law covers such matters as statutory damages, personal data protection, liability for misleading information. Specifically referring to online shopping the law institutes obligation on the trader to provide authentic and complete details about their products or services advertised, a seven day policy on the return of goods and other new responsibilities for E-businesses.<sup>60</sup>

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<sup>58</sup> Council Directive (EC) 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L 281

<sup>59</sup> *Supra* at 50

<sup>60</sup> *Supra* at 44, 188

## CHAPTER II Choice of Law Clauses in B2C E-contracts

### *1. Party autonomy and limitative power of national mandatory provisions*

#### 1.1 Party autonomy and inequality of bargaining power

The ordinary conflict of laws rules are not working properly in E-contracts with consumers due to the fact that the presence of a consumer in contractual relation challenges the necessity and efficiency of party autonomy to choose the applicable law to their contract. The party autonomy is one of the fundamental principle in private international law of modern era, it gives the possibility to the parties to choose the applicable law, and the competent forum to resolve the disputes arising out of the E-contract.<sup>61</sup> Party autonomy is a key element in establishing certainty, efficiency and predictability.

The existence of inequality of the bargaining powers in contracts with consumers brings a new questions in regard with proper application of party autonomy principle in such contracts because E-businesses are considered to be in a more favorable position, having a better understanding of the law. The stronger party is able to include, unilaterally, choice of law clauses or even forum selection clauses into a contract, and the consumer who lacks information about this legal institutions will not object.<sup>62</sup>

The choice of law clauses can be used in an abusive manner by E-businesses, usually by picking the law which offers a lower protection to the consumers. Even in the absence of the intention to prejudice the consumers, by simply including in the contract its standard terms and conditions consumers are more likely to be placed in an unfavorable position as the terms and conditions are more business oriented rather consumer protection oriented.<sup>63</sup> E-businesses are more likely to pick the law of the country of establishment because of the familiarity reasons, but it is not guaranteed that such a choice will offer a proper standard of

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<sup>61</sup> Peter Nygh, *Autonomy in International Contracts* (Oxford University Press, 1999) 31

<sup>62</sup> *Supra* at 18, 9

<sup>63</sup> *Supra* at 62, 140

protection to the consumers. The choice of the forum of the country of establishment is also a popular practice in E-contracts, but such choice inevitable prejudice the foreign consumer who will be forced, in conformity with agreed terms to litigate abroad, hence the unlimited party autonomy is not the most efficient tool in case of E-commerce contracts with consumers.<sup>64</sup>

### 1.1.1 Validity of an express choice of law clause

In majority of E-contracts that involve international commercial transactions parties agree on a choice of law which can be used for the interpretation of the contract in case of a dispute.<sup>65</sup>

There is no uniform definition of formal and material validity of the choice of law clauses, especially in E-contracts. Different countries have divergent approaches which leads to even more uncertainties. The questions if the validity is affected because of matter of form or materiality may be answered according to the law of the forum, the law of consumer's habitual residence<sup>66</sup> or more often by the putative applicable law.<sup>67</sup>

In the E-commerce, the issue of form and materiality is more obscure then in typical paper contracts because usually E-businesses are the ones who establish the terms and conditions of E-contract, the way how the consent will be given and the contracting process.<sup>68</sup>

#### a) Material/substance validity with focus on Rome I regulation and Chinese law

Under the Rome I Regulation the material validity of the contract or any clause of it, including choice of law clauses, will depend on the law that governs the valid contract.<sup>69</sup>

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<sup>64</sup> *Supra* at 62, 10

<sup>65</sup> L&P Newsletter No. 42, "Validity of Clauses concerning Choice of Law, Place of Jurisdiction and Arbitral Awards in International Contracts in Thailand" (2015) <<https://goo.gl/w9drfF>> accessed 13 March 2017

<sup>66</sup> *Supra* at 13, art 6 (1) "*Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence*"

<sup>67</sup> *Supra* at 1, 165

<sup>68</sup> *Id.* at 166

When the parties expressly agreed on a choice of law clause, the material validity of such clause depends on the alleged chosen law.<sup>70</sup> Rome I Regulation sets a complex set of rules in regard with the material validity of the choice of law clauses. The expression of the consent in E-contracts is different than in typical contracts, usually the courts will have to decide if the action by clicking the “*continue*” button instead of “*accept*” will represent a valid agreement.

The same questions of consent on the terms that refers to choice of law in E-contracts can be raised in case of action of downloading or the continuation of website browsing. The consumers, in such situations are entitled to challenge the validity of the whole contract and choice of law clause because of lack of consent in conformity with the law of his habitual residence.<sup>71</sup>

Chines People’s Court had adopted strict criteria in determining material validity of choice of law clauses, the approach looks like punitive sanctions that the parties should bear because of careless drafting of choice of law clauses. The decisions were mostly focused on ignoring the choice of law clause that referred to a foreign law and promotion of application of Chinese law, the material analyses was not considered too valuable.<sup>72</sup>

In the past the Chinese legislator does not specifically regulate the issue of validity of choice of law clauses similarly with the European one, it has a more general approach. In conformity with Conflicts Statute of China the parties can chose the law applicable to their contract rather the law applicable to the settlement of contractual disputes.

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<sup>69</sup> *Supra* at 13, art 3 (5) “*The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13*”

<sup>70</sup> Dean Symeon, *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford University Press 2014) 211

<sup>71</sup> *Supra* at 1, 162

<sup>72</sup> Jieying Liang, *Party Autonomy in Contractual Choice of Law in China* (Cambridge University Press 2018) 87

By contractual disputes should be understood the disputes over the valid conclusion of the contract, the date of conclusion, liability for breach, termination and transfer.<sup>73</sup> After the adoption of Conflicts Statute in 2010, the validity of the contract terms is governed by the law that was chosen by the parties, similarly as it is provided in Rome I Regulation, hence it should be considered that the scope of the law selected by the agreement between the parties should be applicable to the material validity of a choice of law clause too.<sup>74</sup>

Chinese approach shows that affiliation of the consent of the parties to the choice of law should be asserted by identification of an apparent mutual consent in regard with governing law, taking into consideration the relevant circumstances of the case and usages in international commercial transaction law. In case of the disputes concerning the validity of the choice of law clause it should be proven that both parties had given an effective consent in regard with that law and had the same intention.<sup>75</sup>

#### b) Formal validity

Although the article 11 from Rome I Regulation does not provide definition of formal validity, it should be understood as “*every external manifestation required on the part of a person expressing the will to be legally bound, in the absence of which such expression of will would not be regarded as fully effective*”.<sup>76</sup> A classic example of formal requirements for the validity of the contractual clauses is that in conformity with English law a contract for sale of interest in land or land must be concluded in written form in order to be considered valid.<sup>77</sup> The choice of law clause in an international E-contract that needs to fulfill special

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<sup>73</sup> *Supra* at 66

<sup>74</sup> *Id.* at 88

<sup>75</sup> Maria Hook, *The Choice of Law Contract* (Bloomsbury 2016) 78

<sup>76</sup> Jonathan Hill and Adeline Chong, *International Commercial Disputes: Commercial Conflict of Laws in English Courts* (Bloomsbury 2014) 547

<sup>77</sup> *Id.* at 548

requirements should also fulfill those requirements too, such a rationale it justified by article 11 from Rome I Regulation.<sup>78</sup>

### 1.1.2 Implied choice of law

If the parties did not made an express choice of law, English courts and the majority of other European ones will first decide whether the parties agreed on the applicable law through an implied choice of law, in this case the jurisdiction clause can be used as a starting point. Otherwise if will be needed to decide which country has the closest connection to the contract.<sup>79</sup> The European choice of law principles emphasizes the duty of national courts to use strict interpretation while determining the existence of an implied choice of law in traditional and E-commerce contracts. Implied choice of law has a very narrow function, specifically to nullify the prevalence of the will of the parties, hence the law indicated by the implied choice is as efficient as the law designated by the express agreement of the parties.<sup>80</sup> The option of implied choice reduces the predictability of the applicable law in case of E-contracts.

In order to rely on implied choice of law a standard of proof should be satisfied, in such way European legislator limited the judicial discretion in identifying the presence of implied choice. Rome I Regulation was exposed to some amendments just to bring more clarity to the application of implied mechanism. The wording “demonstrated with reasonable certainty”

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<sup>78</sup> *Supra* at 13, art 11 (2) “A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.”

<sup>79</sup> Gerald Spindler and Fritjof Börner, *E-Commerce Law in Europe and the USA* (Springer Science & Business Media 2013) 251

<sup>80</sup> Manuel Penadés Fons, *Commercial Choice of Law in Context: Looking Beyond Rome* (Modern law review 2015) 244

was substituted by “clearly demonstrated”<sup>81</sup> and “more closely connected” become “manifestly more closely connected”.<sup>82</sup>

Implied choice can be rejected only in the case that there are sufficient evidences to prove that a valid choice was made by the parties in E-contract by expressing their autonomy, hence the legal construction of Rome I Regulation is not about the choice of law, but in fact, about the demonstrable choice of law.<sup>83</sup> This approach threatens the equality of solutions across the EU as the national courts poses discretionary power to identify the existence of an express choice of law or of an implied one.

There are number of factors that can justify the recognition of an implied choice of law, for instance the use in the E-contracts terms that feature exclusive characteristics of a legal system, existence of several E-contracts that are interconnected, the use of standard forms typical for a specific system of law, nationality of the parties, used language and even the currency of the payment can be an indicator while identifying the implied choice of law,<sup>84</sup> the decision also depends on the feature of the contract and the specific circumstances of the case.<sup>85</sup> English judges established that the criteria that are used for establishment of the implied choice should be perceived as an objective test that leads to determination of the closest connection.<sup>86</sup>

The burden of proving the existence of the implied choice of law relies on the party who alleges such choice.<sup>87</sup> Even if the alleging party will succeed and a foreign law will be found

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<sup>81</sup> *Supra* at 13, art 3(1)

<sup>82</sup> *Id.* at art 4(3)

<sup>83</sup> Manuel Penadés Fons, *Elección tácita de ley en los contratos internacionales* (Navarra: Thomson Reuters-Aranzadi, 2012)

<sup>84</sup> Opinion of AG Trstenjak in *Jan Voogsgeerd v Navimer SA* [2013] ICR 1274

<sup>85</sup> Case C-64/12 *Anton Schlecker v Melitta Josefa Boedeker* [2013] ECR I-1274

<sup>86</sup> *Timothy Joseph Lawlor v Sandvik Mining & ors* [2013] EWCA Civ 365

<sup>87</sup> *Supra* at 81, 249

applicable, in the case of absence of content of that law the court will be entitled to declare the law of the forum applicable law.

