Law of Electronic Commercial Transactions

Contemporary issues in the EU, US and China

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Part IV

Dispute resolutions

10 Resolving electronic commercial disputes

Businesses, through the use of the internet, can enter into electronic sales contracts with other businesses located in different countries or sell data to a third country easily and quickly. The potential for disputes in the validity of cross-border electronic contracts and the protection of transborder data privacy, is, obviously, much greater than in a paper-based environment where a high degree of commercial contracts are domestic in nature. The determination of internet jurisdiction and applicable law could be much more complicated and uncertain because online contracting is often executed in several places and it is difficult to ascertain the principal place.

At the international level there are no specific rules in the model laws and conventions dealing with internet jurisdiction and choice of law. The UNCITRAL Model Law on Electronic Commerce and the UN Convention on the Use of Electronic Communications in International Contracts do not contain any jurisdiction or choice of law provisions, but provide the measures of the time and place of dispatch and receipt of data messages or electronic communication[1] and the location of the parties.[2] For example, the connecting factors on parties' business location such as 'the place of business', 'the closest relationship to the relevant contract, the underlying transaction or the principal place of business', or 'habitual residence', may be used to determine internet jurisdiction and choice of law.

The EU, as stated in Recital 23 and Article 1(4) of the EC Directive on Electronic Commerce, does not establish any additional rules on private international law with regard to jurisdiction and choice of law.[3] There is also no particularised internet jurisdiction and choice of law legislation in China and the US.

10.1 Internet jurisdiction[4]

Jurisdiction is one of the main subject matters within the region of private international law (also called 'conflict of laws'). Conflict of jurisdiction means several courts may have rights to hear a particular case. When conflict occurs there is a need to ascertain which court is fully entitled to exercise the jurisdiction.

Internet jurisdiction added a new dimension to courts exercising jurisdiction in the late 1990s when disputes, such as electronic commercial transactions or other internet-related subject infringement, happened. Whether the traditional rules of jurisdiction can still be sufficient to determine internet jurisdiction has been questioned and debated.

10.1.1 EU rules applied in cyber jurisdiction

In the EU the Brussels I Regulation (EC No 44/2001),[5] the replacement of the 1968 Brussels Convention, is deemed to be:

> a highly successful instrument, which has facilitated cross-border litigation through an efficient system of judicial co-operation based on comprehensive jurisdiction rules, coordination of parallel proceedings, and circulation of judgments. The system of judicial co-operation laid down in the Regulation has successfully adapted to the changing institutional environment (from intergovernmental co-operation to an instrument of European integration) and to new challenges of modern commercial life.[6]

The above statement is concluded by the Commission's Report on the Review of the Brussels I Regulation on 21 April 2009. There is no doubt that the Brussels I Regulation plays a very significant role in harmonising judicial co-operation between Member States and its achievement in facilitating cross-border litigation cannot be undermined. However, it is probably arguable that whether the Brussels I Regulation has successfully adapted to new challenges of modern commercial life, in particular, new judicial issues on internet-related cases, Article 23(2) of the Brussels I Regulation is the only rule that explicitly acknowledges agreements by electronic means.

The Green Paper, issued on 21 April 2009, accompanies the Commission's Report to launch a broad consultation with eight questions on the review of the Brussels I Regulation:[7]

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

The main function of these questions is to collect opinions on how to remove

obstacles to a free circulation of judgments, enhance certainty of cross-border jurisdiction relating to one of the parties domiciled in a third country rather than Member States, and avoid parallel proceedings in different Member States. Questions 2, 3 and 5 are connected and interacted, especially Questions 2 and 3 with regard to international jurisdiction issues. Although the concerns raised in the Review of the Brussels I Regulation do not directly point to the question of determination of internet jurisdiction, internet jurisdiction is a cross-border issue and, as such, ensuring the smooth operation in the international legal order will reflect on facilitating internet jurisdiction.