The necessity of implied choice of law is crucial for E-contracts, the inclusion of the option to have such an implied choice or so called hypothetical choice under article 3 (1)<sup>88</sup> gives the possibility for national courts to repress the abuse of party autonomy in E-contracts with consumers so freely provided by common law considerations of multiple states and European international public law.

### 1.2 Overriding mandatory rules and public policy in the Rome I Regulation

With the development of private international law the majority of countries reserved the right to use overriding mandatory rules and public policy of the forum or of a third country that is closely connected in order to protect the political, economic and social order in the forum or connected third country that risks to be violated by application of the laws of another country. This approach was implemented for protection of weaker party in consumer E-contracts.<sup>89</sup> However the argument of consumer's protection is pretty weak because of narrow application and scope of overriding rules and public policy. Such mechanisms can be applicable only in case of the necessity to safeguard justice, public interest or morality, but most issues in the E-contracts with consumers are not as crucial that would affect the protected values by overriding mandatory rules and public policy. Such means can be used for protection of the interests of the consumers, but do not provide a highly significant protection.<sup>90</sup>

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<sup>88</sup> *Supra* at 13, art 3 (1) "A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract."

<sup>89</sup> *Id.* at art 9 (1) "Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."

<sup>90</sup> *Supra* at 1, 143

The function of the chosen law by the parties can be considered just an interpretative and supplementary one as in order to have a validly functioning agreement it will be necessary to guarantee the fulfillment of the overriding mandatory rules of the legal system which is mostly connected with the country.<sup>91</sup> Today, for the purpose of protection of legal certainty and predictability article 9 from Rome I Regulation distinguishes cases of application of overriding mandatory rules of the country where obligation has to be performed or of the country of the forum.<sup>92</sup>

Mandatory rules of the forum, in case of E-commerce are usually limited to the rules related to national market, policies or interests. For example in Europe such rules can refer to freedom of circulation of goods or consumer protection rules.<sup>93</sup> In case of mandatory rules of the forum national courts have the duty to consider a double law of the forum, as article 9 (3) offers the possibility of application of the mandatory rules of third countries.

*Amazon* case<sup>94</sup> is a good illustration of how overriding mandatory rules mechanism works in Europe. The case was about a company incorporated in Luxemburg which was concluding E-contracts with consumers from Austria. In conformity with standard terms which were drafted by Amazon and agreed by consumers the E-business was entitled to use the personal data of the consumers supplied during the purchase of goods and also a choice of law clause was made, in conformity with that clause the governing law was that of Luxemburg. In

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<sup>91</sup> Andrea Bonomi, Gian and Paolo Romano, *Choice of law and overriding mandatory rules in international contracts after Rome I* (Walter de Gruyter 2011) 81

<sup>92</sup> *Supra* at 13, art 9 (2) and (3) “ Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”

<sup>93</sup> Andrea Bonomi and Paul Volken, *Mandatory Rules in Private International Law* (Volum X. Sellier 1999)

<sup>94</sup> Case C-191/15 *Verein für Konsumenteninformation v Amazon EU Sarl* [2016]

regard with such abusive terms a consumer protection body claimed an injunction that will make the Amazon to refrain from usage of such terms.

The Court stated that in the spirit of both, Rome I and Rome II Regulations<sup>95</sup> in case of injunction action that was based on unfair contractual terms Rome II Regulation should be applicable, hence the expected applicable law should be the one of the country where the interests of consumers were affected, or are more likely to be affected. As the consumers were from Austria the Austrian law was applicable.<sup>96</sup>

In relation with specific assessments of individual contractual terms the Court held that Rome I should be applicable. In case of E-contracts the consumers usually don't have the power to individually negotiate the terms of the contract, hence they agree on the terms proposed by the E-business. When a choice of law clause is inserted in such contracts it creates an appearance for the consumers, who are not informed about law, that only the law of the E-business can govern the contract. However the consumer is not aware about the protection in regard with choice of law that he can benefit. Consumers lack understanding that in case of absence of choice of law clause the applicable law, due to mandatory provisions, is the one which the national court will decide will be more appropriate. Resulting that the combination of the provisions of Rome I and Rome II Regulations will lead to that the Austrian law is the one that should govern the protection of the consumer rather the one from Luxemburg.

## ***2. The Rome I Regulation and the Scope of the Applicable Law***

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<sup>95</sup> Council Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L 199

<sup>96</sup> *Id* at art 6 (1) “The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.”

## 2.1 Rome I Regulation

Rome I Regulation governs international commercial contracts, including E-contracts, by allowing the identification of applicable law. It is a suitable replacement of Rome Convention.<sup>97</sup>

The Rome I has a universal application.<sup>98</sup> E-contracts started to be concluded way earlier than 2009, the provisions of the Rome I will be applicable only to those E-contracts that were concluded after the date of 17 December 2009.<sup>99</sup> The E-contracts that were concluded before Rome I Regulation entered into force, the Rome Convention will be applicable as its material and special scope are very similar with the ones of Rome I Regulation.

Rome I is a crucial mechanism in determination of *lex contractus*, which will govern the validity and nullity of the contract, the existence of the obligations and the consequences in case of a potential breach, the extinction of obligations the interpretation of the contract, limitation of actions and prescription.<sup>100</sup> The law of the place of performance should be the one that will govern the way in which the contractual obligations will be performed, also the rights of the creditor in case of defective performance.<sup>101</sup>

Article 6 of the Rome I, which is considered the successor of article 5 from Rome Convention, regulates international consumer contracts. The main purpose of the replacement of the articles was to adopt the new regulation to the specifics of E-commerce with consumers. In the draft proposal of the Regulation was stated that “*the development in*

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<sup>97</sup> Anabela Susana De Sousa Gonçalves, *The e-commerce international consumer contract in the European Union* (Mujlt 2015) 7

<sup>98</sup> *Supra* at 13, art 2 “Any law specified by this Regulation shall be applied whether or not it is the law of a Member State”

<sup>99</sup> *Id.* at art 28 “This Regulation shall apply to contracts concluded after 17 December 2009”

<sup>100</sup> *Supra* at art 12

<sup>101</sup> *Id.* at art 12

*distance selling techniques*<sup>102</sup> should be taken into consideration. In addition the Rome I Regulation should be compatible with Brussels I Regulation, hence in order to avoid so called “*forum shopping*” cases in EU there is a concurrence among two legal instruments, one is dealing with applicable law and the second determines the jurisdiction of the national courts.<sup>103</sup>

## 2.2 The professional and the consumer

Rome I Regulation provides a protective approach to the contracts with consumers as they are regarded to be a weaker party in an E-contract or any other types of contracts.<sup>104</sup> Article 6 is specifically designed for the contracts between consumers and professionals, hence consumers and E-businesses,<sup>105</sup> the same article makes clarity in regard of the status of consumer and its contractor.

The legal person that contracts with the consumer is defined as the one who acts in the exercise of the business of professional activities.<sup>106</sup> The notion of the consumer is also pretty explanatory, initially article 5 from Rome Convention<sup>107</sup> provided the protection of the consumers but lacked to provide the nature the consumers, if they are natural or legal personal. Latter, Rome I Regulation clarified the situation in article 6 by stating that

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<sup>102</sup> European Commission (2005) *Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)* COM (650 final) p.6

<sup>103</sup> *Supra* at 98, 8

<sup>104</sup> *Supra* at 13, at Recital 23 “As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favorable to their interests than the general rules”

<sup>105</sup> *Supra* at 13, art 6 “Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence”

<sup>106</sup> *Id.* at art 6 (1) (a), (b)

<sup>107</sup> Convention on the Law Applicable to Contractual Obligations (Rome Convention) OJ L 226, 80/934/EEC

consumers are only natural persons. Hence the rule refers only to contracts that are concluded between individuals and professionals.

In the *Francesco Benincasa*<sup>108</sup> and *Shearson*<sup>109</sup> cases the ECJ stated that a strict interpretation should be given to the concept of consumer. Therefore, only the E-contracts that are concluded specifically with the purpose to satisfy the individual needs in term of private consumption will offer consumers protection to the person who is considered to be the weaker one. Moreover, if the person concludes an E-contract for the purpose of professional activity or trade, even if it is planned for the future, the protection offered to the consumers will not be enforceable.<sup>110</sup> In regard with conclusion of E-contract with dual purposes, for personal and professional one, the ECJ decided that the person will not be able to rely on consumers protection. However the protection will be offered if the E-contract has less significant connection with the professional activity of the person, and is strongly linked with personal necessities. In such challenging situations the national court is deemed to offer proper analyses to the nature, purpose and content of the contract and also to take into consideration the circumstances that existed at the moment the E-contract was concluded.<sup>111</sup>

An interesting question relatable to the consumer's protection offered by Rome I Regulation, appears in cases when the professional, genuinely was not aware that the E-contract was concluded with a consumer and not with another professional or person acting outside its personal purposes. Again, the ECJ responded the question, by saying that protection under article 6 of the Rome I Regulation should be offered only to the persons acting with bad faith, hence even if the purpose of the concluded E-contract will be strictly personal and not for the professional activity of the person but the professional with good faith was unaware about

<sup>108</sup> C-269/95 *Francesco Benincasa v. Dentalkit Srl* [1997]

<sup>109</sup> C-89/91 *Shearson Lehmann Hutton Inc. v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH* [1993]

<sup>110</sup> *Supra* at 98, 9

<sup>111</sup> C-464/01 *Johann Gruber v. Bay Wa AG* [2005]

this because of the actions of the person the protection will not be offered.<sup>112</sup> Such an approach is very welcomed for E-commerce as the agreements are concluded only based on the declaration of the parties and the existence of the trust among them. E-contracts are concluded at distance and the E-business cannot assess the real purpose of the contract by any means except by the declarations of the party.<sup>113</sup>

### 2.3 Harmonization effect of Rome I Regulation

In a broader spectrum the Rome I Regulation represents a constitutive part of growing initiative in EU to create a harmonized set of rules in private international law. Besides the rules of choice of law that governing contractual obligations, other issues from the same spectrum are regulated on the EU level including the rules on the determination of the law which will govern non-contractual obligations and rules which govern the jurisdictional issues of national courts and when recognition and enforcement of the judgments of foreign court can be accepted.

Harmonization initiative goes even further, specifically to the substantive law. There is an ongoing approach of harmonization of “European Contract Law”. Rome I regulation covers the rules of substantive contract law and standard terms and conditions. However Rome I Regulation is still criticized as it lacks clarity and practical applicability of some rules is challenged.

It is important to point out that harmonization, in fact, is highly welcomed in online market, however it is pretty complicated to be established. If we will take a look at the legislative history of Rome I Regulation, then it will be seen that it was a big debate if EU community has the competence to adopt such an act. If this harmonizing effect was hard to obtain on EU level, it will be even harder to be on international level including actors outside EU.

### ***3. Choice of Law Approach in B2C E-commerce Transactions in US***

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<sup>112</sup> *Supra* at 105

<sup>113</sup> *Supra* at 104, 10

### 3.1 Neutral approach to choice of law clauses

In US Second Restatement on conflict of laws<sup>114</sup> which reflects in a pragmatic way the approach offered by the courts, states that in general a more neutral regulatory attitude is taken in case of E-contracts with consumers. Choice of law clauses are usually recognized valid despite unequal bargaining position of the parties unless such clauses are illegal in the light of public policy or contracted with bad faith.<sup>115</sup>

If addressed, the court will have to decide on the question of unconscionability. In order to have a valid choice of law clause it is crucial to identify if the consumer at the moment of acceptance of the terms and conditions predetermined by the E-business was aware about the consequences of such acceptance. If the clause was concluded in an unconscious mode then it will be declared invalid.<sup>116</sup>

It should be noted that the unconscionability refers only to the clause that is in dispute, in this case the choice of law clause. Referring to the clause the court will have to look at its fairness towards the consumers, instead at the effect that will be caused by application of the chosen law. Even in the hypotheses that the chosen law will deprive the consumer of some protective rights that he might have under the default law of the state with the closest connection, the effects of the law that will be applied will be regulated by public policy considerations.<sup>117</sup> Hence, even in E-commerce contracts the unconscionability claim can be rarely found justifiable.

American approach related to the enforceability of choice of law clauses in E-contracts with consumers is a very pragmatic one. Even if the terms and conditions of the E-contract were drafted by the E-business and the whole formation of such contracts usually is based on “take

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<sup>114</sup> Restatement (Second) of Contracts § 187 [1981]

<sup>115</sup> *Supra* at 1, 197

<sup>116</sup> Jürgen Basedow, *Encyclopedia of Private International Law* (Second edition, EE 2017) 66

<sup>117</sup> *Supra* at 1, 198

*it or leave it*", consumers will not usually be favored and protected just because of their unfavorable position in comparison with the E-business.

It was states that mainly the attention is focused on the manner in which such clauses are presented. The validity of choice of law clauses is divided in two aspects, the procedural and substantial one. Usually such clauses are procedurally pretty unconscionable but substantially pretty conscionable. Hence both aspects should be considered while analyzing the validity and eventually enforcement of such clauses.<sup>118</sup>

### 3.1.1 Conscionability of choice of law clause

The choice of law clause can only be invalidated if both, procedural and substantial unconscionability was identified. However, in *Spetch* case<sup>119</sup> the court decided to invalidate the clause referring to choice of law in a browse-wrap agreement because there were ambiguous indicators to the existence of the clause in the terms of the E-contract.

In another instance, in *William* case<sup>120</sup> the court decided to refuse enforcement of choice of law clause as the consumer was not able to get familiar with the terms and condition of the E-contract unless will twice click on "*read now*" button. In both instances, despite the general rule, the courts decided that the clause was invalid even without looking at the substantive aspect of the E-contract.

Other instances can be identified in which the courts were specifically focused on substantial conscionability. Despite the fact that the terms and conditions were in gray on a gray background the court, in *Pollstar* case,<sup>121</sup> decided that the clause on choice of law is valid as there are many precedents when contracts are concluded without having one of the party looking at the terms and conditions of the contract. This dispute, was between professionals,

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<sup>118</sup> *Specht v. Netscape* [2002] 306 F.3d 17 2d Cir.

<sup>119</sup> *Id.*

<sup>120</sup> *Williams v. America Online, Inc.* [2001] WL 135825 Mass. Super.

<sup>121</sup> *Pollstar v Gigmania Ltd* [2000] 170 F Supp 2d 974

however by analogy the ruling can be applicable in B2C cases, as it is pretty common for consumers not to read the terms before accepting them. Key in this situation is that the business should act with good faith.

It is believed that the test on unconscionability is sufficient in consumer E-contracts, however the test by itself is not able to fit very specific characteristics of E-commerce and E-contracts.

The consumers may be aware about the existence of the choice of law clause because of sufficient notice from the E-business, but even in such circumstances an authentic agreement is hard to identify. Consumers lack specific legal knowledge and are less likely to possess information about chosen system of law.

### 3.1.2 Reasonability of chosen law

The choice of the parties should have a reasonable ground. Reasonability is needed in order to fulfill the expectations of parties, consumers and E-business, also it is needed for protection and for obeying bad faith agreements. Two examples can be illustrated in order to prove the reasonability, first the substantial relationship and secondly any other basis can be considered.<sup>122</sup>

Second restatement does not treat individually these two examples, however it states that substantive relationship refers to the cases when the chosen law is the law of the place where the obligation is performed, place where the contract was concluded or the place that has some personal connection with the parties. From the moment when it will be identified that the state is connected in any way to the contract, it can be stated that the legal system of that states has connection with the parties to the E-contract.<sup>123</sup> A reasonable ground of choice of law can be expressed in cases when both, consumer and E-business have their origins in states with less developed systems of law referring to E-commerce. In such cases it will be justifiable to have a foreign choice of law agreement.

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<sup>122</sup> *Supra* at 1, 199

<sup>123</sup> *Supra* at 114

## Chapter III Review of Jurisdiction and Online Arbitration in B2C Agreements

### 1. Jurisdiction in B2C E-contracts

#### 1.1 Overview of jurisdiction clauses in EU

Jurisdiction clauses are used often as an anticipatory mean to settle the place where the potential contractual litigation will take place.<sup>124</sup> Businesses, including E-businesses usually prefer to litigate at their place of establishment. In B2C E-contracts unilateral choice of jurisdiction is a common practice, however such litigation is problematic for the consumer who purchased good or services from abroad. It would be expectable that jurisdictional legal provisions on European level would be contained in the E-commerce Directive but, in fact, it does not deal with any jurisdictional issues,<sup>125</sup> hence the so called “Brussels Regime”<sup>126</sup> is applicable.

The jurisdictional issues with consumes are covered by Recast Brussels Regulation starting with article 17 till 19. Also the Regulation covers jurisdiction in cases of individual contracts of employment which are a particular type of consumer contracts that can be concluded via E-contracts. The main idea of the Regulation is that a specific protection should be offered to the consumer; consumers are entitled to bring a suit at the place of their habitual residence without providing real possibility for the E-business to pull the jurisdiction away from that place of residence. Several exceptions can be accepted from the protective rule instituted by Recast Brussels Regulation, as instance the choice of jurisdiction offered by the E-business can be efficient when the clause offers additional options to the consumers,<sup>127</sup> however a

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<sup>124</sup> Martin Fries, “International Jurisdiction over Consumer Contracts” [2017] <<https://goo.gl/g7wHCB>> accessed 12 March 2018a

<sup>125</sup> *Supra* at 10, art 1 (4) “*This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts*”

<sup>126</sup> Council Regulation (EC) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351

<sup>127</sup> *Id.* at art 23 (2) “*The provisions of this Section may be departed from only by an agreement: which allows the employee to bring proceedings in courts other than those indicated in this Section*”

choice of jurisdiction that puts the consumers in a disadvantaging position usually is not effective. Case law has identified three loop holes in Recast Brussels Regulation which E-businesses and simple businesses were using in order to avoid strict rules on choice of jurisdiction.<sup>128</sup>

First case refers to choice of jurisdiction clauses in contracts that are not the outcome of business activities directed to the Member States in which the consumer has its habitual residence.<sup>129</sup> Businesses, and potentially E-businesses could argue under the regulation that they are not bound to defend their position in the local court from consumer's home country because they did not target to sue the consumers in their member country. In order to close this loop hole the ECJ, clarifies that the fact of worldwide extension of the E-business website does not *per se* establish jurisdiction of a specific Member State. The preference was given in the favor of the consumers rather to the E-businesses, meaning that it is less likely that an E-business will be able to unilaterally pick the place of arbitration.<sup>130</sup>

Next gap refers to the exception offered to the E-businesses to insert a nonnegotiable jurisdiction clause in case of transport contracts. Such an approach of deviation from consumer friendly regulations can be justified by consideration of already existing international treaties. Exclusion of transport E-contracts with consumers leads to that only general provisions from the Regulation will be applicable.<sup>131</sup>

Another ongoing open question refers to the E-contracts with consumers that involve a multi-step journey with more carriers, specifically because the place of performance involves more states. Competent jurisdiction is undefinable, not even Regulations on air transport<sup>132</sup>, rail

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<sup>128</sup> *Supra* at 115, 2

<sup>129</sup> *Supra* at 126, art 12 (1) (3)

<sup>130</sup> C-218/12 *Lokman Emrek v Vlado Sabranovic* [2013]

<sup>131</sup> *Supra* at 126, art 4

<sup>132</sup> Council Regulation (EC) 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L46

traffic<sup>133</sup> and bus and coach transport<sup>134</sup> provide any provisions with regard to jurisdiction. Recently ECJ received a claim that included the request for clarification of the present issue but the claim was eventually dismissed because the parties settled out the courtroom.<sup>135</sup>

## 1.2 Specific characteristics of Internet jurisdiction

The need for an effective mechanism that will regulate the jurisdictional aspect of E-commerce relations is self-explanatory, however a more important question can be raised in relation with real possibility of existence of a neutral legislation while ignoring the differences that exist between physical and online commerce and the effectiveness of such mechanism in a E-commerce based environment. Some scholars strongly recommend adapting private international law to the realities of the internet, for example similar with Recast Brussels Regulation.,<sup>136</sup>

The latter position seems to be more reasonable as the necessity of new normative rules should not be treated only through the prospective of the legal considerations, also factual details as nature of the surrounding environment should be considered too.