Choice of court clause or agreement

A well-drafted contract will usually insert a choice of jurisdiction or court clause. This is often referred to as an 'exclusive' clause, providing that all disputes between the parties arising out of the contract must be referred to a named court or the courts of a named country.[9] On 1 April 2009 the European Council signed on behalf of the European Community the Hague Convention on Choice of Court Agreements[10] concluded on 20 June 2005 (hereafter the Choice of Court Convention).[11] The Choice of Court Convention shall 'apply in international cases to exclusive choice of court agreements concluded in civil or commercial matters'.[12] So when the EU accedes to the Choice of Court Convention the European Commission shall declare clearly the meaning of 'international cases' and that a choice of court agreement can only be governed by the Choice of Court Convention if one of the parties is not domiciled in an EU Member State. Otherwise, it may conflict with Article 23 of the Brussels I Regulation as Article 23(1) applies when at least the parties, one or more of whom is domiciled in a Member State, have agreed that the courts of a Member State are to have jurisdiction over disputes arising in connection with a particular legal relationship.

In other words, Article 23 of the Brussels I Regulation authorises parties, one or more of whom are within Member States, to enter into an agreement designating the court or courts to determine such disputes. The chosen courts can be general courts or specific courts of a country. For example, Company A (in Italy) and Company B (in Germany) have agreed a jurisdiction clause 'disputes must be referred to the courts of Germany' in their electronic contracts of sale. Under these circumstances German courts are designated to have jurisdiction over A and B's disputes. However, if later on, A and B made another distribution contract without a jurisdiction clause (the sales contracts and the distribution agreement are different legal relationships), then the original jurisdiction clause in the sale contract does not confer jurisdiction with regard to a dispute arising under the distribution contract.[13] If the jurisdiction clause includes a choice of a particular court, Article 23 is to confer jurisdiction on that court, but not on other courts in the same country. However, A and B can also choose the other courts, for instance the French

court, instead of the Italian or German courts, to hear the case, because Article 23 does not 'require any objective connection between the parties or the subject matter of the dispute and the territory of the court chosen'.[14] Moreover, A and B can also conclude a further exclusive jurisdiction agreement varying the earlier agreement, because Article 23 is based on the principle of party autonomy and it does not prevent parties from changing their decisions.[15]

However, Article 23(3) includes an exemption to parties, none of whom is domiciled in a Member State. In this situation the chosen courts have discretion to determine the existence and exercise of their jurisdiction in accordance with their own law.[16] The courts of the other members shall have no jurisdiction over the disputes unless the chosen court or courts have declined jurisdiction.

As recognised by Article 23(2) of the Brussels I Regulation, 'any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing'.[17] In the author's view this clause implies that a contract stored in a computer as a secured word document (i.e. a read-only document or document with entry password), or concluded by email and a clickwrap agreement falls within the scope of Article 23(2) of the Brussels I Regulation. In the e-contracting cases, to insert a choice of jurisdiction clause in the standard terms and conditions on the website can avoid further ambiguity about which court has jurisdiction when disputes arise. For example, the website owner can incorporate a choice of jurisdiction clause into an interactive clickwrap agreement that the buyer needs to click the 'I agree' button to assent to.[18]

Just like ordinary contracts, courts will determine jurisdiction of an online contract according to three main types of jurisdiction rules in the Brussels I Regulation: general jurisdiction, special jurisdiction and exclusive jurisdiction.

General jurisdiction

The general jurisdiction rule under the Brussels I Regulation is that defendants who are domiciled in one of the contracting states shall be sued at the place of their domicile.[19] Under Article 2 of the Brussels I Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that state. Furthermore, domicile rules within the Brussels I Regulation govern the domicile of individuals[20] and domicile of corporations.[21] With contracts made over the internet it is difficult to determine where the party is domiciled, even though the plaintiff can identify the party and locate the transaction.[22] Article 59(1) of the Brussels I Regulation provides that, as regards natural persons, in order to determine whether a party is domiciled in a particular Member State, the court shall apply the law of that state. Article 60(1) lays down that for the purposes of the Brussels I Regulation a company or other legal person or association of natural or

legal person is domiciled at the place where it has (1) its statutory seat or (2) its central administration or (3) its principal place of business.

On the internet, since the decision of the e-transaction might be made following discussion via video conferencing between senior officers who reside in different states, it has become more difficult to ascertain the location of the central administration.[23] According to the UN Convention on the Use of Electronic Communications in International Contracts (the UN Convention), 'the location of the parties'[24] is defined as 'a party's place of business'.[25] If a natural person does not have a place of business, the person's habitual residence should be deemed as a factor to determine jurisdiction.[26] The UNCITRAL Model Law on Electronic Commerce is the same as the UN Convention, providing that 'if the originator or the addressee does not have a place of business, reference is to be made to its habitual residence'.[27] In the author's view, the person's habitual residence on the internet occasion should be treated the same as the traditional offline rule that general jurisdiction should be connected to the habitual residence of the defendant but not the claimant.

Furthermore, according to the UN Convention, if a party does not indicate his place of business and has more than one place of business, then the place of business is that which has the closest relationship to the relevant contract.[28] The closest connecting factors are those that occur before or at the conclusion of the contract.[29] In the author's opinion, these factors are no different from the offline world, which would also relate to statutory seat, central administration or principal place of business. As a person or legal person doing electronic commerce, his/her statutory seat, central administration or principal place of business can be checked by the claimant, and the result can be found according to some connecting factors such as the registration of the defendant's business, licences, electronic payments and places of delivery of goods or services. This would lead to the following issue: special jurisdiction.

Special jurisdiction

Article 5 of the Brussels I Regulation derogates from the general principle contained in Article 2, which gives the claimant the opportunity to proceed against the defendant in a Member State in which the defendant is not domiciled. Under this provision it contains seven matters, one of which, Article 5(1), deals with matters relating to a contract. This general rule does not apply to insurance, consumer and employment contracts.[30]

How to ascertain 'the place of performance of the obligation in question'[31] is the focal point of how to determine jurisdiction. The place of performance, according to Article 5(1)(b), is the place of delivery of goods (or where it should have been delivered), or the place where the services were provided or should have been provided. Since the place of delivery is a close linking factor to determine special jurisdiction, an electronic contract is no different

from a paper-based contract when the contract itself involves physical delivery of goods. The difficulty in applying Article 5(1) lies in the interpretation of whether multiple places of delivery are within the scope of Article 5(1).

Unfortunately what Article 5(1)(b) does not expressly address is that posed by the situation where, as regards a contract for the sale of goods, there is more than one place of delivery or, in relation to a contract of services, there is more than one place of performance. Problems with regard to multiple places of delivery of goods or provision of services,[32] can be divided into two categories: one is, different obligations have different places of delivery, and the other is that the relevant obligation has several places of delivery.

At the first category, there are two possibilities: first, disputes concern more than one obligation. Article 5(1) allocates jurisdiction to the courts for each place of performance with regard to the dispute arising out of the obligation, which should have been performed at that place.[33] Second, cases involve two obligations with one principal obligation. The courts for the place of performance of the principal obligation have jurisdiction over the whole claim.[34]

At the second category, there are also two possibilities: first, as noted by the most recent case *Color Drack GmbH v Lexx International Vertriebs GmbH*,[35] there is a query about 'whether the first indent of Article 5(1)(b) of the Brussels I Regulation applied in the case of a contract for the sale of goods involving several places of delivery within a single Member State',[36] and if so, 'whether the plaintiff could sue in the court for the place of delivery of its choice'[37] among all places of deliveries. The Court ruled that the applicability of the first indent of Article 5(1)(b), where there are several places of delivery within a single Member State, complies with the regulation's objective of predictability, and proximity underlying the rules of special jurisdiction in matters relating to a contract.[38] Because the defendant should expect, when a dispute arises, that he may be sued in a court of a Member State other than the one where he is domiciled. Although the defendant might not know exactly which court the plaintiff may sue him in, he would certainly know that any court which the plaintiff might choose, would be situated in a Member State of performance of the obligation. As to the question of whether the plaintiff can sue in a court of its own choice under Article 5(1)(b), the Court ruled that for the purposes of application of the provision, the place of delivery must have the closest linking factor between the contract and the court, and 'in such a case, the point of closest linking factor will, as a general rule, be at the place of the principal delivery, which must be determined on the basis of economic criteria'.[39] If all places of delivery are 'without distinction', and 'have the same degree of closeness to the facts in the dispute',[40] the plaintiff could sue in the court for the place of delivery of its choice.

This first query leads to the second consideration: if the places of delivery were in different Member States, will Article 5(1)(b) still apply? Where the

relevant obligation has been, or is to be, performed in a number of places in different Member States, following the Advocate General's opinion, Article 5(1)(b) does not apply to this situation as the objective of foreseeability of the Brussels I Regulation could not be achieved;[41] that is, if a single place of performance for the obligation in question could not be identified for the purpose of this provision,[42] then the claimant should turn to Article 2 of the Brussels I Regulation, according to which the court with jurisdiction is that of the domicile of the defendant.