Traditional legislation in regard with solving commercial disputer depends on territorial localization that helps to identify the competent jurisdiction however such an approach becomes problematic in case of the world of borderless E-commerce where the parties to the E-contract can't control the territorial flow of their content and are unable to identify real location of their counterparty.<sup>137</sup> It is not certain for the consumer's understanding how a website which has the domain ending with "uk", is in fact an E-business based in US that use a Russian support and payment system. The domain mane of the website does not provide

<sup>133</sup> Council Regulation (EC) 1371/2007 on rail passengers' rights and obligations [2007] OJ L315/14

<sup>134</sup> Council Regulation (EC) 181/2011 concerning the rights of passengers in bus and coach transport [2011] OJ L55

<sup>135</sup> German Federal Court of Justice, judgment dated August 18, 2015, file no. X ZR 2/15

<sup>136</sup> Matthew Burnstein, *A global network in a compartmentalised legal environment* (PPL 1998) 23

<sup>137</sup> Juliet M. Oberding and Terje Norderhaug, *A Separate Jurisdiction For Cyberspace* (Volume 2, Cref 1996)

accurate information to the consumer about the regulatory space, hence because of the lack of notice about relevant territorial location of E-business is will be unfair to expose consumers to foreign jurisdiction.<sup>138</sup>

Some scholars argue that the parties who are intending to conclude an E-contract should get familiar with the relevant law. Such opinions are highly criticized as according to the concept of rule of law the ability of the parties to research the applicable regulatory environment depends on the existence of a clear rule on jurisdiction which obviously cannot be satisfied in case of E-commerce environment. In this way the concept of notice of applicable law is unrealistic in case of E-commerce as neither the consumers nor the majority of E-businesses will have the financial and technical support to get familiar with several potential applicable jurisdictions.<sup>139</sup>

The creation of artificial borders in E-commerce by control and filtering mechanisms might contribute, only partially, to predictability of the jurisdictional aspect in E-contracts. For example, E-businesses can require their consumers to fill a questionnaire which will require information about territorial location of the consumer and also consumers can require from the E-business to provide clear and extensive information about their activity and location on the ground of the Directive on Electronic Commerce.<sup>140</sup> Also, the E-business can avoid the application of Recast Brussels Regulation by inserting a choice of jurisdiction clause in their contractual terms and conditions.<sup>141</sup>

All this options of self-regulation leads to a clear establishment of “*electronic lex mercatoria*” which is of course beneficial for E-commerce but don’t really lead to a final solution to the problem where jurisdiction is based on territorial indicators.

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<sup>138</sup> KCATL Journal "A consumer-neutral look at jurisdiction in e-commerce" (2015) <<https://goo.gl/TQ9m5H>> accessed 16 March 2018

<sup>139</sup> Uta Kohl, *The Rule of Law, Jurisdiction and the Internet*, (Volume 12 IJLIT 2004) 365

<sup>140</sup> *Id.* at 10 art 5

<sup>141</sup> *Supra* at. 138

Even in US law the existence of commercial activity online is a ground to favor jurisdiction where the consumer has its habitual residence. In an early E-commerce case that involved interactive websites and not passive ones, Zippo test was often used to identify the jurisdiction.<sup>142</sup> With time the position of US courts evolved, now there “*must be evidence that the defendant “purposefully availed” itself of conducting activity in the forum state, by directly targeting its web site to the state, knowingly interacting with residents of the forum state via its web site, or through sufficient other related contacts*”<sup>143</sup>

## ***2. EU Rules Applicable in Cyber Jurisdiction with Reference on the Consumer Protection Directive***

### **2.1 Choice of jurisdiction clauses in B2C E-contracts**

The applicability of the fourth section of Recast Brussels Regulation which offers an additional protection to the consumers is subject of real existence of a consumer contract from commercial understanding,<sup>144</sup> hence the existence of the consumer status is of a high importance as only such status can offer the possibility to rely on the protective perception designed in legislations of a consumer as a weaker part. Unfortunately, because of a high level of fragmentation of EU laws there isn't a unanimously accepted notion of consumer. Each directive treats this notion individually in a way which will suit its purposes.<sup>145</sup>

In the spirit of the Recast Brussels Regulation, as stated in *Cape Snc v Idealservice Srl* case a consumer should be understood as a natural person which enters into a commercial agreement for the purposes outside trade or commercial activity that he practices. Also a

<sup>142</sup> *Zippo Mfg. Co. v. Zippo Dot Com Inc.* [1997] 952 F. Supp. 1119, 1124

<sup>143</sup> Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 432 [2004] (quoting *Toys “R” Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454 (3d Cir. 2003)) <<https://goo.gl/p8eH2u>> accessed 31 March 2018

<sup>144</sup> Council Regulation (EC) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L351

<sup>145</sup> Margus Kingisepp and Age Värvi, *The Notion of Consumer in EU Consumer Acquis and the Consumer Rights Directive—a Significant Change of Paradigm?* (Juridica International 2011) 44

consumer is a party which is considered weaker from economic prospective and less informed about juridical matters.<sup>146</sup> In case of the Section four of the regulation, the notion of the consumer should be interpreted in the spirit of the Brussels regime.<sup>147</sup>

A substantial question can be raised in regard with how broad the term “*consumer*” can be interpreted from the fourth section. One might say that teleological interpretation should lead to an extensive protection, but in reality the overall scope and voice of the Recast Brussels Regulation should be taken into consideration. To keep in mind that Section 4 is just an exception from the general jurisdictional principle that favors the domicile of the defendant as the jurisdictional indicator, it means that only existence of a valid E-contract concluded with a consumer will lead to exception from the rule offering a more favoring treatment to the consumer in regard with jurisdictional issues. Section four should be interpreted in a very strict manner as it genuinely represents an exception because of the position of the consumer.<sup>148</sup>

In Francesco *Benincasa v Dentalkit Srl.* case the ECJ established that the purchaser, in our case of the one who purchase via an E-contract, should be determined by referring to the nature of the contract and the used aims instead of limiting the analyses only to the subjective situation of the person.<sup>149</sup> In this way the purchaser that purchases the goods outside its personal needs risk not to be able to rely on section four if he will be qualified as a business or E-business. Such situations are specific when a person purchases online goods or services

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<sup>146</sup> C–542/99 *Cape Snc v Idealservice Srl* [2001] ECR I–09049

<sup>147</sup> C–99/96 *Hans-Hermann Mietz v Intership Yachting Sneek BV* [1999] ECR I–02277

<sup>148</sup> John L . Murray, "Methods of Interpretation – Comparative Law Method" [2007] <<https://goo.gl/AUAJpf>> accessed 31 March 2018

<sup>149</sup> C–269/95 *Francesco Benincasa v Dentalkit Srl.* [1997] ECR I–03797

for mixed purposes or even for professional usage that is not related to his main professional specialization.<sup>150</sup>

The practice of hybrid sellers was also an open question for E-commerce. For example in case of eBay users who often use eBay online platform as an additional or even main source of income. In such case the distinction between consumer and E-business is pretty blurred. Also the entry barriers of E-commerce were considerably lowered during the last years. Because the progressive industrialization of IT it becomes very easy for individuals to set up small start-ups. Such a blurred distinction between consumer and E-businesses can be firstly approached through the purpose of conclusion of E-contracts which will determine the general nature of the agreement and the status of the parties; hence if the goods were obtained for business purposes then there will not be possible to require application of Section 4 of the Recast Brussels Regulation.<sup>151</sup>

In order to provide more clarity to the blurred concept of consumer and E-business in E-commerce is important to establish what “*acting in a normal course of business*” actually mean. The European Court has the primary competence to decide on the interpretation of Recast Brussels Regulation and it did so by responding this question in *Johann Gruber v Bay Wa* case.<sup>152</sup> The case is a leading authority in which the ECJ described the importance of non-negligible purpose in determination of application of Section four from the Regulation.

In conformity with the case, the Court established a test that should be used in order to identify the presence or absence of non-negligible business purpose, the Court also stated that if there are not enough grounds to prove the presence of non-negligible business purpose then the application of Section four of the Regulation should not be refused because the E-contract

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<sup>150</sup> Christine Riefa, "Council Regulation (EC) 44/2001 and Internet Consumer Contracts: Some Thoughts on Article 15 and the Futility of Applying 'In the Box' Conflict of Law Rules to the 'Out of the Box' Borderless World" [2005]

<sup>151</sup> Lilian Edwards, *Law and the Internet* (third edition, 2009) 611

<sup>152</sup> C-464/01 *Johann Gruber v Bay Wa* [2005] ECR I-00439

in this case will fall under the protective purpose. In case of the identification of non-negligible business purpose the application of Section four is precluded.