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

Firstly, is there a contract for the sale of goods, the provision of services or neither? Generally, goods can be ordinary goods with physical delivery and digital goods with performance over the internet, such as digital books, online journals and software programs. With regard to software programs, there is academic authority in favour of the proposition that software transferred online constitutes 'goods' for the purposes of the United Nations Convention on Contracts for the International Sale of Goods (CISG).[43] However, carriage of goods by sea, the provision of financial services, providing internet access to recipients or designing a website for a company should all be categorised as services. In addition, programming software that meets the buyer's specific needs should be regarded as providing services. Sometimes, in a complex software development project, a piece of software program can be broken down into self-contained sections so that when there is payment by instalments on completion of milestones, payment will be due from the buyer on completion of each milestone within the framework of a software development contract.[44]

Secondly, how should digitised goods be distinguished from other products? Digitised products are intangible. Intangible property is, by its nature, not physically located in a particular state.

However, the fact that a party has downloaded digitised products onto his computer, so that they are located on his hard drive, does not mean that the relevant *situs* is the place where the computer is presently located. Rather, we must consider the more complex question of where digitised products were located at the time of the purported dealing with them.[45]

Thirdly, what can be the place of performance of the obligation in question in cyberspace? As discussed before, the place of delivery between businesses is usually included in the contract of sale.[46] However, it becomes complicated when parties do not indicate the place of delivery in their contract, because it

might involve multiple places of delivery and services might also be provided by the seller's agencies. Furthermore, it would be even more complex when the transaction involves the delivery of digitised goods, as there are a number of places where electronic transactions are processed, for example, place of dispatch and receipt, the place where the seller has a specified personal connecting factor and the place where the recipient (i.e. the buyer) has a specified personal connection.

According to Article 5(1)(b) of the Brussels I Regulation, the place of performance should be deemed to be the place of delivery. Since it is very difficult to ascertain the place of performance with digitised goods involving online delivery, in the author's opinion both the sender's and recipient's place of business could be considered connecting factors depending on the characteristics of commercial transactions. In other words, in B2B and B2C electronic commercial transactions the closest connecting factors might be treated differently. However, the recipient's place of business as a connecting factor seems to be compatible with the US jurisdiction tests as discussed below.

10.1.2 US jurisdiction tests

Due to the fact that US companies are at the forefront of internet technology, litigation regarding e-commerce in the US is more advanced than anywhere else in the world. On 19 January 2009, the US, like the EU, signed the Hague Convention of Choice of Court Agreements.[47] If both the US and EU accede to the Hague Convention it will facilitate the harmonisation of judicial agreements and procedures between the two states.

Similar to the EU Brussels regime (general and special jurisdiction), there are two types of jurisdiction in the US: general and specific. General jurisdiction is jurisdiction over the defendant for any cause of action, whether or not related to the defendant's contacts with the forum state; whereas specific jurisdiction exists when the underlying claims arise out of, or are directly related to, a defendant's contacts with the forum state.[48]

The above notion comes from the famous case *International Shoe Co v Washington*,[49] which indicated that the minimum contacts test has both a general and a specific component.[50] What is meant by 'minimum contacts'? It is a requirement that must be satisfied before a defendant can be sued in a particular state. In order for the suit to go forward in the chosen state, the defendant must have some connections with that state. For example, advertising or having business offices within a state may provide minimum contacts between a company and the state.

General jurisdiction

Under the most commonly employed minimum contacts test, general jurisdiction is usually premised on 'continuous and systematic' contacts

between the defendant and the forum so as to make the defendant amenable to jurisdiction without regard to the character of the dispute between the parties.[51] It is clear that if the contacts that are unrelated to the dispute ('unrelated contacts') meet the threshold of being 'continuous and systematic', the defendant is amenable to general jurisdiction based upon its contacts with the state.