Consumers in E-commerce are often exposed to conclusion of adhesion contract where they have no power of negotiation. Also consumers are often considered a weaker party in a E-contract because they don't usually read the terms and conditions posted on the website of the E-business. And the economic imbalance is a crucial factor too in determination of the bargaining positions of the parties to an E-contract. Inequality is preset even when the consumer have to prepay for the goods or services that will be offered latter. For this reasons and other more the protection offered to the consumers by modern EU legislation should be even more adopted to the realities of E-commerce activity.<sup>153</sup>

#### 2.1.1 Exclusive jurisdiction agreements

Jurisdiction clauses usually will provide for exclusive or non-exclusive jurisdiction. The understanding of this two type of clauses depends from jurisdiction to jurisdiction, but the general interpretation of exclusive jurisdiction clauses provide that only the court that was chosen by the parties will have the authority to decide on the dispute.<sup>154</sup>

E-contracts that are signed by the consumers usually are predetermined by the E-business, in such contracts E-businesses are eager to include a clause which will determine the competent court to decide the future dispute in case if it will appear. Such clauses usually provide for a court that is closer or more convenient to the E-business and less convenient to the consumer as it can be located in a different country the one where the consumer has its habitual residence or it can involve a foreign legislation to which the consumer does not have access

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<sup>153</sup> *Supra* at 138

<sup>154</sup> Herbert Smith, "'Governing law" and "jurisdiction" clauses" (2008) <<https://goo.gl/JXSV1S>> accessed 17 March 2018

or necessary linguistic skills to understand and such a choice of jurisdiction could have a detrimental effect on the consumer.<sup>155</sup>

The principle of party autonomy is addressed in Section seven from the Recast Brussels Regulation which allows the parties to assign jurisdiction in case of a dispute to one or more courts from Member States.<sup>156</sup> In the light of freedom of choice the nominated court by the parties agreement will have to decide on the dispute while excluding the potential jurisdiction of any other court that would have jurisdiction in conformity with the regulation.<sup>157</sup>

The choice of jurisdiction can be done in favor of a court from a Member State even if both parties are not from a Member State and the substantial validity of such choice made in E-contracts should be assessed by the law of the Member State of the court to which jurisdiction was assessed.<sup>158</sup> In regard with formal requirement is important to say that they need to be fulfilled in order to ensure the existence of the consent of the parties in regard with the jurisdictional issue.<sup>159</sup>

#### a) Formal validity

In order to decide the formal validity of the jurisdiction clause the choice of law rule will be applied, in case of E-commerce contracts with consumers the law of the habitual residence of

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<sup>155</sup> Out-Law, "ECJ says courts must assess consumer contract jurisdiction clauses" (2010) <<https://goo.gl/f3Hi7D>> accessed 17 March 2018

<sup>156</sup> Ellen Wauters and Eva Lievens, *Social Networking Sites' Terms of Use Addressing Imbalances in the User-Provider Relationship through Ex Ante and Ex Post Mechanisms* (JIPITEC 2014) 139

<sup>157</sup> C- 543/10 *Refcomp SpA v. Axa Corporate Solutions Assurance SA and others* [2013] ECR

<sup>158</sup> *Supra* at 126, art 25 (1) "If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise."

<sup>159</sup> C-214/89 *Powell Duffryn plc v Wolfgang Petereit* [1992] ECR I-00001

the consumer will be the reasonable one.<sup>160</sup> In conformity with Recast Brussels Regulation a jurisdiction clause is considered valid only if it is concluded in writing.<sup>161</sup> Such provision might raise the question if “writing” refers to contracts concluded online, luckily article 25 (2) provides that any “*communication by electronic means which provides a durable record of the agreement*” shall fall under the meaning of “writing”.

Usually in E-commerce the jurisdiction clause is incorporated in the terms and conditions of the E-business that consumers are less likely to read entirely. The European Court of Justice in the past expressed its thought in *Estasis Salotti di Colzani Aimò e Gianmario Colzani v RUWA Polstereimaschinen* case relating to the cases when consumers concluded contracts but did not notice the jurisdiction clause or did not have the chance to read that clause, which is typically the case in E-commerce.<sup>162</sup> The Court adopted the policy in conformity with which the jurisdiction clause will be considered valid only if the clause is drafted in such a style that will offer a sufficient notice to the consumer about its existence, hence in E-commerce if the consumer is not sufficiently diligently directed to the jurisdiction clause then the agreement on specific jurisdiction will be invalid even if the consumer clicked to accept the terms and conditions predetermined by the E-business.

In majority of cases consumers are not reading the terms of the E-contract, and in order to ensure the formal validity of the clause E-businesses adopted new techniques that will partially ensure that the consumers played attention to the terms that they are accepting. As instance some E-businesses have a box with terms and conditions on their website, until the consumer will not scroll down to the end of the terms and conditions the “accept” button is

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<sup>160</sup> *Supra* at 13, art 11 (4) “*Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.*”

<sup>161</sup> *Id.* at art 25 (1)

<sup>162</sup> C-24/76 *Estasis Salotti di Colzani Aimò e Gianmario Colzani v RUWA Polstereimaschinen GmbH* [1976] ECR 1831

not available. Another used technique refers to the case when the “accept” button appears only after the terms and conditions were displayed on the screen for a specific amount of time, usually for one or one and a half minute. Using such techniques the E-businesses are ensuring that the consumer had a real possibility to have access to the terms and conditions and to read them that will make the jurisdiction clause valid from the prospective of formal requirements.<sup>163</sup>

## 2.2 Alternative dispute resolution and Online dispute resolution in the light of 93/13 Directive

E-contracts concluded with consumer, per se, are of an average or even small value, for this reason claim to cross-border litigate in case of a dispute is pretty unjustified. European Commission pays specific attention to cross-border dispute resolution cases with consumers, for this reason Alternative Dispute Resolution (ADR)<sup>164</sup> and Online Dispute Resolution (ODR)<sup>165</sup> schemes were developed. Due that fact that ODR and ADR schemes works only with the common consent of both parties the protective EU rules are less relevant but still applicable if needed.

ADR Directive contributes to the quality raise of ADR in case of disputes with consumers, it helps consumers to solve the dispute out of court involving less costs and time. The most common forms of ADR are mediation where a third party contributes parties to reach a common agreement and arbitration where a sole arbitrator or a panel of arbitrators takes a final decision after the facts of the case are analyzed.<sup>166</sup> At the same time, the ODR

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<sup>163</sup> Zheng Sophia Tang, *Consumer contracts and the Internet in EU private international law* (Research Handbook on EU Internet Law 2015) 16 <<https://goo.gl/RKe592>> accessed 27 July 2010

<sup>164</sup> Council Directive (EC) 2013/11 on alternative dispute resolution for consumer disputes and amending Regulation [2013] OJ L165

<sup>165</sup> Council Regulation (EC) 524/2013 on online dispute resolution for consumer disputes [2013] OJ L165

<sup>166</sup> UK Department for Business Innovation & Skills, “Alternative dispute resolution for consumers, Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation – Impact Assessment” (March 2014) 10 <<https://goo.gl/vzFYfu>> accessed 28 March 2018

Regulation sets and ODR platform from which disputes based on E-contracts are directed to ADR schemes,<sup>167</sup> ODR is mechanism used for offering resolutions by using means of electronic communication and several other communication and information mechanisms. Regulation requires all Member States to create an ODR platform, typically a free of charge website in different official languages.<sup>168</sup>

In case of ODR physical presence of the parties is not needed as a dispute resolution is offered online, hence jurisdiction concerns are not raised in case of ODR. However protective choices of law rules are still applicable as according to ADR Directive the consumer should not be deprived of protection offered by mandatory rules from consumer's habitual residence if it will be concluded that the dispute is in the scope of article about consumer contracts<sup>169</sup> from Rome I Regulation.<sup>170</sup>

It is needed to be recalled that EU Member States have different legal approach in regard with ADR on which the E-business and consumers agreed via E-commerce contracts, specifically it refers to the arbitration clauses incorporated in the terms and conditions of the website of the E-business. The European Court suggested the competent authority that can decide on the validity of such clauses in *Asturcom* case. The Court stated that in the light of the Directive 93/13 on unfair terms in consume contracts<sup>171</sup> the national courts or tribunal to which the action was addressed for hearing referring to the enforcement of an award that was issues in the absence of the consumers participation will have the competence to asses if the arbitral clause concluded between the business and consumer is fair or not. The court or

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<sup>167</sup> Arno R. Lodder, Andrew D. Murray, EU Regulation of E-Commerce: A Commentary (Edward Elgar Publishing 2017) 254

<sup>168</sup> United Nations Commission on International Trade Law, "UNCITRAL Technical Notes on Online Dispute Resolution" (2017) <<https://goo.gl/4ehCja>> accessed 28 March 2018

<sup>169</sup> *Supra* at 13, art 6 (1) and (2)

<sup>170</sup> *Supra* at 164, art 11 (1) b) and c) and Recital 44

<sup>171</sup> Council Directive (EC) 93/13 on unfair terms in consumer contracts [1993] OJ L95

tribunal can use the mechanisms offered by national law in order to conclude, if it's the case, that consumer should not be bound by the clause.<sup>172</sup>

Consideration should be made in case of B2C contracts which contain ADR clause. In *Rosalba Alassini* case the European Court of Justice stated that if the contractual terms are predetermined by the business then the consumer might allege that the clause is not binding for the consumer using the provisions from Directive 93/13. The enforceability of an online mediation clause depends if certain criteria are fulfilled. First, online mediation does not cause a substantial delay in the dispute resolution process, second it should not be expensive for the consumer, the limitation period should be suspended while addressing to online mediation, parties should maintain the right to bring an action before the court, the equality of the position is respected and the measures with interim character are not excluded.<sup>173</sup>

In regard with pre-dispute arbitration clauses it was decided on two occasions by the Court that national courts can decide on the unfairness of such clauses even if the consumer during the arbitral proceeding did not raise the unfair nature of the clause as the consumer is in a less favorable position in comparison with the E-business or any type of businesses.<sup>174</sup>