The most difficult issue in relation to general jurisdiction is the amount of unrelated contacts needed to subject a defendant to *in personam* jurisdiction.[52] That is, the defendant has some continuing physical presence in the forum, usually in the form of offices. There is a question whether 'mere' residence, as opposed to domicile or nationality, can be a sufficient connection for the exercise of general jurisdiction over an individual defendant.[53] The Second Restatement states that a defendant's residence is sufficient for the exercise of general jurisdiction 'unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable'.[54] Thus, general jurisdiction results from a party's continuous, systematic and ongoing ties to a certain forum.[55]

Specific jurisdiction

However, specific jurisdiction turns upon the character of the dispute ('related contacts'). That is, if the contact is related to the cause of action, such related-contact jurisdiction is specific jurisdiction, because (unlike general jurisdiction) it is dependent upon the character of the dispute.[56] Specific jurisdiction is often used when a party's contacts do not fulfil the general jurisdiction criteria, and permits the court to assert jurisdiction over parties to a dispute arising from the parties' contacts with the state involved.[57] Due to the requirement that the contacts are 'related' to the dispute, those contacts may well suffice for jurisdiction in the lawsuit at hand, but may not in another lawsuit relating to the defendant's activities in another state.[58] Thus, determining whether specific jurisdiction exists in a particular case depends upon two separate considerations – the first is whether the contacts are 'related' to the dispute. The second, assuming that the contacts are so related, is whether the contacts are 'constitutionally sufficient'.[59]

For the last few years, US courts, both state and federal, have been wrestling with the problematic issue of personal jurisdiction in the context of internet-related activities. In deciding these cases US courts have been reluctant to view the mere general availability of a website as a 'minimum contact' sufficient to establish specific personal jurisdiction over a non-resident defendant, at least in the absence of other contacts with the forum state.[60] Whether a defendant can be subject to specific jurisdiction in contact cases depends on the entire course of dealing, including 'prior negotiation and contemplated future consequences' establishing that 'the defendant purposefully established minimum contacts with the forum'.[61]

In practice, when trying to determine whether it has personal jurisdiction

over a non-resident defendant, the US court will use a two-step test. First, the court will examine the state's long-arm statute in order to determine whether there is a statutory basis for allowing that plaintiff to sue the defendant in that forum. In the second step, the court looks for some acts or activities by which the defendant has purposefully availed himself or herself of the privilege of conducting business in that state to such an extent that the defendant should reasonably anticipate being sued there.[62] The second step plays a large role in the jurisdiction calculus, that is, 'purposefully' and 'reasonableness'.

In addition, specific jurisdiction can also be examined by two factors: exercise of jurisdiction is consistent with these requirements of 'minimum contacts' and 'fair play and substantial justice'. These can firstly be determined by where the non-resident defendant has purposefully directed his activities or carried out some transaction with the forum or a resident thereof, or performed some act by which he purposefully availed himself of the privileges of conducting activities in the forum, thereby invoking the benefits and protections of its laws; secondly, the claim arises out of or relates to the defendant's forum-related activities; and thirdly, the exercise of jurisdiction is reasonable.[63]

In the *Zippo* case, the Western Pennsylvania District Court expanded on the International Shoe 'minimum contact test' by stating that personal jurisdiction for e-commerce companies should be dealt with on a 'sliding scale'.[64] That is, the 'minimum contacts' test sets forth the due process requirements that a defendant, not present in the forum, must meet in order to be subjected to personal jurisdiction: 'he must have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice" '.[65] *Zippo Mfg Co v Zippo Dot Com Inc*[66] is emerging as the seminal case on whether an internet website provides the minimum contacts necessary to establish jurisdiction. *Zippo* introduced a sliding scale to analyse the contacts of potential defendants created by internet websites. In determining the constitutionality of exercising jurisdiction the *Zippo* court focused on the 'nature and quality of commercial activity that an entity conducts over the Internet'.[67]

The sliding scale approach can be divided into three categories – first: active websites. The defendant enters into contracts with residents of a foreign jurisdiction that involve the repeated transmission of computer files over the internet;[68] these are grounds for the exercise of personal jurisdiction. Second: passive websites. Passive websites merely provide information to a person visiting the site. They may be accessed by internet browsers, but do not allow interaction between the host of the website and a visitor to the site. Passive websites do not conduct business, offer goods for sale, or enable a person visiting the website to order merchandise, services, or files. The defendant has simply posted information on a passive internet website which is accessible to users in foreign jurisdictions. This is not a ground for the exercise of personal jurisdiction. Third: interactive websites. Interactive websites make up the middle of the sliding scale where a user can exchange

information with the host computers. In this middle scale, jurisdiction should be determined by the 'level of interactivity and commercial nature of the exchange of information that occurs on their web site'.[69] Factors such as online contracting (found on most e-commerce sites) can show a high level of interaction leading to the exercise of jurisdiction. This is the crucial point of the sliding scale analysis. If the activities occurring on a defendant's website lean more towards the passive side of the scale, personal jurisdiction will not be applied. If, however, the activity slides toward the active side of the scale, personal jurisdiction will likely be upheld.[70]