### **3. US Discretion Based Jurisdiction in B2C E-contracts**

#### **3.1 US jurisdiction tests**

It is fair to say that US E-businesses are particularly advanced and highly popular, by having bigger platforms more consumers are attracted hence the risk of more disputes exists. In case of litigations that result from commercial deals concluded online the courts first will first determine if it has personal jurisdiction over one of the parties or both parties.<sup>175</sup> The validity of jurisdiction clauses in US is a matter of law, hence the choice of law has a crucial role as it

<sup>172</sup> C-40/08 *Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira* [2009] ECR I-09579

<sup>173</sup> C-317/08 *Rosalba Alassini v Telecom Italia SpA* [2010] ECR I-02213

<sup>174</sup> C-168/05 *Elisa María Mostaza Claro v Centro Móvil Milenium SL* [2006] ECR I-168/05 and *Supra* at 163

<sup>175</sup> Bruce Baldinger, "Personal Jurisdiction in the Borderless World of E-Commerce" (2017) <<https://goo.gl/UntqBw>> accessed 28 March 2018

defines the applicable law. In US courts treat differently the question of identification of applicable law to jurisdiction clauses, some apply contractual rules of *lex fori*, others the law that governs the main contract and even US common law principles are used in some instances.<sup>176</sup>

A big part of US states does not have specific regulations referring to the validity of jurisdiction clauses, the intention of the parties is usually considered one of the most significant indicator. In case of E-contracts the validity of jurisdiction clauses mostly depends on the meeting of genuine consent between the parties. However as in case of E-contracts consumers are less engaged in reading of the terms and conditions drafted by the E-business the authenticity of genuine consent can be questioned. It is expected that in order to rely on such a clause several requirements have to be met. First the E-business should communicate in a clear manner to the consumer about the existence of such clause in its terms and conditions, secondly the consumer should have a real opportunity to read the clause and thirdly, an undisputable consent should be given.<sup>177</sup>

The fulfillment of such requirements might be challenged in the changing and borderless E-commerce environment, especially because jurisdiction clauses are usually included in browse-wrap and click-wrap contracts.<sup>178</sup>

### 3.1.1 Click-wrap and browse-wrap agreements

Click-wrap agreements are a common type of agreement concluded online, including for commercial purposes. The terms and conditions, including jurisdiction clause, are presented on the website of the E-business. In order to conclude such an agreement for the purpose of buying goods and services or downloading files, the consumer who is identified as a user

<sup>176</sup> Jonathan Hill and Adeline Chong, *International Commercial Disputes Commercial Conflict of Laws in English Courts* (fourth edition, Hart Publishing 2010) 48

<sup>177</sup> *Supra* at 1, 136

<sup>178</sup> Kayleen Manwaring, "Enforceability of Clickwrap and Browsewrap Terms in Australia: Lessons from the U.S. and the U.K." [2011], 1 <<https://goo.gl/TuF3Pg>> accessed 31 March 2018

will have to click the button “*I agree*” or “*I accept*” in a pup-up window or in a dialogue box.<sup>179</sup>

The enforceability of the terms in click-wrap contracts can be affected, in the first place, by that the agreement is not signed but rather the consumer just click the “*I agree*” or “*I accept*” button.<sup>180</sup> In *Scarcella*<sup>181</sup> case the New York court held that the forum selection clause is invalid because the wording displayed on the E-business website was encouraging the consumers not to read the terms and conditions of the agreement before clicking the consent button as such practice was unfair toward the consumers who are considered a weaker parties and in that specific case the clause was considerably putting the consumer in a disadvantaged position. American courts are also keen to identify if the consumers were conscious while agreeing on the clauses from click-wrap contracts. In *Comb*<sup>182</sup> case the court found that the compelling arbitration clauses incorporated in the terms of click-wrap contracts of PayPal were unenforceable because of the unconscionability of the consumers as an average value of a claim was smaller compared the expenses for arbitration.

To browse-wrap agreements is specific that terms and conditions are available by accessing a hyperlink that is posted on the website of the E-business and conclusion of such agreements does not require an express consent manifestation.<sup>183</sup> The enforceability of terms from such agreements is has been exposed to more difficulties as the concept of sufficient knowledge had a very relative understanding. American courts took a firm position, affirming that the consumers should be sufficiently clear noticed about the terms of the browse-wrap agreement. As instance, in *Pullstar* case the court rejected the enforcement of the terms

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<sup>179</sup> Walker Morris, "Click-Wrap Agreements" (18 December 2015) <<https://goo.gl/HKnuk3>> accessed 29 March 2018

<sup>180</sup> Simon Blount, *Electronic contracts : principles from the common law* (first published 2008, 2009) 61

<sup>181</sup> *Scarcella v. America Online, Inc.* [2005] 4 Misc. 3d 1024 798 N.Y.S.2d 348

<sup>182</sup> *Comb v. PayPal, Inc.* [2002] 218 F.Supp.2d 1165 N.D.

<sup>183</sup> Graham J. H. Smith, *Internet Law and Regulation* (Sweet & Maxwell 2007) 821

because the terms were in gray on gray wallpaper and there were no express indications by using means of underlining or other means about the existence of a hyperlink with the terms.<sup>184</sup>

However existing practice in regard with the enforcement of the browse-wrap terms also can be found. In two appellate decisions it was found that the E-business provided sufficiently clear notice to the consumers about the existence of the terms.<sup>185</sup> Hence it is important to keep in mind the necessity of an adequate notice in order to rely on validity of a browse-wrap agreement.

#### ***4. Chinese legal provision on E-commerce jurisdiction***

##### **4.1 Jurisdiction agreements**

Chinese Civil Procedure Code which is applicable in case of E-commerce does not provide exact conditions for a valid and enforceable jurisdiction clause in case of international E-commerce, however it is known that the clauses should be in written. In particular, E-contracts with consumers are treated by general rules for consumer contracts or just from contracts.<sup>186</sup> Similarly with EU interpretation, Chinese laws provide that the term “in writing” refers to agreements concluded via electronic means because Contract Law of the People’s Republic of China provides that contracts can be concluded in any form.<sup>187</sup>

In its guidelines on application of China civil procedure law the Supreme Court held that even if not expressly provided by article 531 from the law, it should be understood that the parties in a contract with extraterritorial element can agree to submit their dispute to a specific foreign court that has a connection to the dispute. Usually it is the court where the defendant has its domicile, where contract is performed or domicile of the plaintiff. It is

<sup>184</sup> *Pollstar v Gigmania Ltd* [2000] 170 F Supp 2d 974

<sup>185</sup> *Aral v Earthlink Inc* [2005] 134 Cal App 4th 544, *Hubbert v Dell Corp* [2005] JNE2d WL 1968774

<sup>186</sup> Zheng Sophia Tang, Choice-of-Court Agreements in Electronic Consumer Contracts in China [2016] 24

<sup>187</sup> Contract Law of the People’s Republic of China 1991, art 11 “*a contract may be made in writing, oral conversation as well as in any other form*”

curious that even if in some cases because of the presence of exclusive jurisdiction parties will be bound to submit the dispute to Chinese courts such arrangements can be obeyed by agreeing on arbitration.<sup>188</sup>

A jurisdiction clause in E-contacts with consumers should at least satisfy some general requirement with formal character. In order to have a valid and enforceable choice of jurisdiction clause the jurisdiction should be designated to a court that is substantially connected to the dispute between the parties.<sup>189</sup> The requirement of substantive connection has a particular importance for E-commerce contracts with consumers as it is used in order to prevent abuses from the E-business as they are in a more favorable bargaining position in comparison with their clients.

Similarly with US approach, consumers should receive a reasonable notice about the existing jurisdiction clause incorporated in the terms and conditions of the E-business. It imposes on the E-business an additional duty to offer appropriate knowledge to its consumer about terms and conditions of the agreement in order to receive a valid consent.<sup>190</sup> The reasonability of notice is identified by the discretionary approach of the judges. In *Liao Yandong* case<sup>191</sup> the court decided that some additional steps should be taken by the E-business in order to bring consumer's attention to the choice of jurisdiction clause, as instance by writing the clause in bold, in different colors or by highlighting it. Also the clause will be considered valid and enforceable if it pops out on the screen before "*I agree*" button is clicked.

The duration and intensity of the commercial relation between the E-business and consumer will also an indicator for establishment of validity of jurisdiction clause. As instance, in

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<sup>188</sup> Jason Tian, "Jurisdiction agreement under China Laws" (Chinese Lawyers in Shanghai, 9 August 2015) <<https://goo.gl/8JjaZy>> accessed 30 March 2018

<sup>189</sup> *Supra* at 186, 25

<sup>190</sup> Chinese Supreme People's Court, Judicial Interpretation of The Law on Civil Procedure art 31 (4 February 2015)

<sup>191</sup> *Liao Yandong v Tencent* [2016] Foshan Intermediate People's Court of Guangdong Province, No 06646

*Daizhibai* case<sup>192</sup> the court decided that the jurisdiction clause incorporated in the terms and conditions of an E-business was valid because the consumer repeatedly contracted that E-business during several years, hence it was clear that the reasonable notice existed as the terms and conditions appeared all the time on the screen before the consumer was logging in which means that the consumer had multiple times the chance to get familiar with the terms that he agrees on.

In case of browse-wrap agreements Chinese courts have split decisions. Similarly as in US in *Li Junbo* case<sup>193</sup> Chinese court decided that the jurisdiction clause should be declared valid as long as it is in bold and underlined even if it indicates that the jurisdiction is offered to a court from the country where the E-business has its seat. Differently was decided in another case, where the validity of a jurisdiction clause was refused because the agreement was written in a very sophisticated manner and in a small size that is not easily understandable for the consumers.

As analyzed above, US system requires for a sufficient notice, however in Chinese such test is considered to be too relaxed for the E-businesses as it cannot provide sufficient protection for the consumers. Hence a test of reasonable notice is considered a more protective one from the prospective of a consumer.<sup>194</sup>

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<sup>192</sup> *Daizhibai v Hangzhou Leihuo Science & Technology Ltd* [2016] Lianyungang Intermediate People's Court of Jiangsu Province, No 00129

<sup>193</sup> *Li Junbo & Zheng Juqi v Tmall Internet Ltd* [2016] Hanjiang Intermedium People's Court of Hubei Province, No 96/24

<sup>194</sup> *Supra* at 186, 26

## **Final Conclusive Notes**

E-commerce is a rapidly growing global phenomenon whose popularity has increased exponentially the last decade and has shown no sign of slowing down, its growth guaranteed in large part due to the incredible potential for profit combined with consumer convenience.

The purpose of this research was to present an overview of current legal regulations on E-commerce in the most developed online markets. The overview showed that, as many new practices, E-commerce presents new challenges for the legal system because of its unique character where the law must work in conjunction with technology. This unique fusion leads to new and complicated questions for the legal field, the most important being consumer protection as they are the weaker party in E-contracts. Other important issues that were identified during this research includes the protection of the interests of E-businesses, the need to promote technological development, and the internet's effect on choice of law and choice of court.

This research leads to conclusion that choice of law and jurisdiction clauses, as they are strongly connected, directly affect the consumer. The chosen court and system of law will decide the outcome of the parties' commercial transaction.

Based on second and third chapters it can be concluded that the US, EU, and Chinese systems offer similar but slightly different criteria for identification of consumers in E-contracts. This identification, in fact, is crucial as it determines if a party in an E-contract will or will not benefit from consumer protection laws. This different approach can be extremely complicated for the consumer, who likely has little understanding of contract law at all. Prior to the internet, private citizens rarely made contracts with foreign business, a practice which is now an everyday occurrence but the population at large lacks the education and experience necessary to make informed choices, a problem compounded by the existence of multiple

subtly different legal systems and the unclear identification of online businesses nation of origins.

The overview showed that as the traditional laws were written in a pre-internet age and is far less relevant to the modern challenges; this would likely require drafting an international legal framework for E-commerce collectively. The only way to address before mentioned concerns is through harmonization of choice of law and choice of jurisdiction provisions, which would allow certainty and predictably in E-contracts. Due to its emergent nature, E-commerce still lacks a unified method of harmonization of law, a problem compounded by the different intentions between the Chinese, American, and EU systems, and their different understandings of choice of law and jurisdiction clauses.

The EU's system is by far the most protective of consumers, offering more predictable content via the ECJ step by step approach, while the Chinese system, by contrast, has the most business oriented approach, offering far less consumer protection than their EU counterparts. The US serves as an intermediary between these two positions, providing more consumer protections than China but being far more business focused than the EU.

The internet moves extremely quickly, and has brought about a globalized world faster than the legal systems can catch up, and so until an international understanding of harmonization is found, it is almost impossible for a consistent understanding of these clauses to be found.

This problem would require international cooperation and likely a wide spread rethinking and redefining of the legal terminology in relation to E-commerce. Law is nothing without relevance, if the legal system cannot meet the needs of its adherence, then it will not be respect, it is essential for an international standard to be set not just for the consumer and the business, but also for the rule of law itself.

## Bibliography

### Table of books

Adam J. Mambi	<i>ICT Law Book: A Source Book for Information and Communication Technologies &amp; Cyber Law in Tanzania &amp; East African Community</i>	(African Books Collective, 2010)
Anabela Susana De Sousa Gonçalves	<i>The e-commerce international consumer contract in the European Union</i>	(Mujlt 2015)
Andrea Bonomi and Paul Volken	<i>Mandatory Rules in Private International Law</i>	(Volum X. Sellier 1999)
Andrea Bonomi, Gian and Paolo Romano	<i>Choice of law and overriding mandatory rules in international contracts after Rome I</i>	(Walter de Gruyter 2011)
Arno R. Lodder and Andrew D. Murray	<i>EU Regulation of E-Commerce: A Commentary</i>	(Edward Elgar Publishing 2017)
Dan Svantesson	<i>Private International Law and the Internet</i>	(4 <sup>th</sup> Edition, first published in 2002, Kluwer Law International 2016)
Dan Swantesson	<i>Private International Law and the Internate</i>	(Kluwer law International 2007)
Dean Symeon	<i>Codifying Choice of Law Around the World: An International Comparative Analysis</i>	(Oxford University Press 2014)
Denis Keenan	<i>Law for Business</i>	(13th edition, Longman 2006)
Edward Elgar	<i>Research Handbook on EU Internet Law</i>	(Edward Elgar Publishing Limited 2014)
Ellen Wauters and Eva Lievens	<i>Social Networking Sites' Terms of Use Addressing Imbalances in the User-Provider Relationship through Ex Ante and Ex Post Mechanisms</i>	(JIPITEC 2014)
Gerald Spindler and Fritjof Börner	<i>E-Commerce Law in Europe and the USA</i>	(Springer Science & Business Media 2013)
Graham J. H. Smith	<i>Internet Law and Regulation</i>	(Sweet & Maxwell 2007)

James Fawcett	<i>Private International Law</i>	(14 <sup>th</sup> Edition, Oxford University Press 2009)
Jieying Liang	<i>Party Autonomy in Contractual Choice of Law in China</i>	(Cambridge University Press 2018)
Jonathan Hill	<i>Cross Border Consumer Contracts</i>	(Oxford University Press 2008)
Jonathan Hill and Adeline Chong	<i>International Commercial Disputes: Commercial Conflict of Laws in English Courts</i>	(Bloomsbury 2014)
Jonathan Hill and Adeline Chong	<i>International Commercial Disputes Commercial Conflict of Laws in English Courts</i>	(fourth edition, Hart Publishing 2010)
Juliet M. Oberding and Terje Norderhaug	<i>A Separate Jurisdiction For Cyberspace</i>	(Volume 2, Cref 1996)
Lilian Edwards	<i>Law and the Internet</i>	(Third edition, 2009)
Manuel Penadés Fons	<i>Commercial Choice of Law in Context: Looking Beyond Rome</i>	(Modern law review 2015)
Manuel Penadés Fons	<i>Elección tácita de ley en los contratos internacionales</i>	(Navarra: Thomson Reuters-Aranzadi, 2012)
Margus Kingisepp and Age Värvi	<i>The Notion of Consumer in EU Consumer Acquis and the Consumer Rights Directive—a Significant Change of Paradigm?</i>	(Juridica International 2011)
Maria Hook	<i>The Choice of Law Contract</i>	(Bloomsbury 2016)
Maryke Silalahi Nuth	<i>Electronic contracting in Europe</i>	(Sender for rettsinformatikk Postboks 6706 St. Olavs plass 0130 Oslo, Complex nr. 2/2008)
Matthew Burnstein	<i>A global network in a compartmentalised legal environment</i>	(PPL 1998)
Michael Lehmann	<i>Electronic Business in Europa</i>	(Buch 2002)
Mindy Chen-Wishart	<i>Formation and Third Party Beneficiaries</i>	(Oxford University Press, 2018)
Peter Nygh	<i>Autonomy in International Contracts</i>	(Oxford University Press,

Simon Blount	<i>Electronic contracts : principles from the common law</i>	(first published 2008, 2009)
Symeon Symeonides	<i>The American Choice of Law Revolution: Past, Present and Future</i>	(The Hague Academy of International Law Monographs, 2006)
Thomas Russell	<i>Commercial Advertising (RLE Advertising)</i>	(first published in 1919, 7th Volume, Routledge 2013)
Uta Kohl	<i>The Rule of Law, Jurisdiction and the Internet</i>	Volume 12 IJLIT 2004)
Zheng Sophia Tang	<i>Electronic consumer Contracts in the conflict of law</i>	(Second Edition, first published in 2009, Hart Publishing, 2015)
Zheng Sophia Tang	<i>Consumer contracts and the Internet in EU private international law</i>	(Research Handbook on EU Internet Law 2015)
Jürgen Basedow	<i>Encyclopedia of Private International Law</i>	(Second edition, EE 2017)

### Table of journals

Center of International Law (Martin Fries)	<i>"International Jurisdiction over Consumer Contracts" (2017)</i>	< <a href="https://goo.gl/g7wHCB">https://goo.gl/g7wHCB</a> > accessed 12 March 2018
Commercial Law Magazine (Bleocarca Alexandra)	<i>"Earlier stage in the electronic contract conclusion" (2010)</i>	
DAAAM International, (Emilia Cotoi)	<i>"The conclusion of electronic contract" (2011)</i>	< <a href="https://goo.gl/Janv8s">https://goo.gl/Janv8s</a> > accessed 11 March 2018
International Journal of Law and Information Technology (Emad Abdel Rahim Dahiyat)	<i>"Towards new recognition of liability in the digital world: should we be more creative?" (2011)</i>	<a href="https://goo.gl/L3oN1o">https://goo.gl/L3oN1o</a> > accessed 12 March 2018
International Review of Law (Christine Riefat)	<i>"Council Regulation (EC) 44/2001 and Internet Consumer Contracts: Some Thoughts on Article 15 and the Futility of Applying 'In the Box' Conflict of Law Rules to the 'Out of the Box'</i>	

*Borderless World” (2005)*

Jipotec (Jörg Binding and Kai Purnhagen)	<i>“Regulations on E-Commerce Consumer Protection Rules in China and Europe. Compared – Same Same but Different?” (2011)</i>	< <a href="https://goo.gl/hTcrCz">https://goo.gl/hTcrCz</a> > accessed 31 March 2018
Journal of Consumer Policy (Marco Loos)	<i>“Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers” (2015)</i>	< <a href="https://goo.gl/gUAj3q">https://goo.gl/gUAj3q</a> > accessed 12 March 2018
KCATL Journal	<i>“A consumer-neutral look at jurisdiction in e-commerce” (2015)</i>	< <a href="https://goo.gl/TQ9m5H">https://goo.gl/TQ9m5H</a> > accessed 16 March 2018
Law and Technology (Zheng Sophia Tang)	<i>„Choice-of-Court Agreements in Electronic Consumer Contracts in China” (2016)</i>	
Studies in Ethics, Law, and Technology (Kayleen Manwaring)	<i>“Enforceability of Clickwrap and Browsewrap Terms in Australia: Lessons from the U.S. and the U.K.” (2011)</i>	< <a href="https://goo.gl/TuF3Pg">https://goo.gl/TuF3Pg</a> > accessed 31 March 2018
The American Journal of Comparative Law (Eduardo Vitta)	<i>“The impact in Europe of the American “Conflicts revolution” (1982)</i>	< <a href="https://goo.gl/vY33mU">https://goo.gl/vY33mU</a> > accessed 31 March 2018