As discussed above, the most developed doctrine of US jurisdiction is the *Zippo* sliding scale which encourages inquiry into the level of interactivity of a website. However, in order to avoid it falling into the middle of the scale one would have expected the court to provide a rough definition of 'interactivity', but it did not.[71] Moreover the *Zippo* test, with its emphasis on the level of interactivity inherent to a website, has become less relevant given that almost all commercial sites are now 'at least highly interactive, if not integral to the marketing of the website owners'.[72]

US courts, in accordance with jurisdictional developments abroad, have further developed an alternative approach to determining jurisdiction in e-commerce: an 'effects' test, based on the Supreme Court's decision in *Calder v Jones*.[73] It permits states to exercise jurisdiction when the defendants intentionally harm forum residents. In applying this 'effects' test to internet cases, US courts focus on the actual effects the website has in the forum state rather than trying to examine the characteristics of the website or web presence to determine the level of contact the site has with the forum state.[74] However, an 'effect' test will more easily apply to injuries in tort to individuals where injury is localised or intent can be inferred, but not when e-commerce cases involve corporations.[75] Because determining where a larger, multi-forum corporation is 'harmed' is a difficult prospect[76] the court noted that the 'effects' test does not 'apply with the same force' to a corporation as it does to an individual because a corporation 'does not suffer harm in a particular geographic location in the same sense that an individual does'.[77]

Questioning the utility of the *Zippo* and 'effects' tests, some US courts have focused on whether there was 'something more' needed for the exercise of jurisdiction. Courts further introduced the 'targeting test'.[78] The requirement of the 'targeting test' is satisfied 'when the defendant is alleged to have engaged in wrongful conduct targeted at a plaintiff whom the defendant knows to be a resident of the forum state'.[79] It has been argued that the targeting-based test is a better approach for the courts to employ than the sliding scale test in *Zippo* when determining jurisdiction in cases involving internet-based contacts. The targeting test, unlike the other one, places greater emphasis on identifying the intentions of the parties and the steps taken to either enter or avoid a particular jurisdiction.[80] Further, the advocates of the targeting test view it as a better and fairer approach for determining whether the defendant reasonably anticipated being hauled into

a foreign court to answer for his activities in the foreign forum state.[81] This determination is central to the due process analysis articulated by the US Supreme Court in *World-Wide Volkswagen*: '[T]he defendant's conduct and connection with the forum State are such that he should reasonably anticipate being hauled into court there'. The Due Process Clause, by ensuring the 'orderly administration of the laws', gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.[82]

So how can we ascertain the 'targeting' approach in electronic contracts?

Firstly, it is based on the intention of the defendant: the defendant must 'direct' electronic activity into the forum state. Unlike the *Zippo* approach 'a targeting analysis seeks to identify the intentions of the parties and to assess the steps taken to either enter or avoid a particular jurisdiction'.[83] It requires that a defendant specifically aims its online activities at a forum to come under the jurisdiction of that state.[84] This will give courts a solid conceptual basis: a 'deliberate or intended action' from which to tackle sophisticated cases and produce consistent results.[85] Secondly, the defendant must intend to engage in business or other interactions ('something more') in the forum state. Thirdly, the defendant must engage in an activity that created under the forum state's law a potential cause of action with regard to a person in the forum state.