**Table of legislation**

Council Directive (EC) 2011/83	on consumer rights	[2011] OJ L 304
Council Directive (EC) 2013/11	on alternative dispute resolution for consumer disputes and amending Regulation	[2013] OJ L165
Council Directive (EC) 93/13	on unfair terms in consumer contracts	[1993] OJ L95
Council Directive (EC) 94/820	relating to the legal aspects of electronic data interchange	[1994] OJ L 338
Council Directive (EC) 95/46	on the protection of individuals with regard to the processing of personal data and on the free movement of such data	[1995] OJ L 281

Council Directive (EC)2000/31	on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)	[2000] OJ L 178
Council Directive (EEC) 93/12	on unfair terms in consumer contracts	[1993] OJ L95
Council Regulation (EC) 1215/2012	on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters	[2012] OJ L 351
Council Regulation (EC) 1371/2007	on rail passengers' rights and obligations	[2007] OJ L315/14
Council Regulation (EC) 181/2011	concerning the rights of passengers in bus and coach transport	[2011] OJ L55
Council Regulation (EC) 261/2004	establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights	[2004] OJ L46
Council Regulation (EC) 524/2013	on online dispute resolution for consumer disputes	[2013] OJ L165
Council Regulation (EC) 593/2008	on the law applicable to contractual obligations (Rome I)	[2008] OJ L 177
Council Regulation (EC) 864/2007	on the law applicable to non-contractual obligations (Rome II)	[2007] OJ L 199
Council Regulation (EC) No 1215/2012	on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters	[2012] OJ L351
People's Republic of China	Contract Law of the People's Republic of China	[1991]
Rome Convention	Convention on the Law Applicable to Contractual Obligations	[1980] OJ L 226, 80/934/EEC
Restatement	Second of Contracts	[1981]

## Table of cases

### European Court of Justice

C- 543/10	<i>Refcomp SpA v. Axa Corporate Solutions Assurance SA and others</i>	[2013]
C-168/05	<i>Elisa María Mostaza Claro v Centro Móvil Milenium SL</i>	[2006] ECR I-168/05
C-214/89	<i>Powell Duffryn plc v Wolfgang Petereit</i>	[1992] ECR I-00001
C-218/12	<i>Lokman Emrek v Vlado Sabranovic</i>	[2013]
C-24/76	<i>Estasis Salotti di Colzani Aimo e Gianmario Colzani v RUWA Polstereimaschinen GmbH</i>	[1976] ECR 1831
C-269/95	<i>Francesco Benincasa v. Dentalkit Srl</i>	[1997]
C-269/95	<i>Francesco Benincasa v Dentalkit Srl.</i>	[1997] ECR I-03797
C-317/08	<i>Rosalba Alassini v Telecom Italia SpA</i>	[2010] ECR I-02213
C-40/08	<i>Asturcom Telecomunicaciones SL v Cristina Rodríguez Nogueira</i>	[2009] ECR I-09579
C-464/01	<i>Johann Gruber v. Bay Wa AG</i>	[2005]
C-464/01	<i>Johann Gruber v Bay Wa</i>	[2005] ECR I-00439
C-542/99	<i>Cape Snc v Idealservice Srl</i>	[2001] ECR I-09049
C-89/91	<i>Shearson Lehmann Hutton Inc. v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH</i>	[1993]
C-99/96	<i>Hans-Hermann Mietz v Intership Yachting Sneek BV</i>	[1999] ECR I-02277
C-191/15	<i>Verein für Konsumenteninformation v Amazon EU Sarl</i>	[2016]
C-244/98	<i>Océano Grupo Editorial SA v. Murciano Quintero</i>	[2000] ECR I-04941
C-473/00	<i>Cofidis v. Fredout</i>	[2002] ECR I-10875

C-64/12                      *Anton Schlecker v Melitta Josefa Boedeker*                      [2013] ECR I-1274

European Union

*AOL France v. UFC Que Choisir*                      R.G. 04/05564                      [2005]

*Timothy Joseph Lawlor v Sandvik Mining & ors*                      EWCA Civ 365                      [2013]

United States

*Alta Vista Corp., Ltd. v. Digital Equipment Corp.*                      44 F. Supp. 2d 72                      [1998]

*Aral v Earthlink Inc*                      134 Cal App 4th 544                      [2005]

*Brighton Inv., Ltd. v. Har-Zvi*                      88 A.D.3d 1220 (3d Dep)                      [2011]

*Comb v. PayPal, Inc.*                      218 F.Supp.2d 1165 N.D.                      [2002]

*Forcelli v. Gelco Corp*,109 AD3d 244(NY Slip Op 05437)                      [2013]

*Hubbert v Dell Corp*                      NE2d WL 1968774                      [2005]

*Inc. v. Step Two, S.A.,*                      318 F.3d 446, 454 (3d Cir.)                      [2003]

*Palmo v. Straub*                      45 A.D.3d 1090 (3d Dep't)                      [2007]

*Pollstar v Gigmania Ltd*                      170 F Supp 2d 974                      [2000]

*Roberts v. Stracick*                      13 A.D.3d 1208 (4th Dept)                      [2004]

*Scarcella v. America Online, Inc.*                      4 Misc. 3d 1024 798 N.Y.S.2d 348                      [2005]

*Williamson v. Delsener*                      59 A.D.3d 291 (1st Dep't)                      [2009]

*Wronka v. GEM Community Mgt.*                      49 A.D.3d 869 (2d Dep't)                      [2008]

*Zippo Mfg. Co. v. Zippo Dot Com Inc.*                      952 F. Supp. 1119, 1124                      [1997]

<i>Specht v. Netscape</i>	306 F.3d 17 2d Cir.	[2002]
<i>Williams v. America Online, Inc.</i>	WL 135825 Mass. Super.	[2001]

## China

<i>Daizhibai Leihuo Science Technology Ltd v Hangzhou Lianyungang Intermediate People's Court of Jiangsu Province, No 00129</i>		[2016]
<i>Li Junbo &amp; Zheng Juqi v Tmall Internet Ltd</i>	Hanjiang Intermedium People's Court of Hubei Province, No 96/24	[2016]
<i>Liao Yandong v Tencent</i>	Foshan Intermediate People's Court of Guangdong Province, No 06646	[2016]

## **Table of websites and blogs**

Wolters Kluwer Portal	"Computabel contracts/ E-comntracting" (2014)	< <a href="https://goo.gl/5YAtBq">https://goo.gl/5YAtBq</a> > accessed 11 March 2018
Baldinger Law (Bruce Baldinger)	"Personal Jurisdiction in the Borderless World of E-Commerce" (2017)	< <a href="https://goo.gl/UntqBw">https://goo.gl/UntqBw</a> > accessed 28 March 2018
Legal Match (Peter Clarke)	"Are Emails Legally Binding as Contracts?" (2017)	< <a href="https://goo.gl/X4YkTx">https://goo.gl/X4YkTx</a> > accessed 11 March 2018
LexoLogy (Herbert Smith)	"Governing law" and "jurisdiction" clauses" (2008)	< <a href="https://goo.gl/JXSV1S">https://goo.gl/JXSV1S</a> > accessed 17 March 2018
Out-Law	"ECJ says courts must assess consumer contract jurisdiction clauses" (2010)	< <a href="https://goo.gl/f3Hi7D">https://goo.gl/f3Hi7D</a> > accessed 17 March 2018
Questia	"Personal Jurisdiction and the Internet: Seeing Due Process through the Lens of Regulatory Precision"	< <a href="https://goo.gl/p8eH2u">https://goo.gl/p8eH2u</a> > accessed 31 March 2018
Semantic Scholar	"Report of Mr . Justice John L . Murray , President of the Supreme Court and Chief Justice of Ireland Methods of Interpretation – Comparative Law Method" (2007)	< <a href="https://goo.gl/AUAJpf">https://goo.gl/AUAJpf</a> > accessed 31 March 2018
Sinoblawg	"Jurisdiction agreement under China Laws" (2015)	< <a href="https://goo.gl/8JjaZy">https://goo.gl/8JjaZy</a> > accessed 30 March 2018
Walker Morris	"Click-Wrap Agreements" (2015)	< <a href="https://goo.gl/HKnuk3">https://goo.gl/HKnuk3</a> >

### Table of other sources

Chinese People's Court	Supreme	Judicial Interpretation of The Law on Civil Procedure art 31	[2015]
European Commission		Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)	[2005] COM (650 final)
Europeana Organisation	Consumer	Review of the Consumer Rights Directive (2016)	< <a href="https://goo.gl/r415dQ">https://goo.gl/r415dQ</a> > accessed 31 March 2018
German Federal Court of Justice		judgment dated August 18, 2015, file no. X ZR 2/15	
L&P Newsletter No. 42		Validity of Clauses concerning Choice of Law, Place of Jurisdiction and Arbitral Awards in International Contracts in Thailand (2015)	< <a href="https://goo.gl/w9drfF">https://goo.gl/w9drfF</a> > accessed 13 March 2017
Opinion of Advocate General Trstenjak		in Jan Voogsgeerd v Navimer SA	[2013] ICR 1274
UK Department for Business Innovation and Skills		“Alternative dispute resolution for consumers, Implementing the Alternative Dispute Resolution Directive and Online Dispute Resolution Regulation – Impact Assessment”	[2014] < <a href="https://goo.gl/vzFYfu">https://goo.gl/vzFYfu</a> > accessed 28 March 2018
United Nations Commission on International Trade Law		“UNCITRAL Technical Notes on Online Dispute Resolution”	[2017] < <a href="https://goo.gl/4ehCja">https://goo.gl/4ehCja</a> > accessed 28 March 2018