Although the targeting approach provides consistency and legal certainty it does not totally preclude the 'American propensity toward individualized justice'.[86] Overall, among the three measuring mechanisms discussed above, the 'targeting' approach gives more legal certainty over determining internet jurisdiction.[87]

10.1.3 Chinese legislation on internet jurisdiction

There is no particularised internet jurisdiction legislation promulgated in China. The general international or national rules covering issues of jurisdiction are currently being used. Jurisdiction agreements concluded through electronic means should be regarded as equivalent to those in writing, on the basis of the Chinese Contract Law and the Chinese Electronic Signature Law. Chapter II of the Civil Procedure Law of the People's Republic of China[88] deals with the issues of jurisdiction to adjudicate and also covers international arbitration and judicial assistance (e.g. enforcement of foreign courts' judgments or the awards of a certain arbitration tribunal).

The Civil Procedure Law, unlike relevant laws in the EU and US, does not address the jurisdiction provision by focusing on general and special principles. Overall, it governs jurisdiction of contracts by providing that 'a lawsuit initiated for a contract dispute shall be under the jurisdiction of the people's court in the place where the defendant has his domicile or where the contract is performed'.[89] Currently, there are three core interpretations of

the Civil Procedure Law issued by the Supreme Court to help implement jurisdiction issues. They are: the 1992 Opinions of the Supreme Court on the Implementation of the Civil Procedure Law; the 1998 Regulations of the Supreme Court Regarding Some Questions on the Enforcement of Judgments; and the 2002 Regulations of the Supreme Court Regarding Some Questions on International Jurisdiction in Civil and Commercial Matters.

The Chinese Civil Procedure Law, just like the EU and US, employs 'party autonomy'. Article 25 of the Civil Procedure Law regulates choice of court issues and is in favour of 'party autonomy'. It states that:

> the parties to a contract may choose through agreement stipulated in the written contract the people's court in the place where the defendant has his domicile, where the contract is performed, where the contract is signed, where the plaintiff has his domicile or where the object of the action is located to have jurisdiction over the case, provided that the provisions of this Law regarding jurisdiction by level and exclusive jurisdiction shall not be violated.[90]

Article 243 deals with lawsuits brought against a defendant who is not domiciled in the People's Republic of China concerning a contractual dispute or other disputes over property rights and interests. The defendant shall be sued in the courts where the contract is signed or performed, where the object of the action is located, where the defendant's distrainable property is located, where the infringing act takes place, or where the representative agency, branch or business agent is located.

Moreover, Article 244 of the Civil Procedure Law specifically applies to international cases, requiring that parties should choose the court which has substantial connection with the disputes.[91] Article 246 of the Civil Procedure Law provides that 'Lawsuits initiated for disputes arising from the performance of contracts for Chinese-foreign equity joint ventures, or Chinese-foreign contractual joint ventures, or Chinese-foreign cooperative exploration and development of the natural resources in the People's Republic of China shall be under the jurisdiction of the people's courts of the People's Republic of China'.

In the author's opinion the jurisdiction provision in Civil Procedure Law is vague when referring to international contracts for the sale of goods. With emerging electronic contract disputes the Civil Procedure Law will appear to be increasingly insufficient. Although the Chinese Electronic Signature Law doesn't deal with any jurisdiction issues, China has tried to establish some regulations governing the internet with, for example, the Management of Chinese Computer Information Networks connected to International Networks Regulation,[92] as well as the Computer Information Network and Internet Security, Protection and Management Regulation.[93] These two regulations cover both civil and criminal issues. However, the rules relating to jurisdiction are still largely insufficient. There are specific rules to determine

which law should apply, such as Article 15 of the Management of Chinese Computer Information Networks Regulation which states vaguely that those who violate these regulations while at the same time breaking other relevant laws and administrative rules and regulations shall be punished in accordance with the relevant laws and administrative rules and regulations.

Overall, according to Chinese law, there are six basic principles to determine the jurisdiction: the domicile principle,[94] the personal jurisdiction principle,[95] the freedom of choice principle,[96] the principle of related location,[97] the exclusive jurisdiction principle[98] and the territorial jurisdiction principle.[99] The fundamental jurisdiction rule in Chinese conflict of laws is that a civil suit against a Chinese citizen comes under the jurisdiction of the court at the place where the defendant is domiciled or, if not the same, under the jurisdiction of the people's court at the place of his regular abode or residence.[100]

10.1.4 Summary: a comparative study

The EU and US both signed the Hague Convention on Choice of Court Agreements in 2009, which is considered an important step in the improvement of harmonisation of private international law. Compared to the EU special jurisdiction approach, the US specific jurisdiction approach is different. The Brussels I Regulation in the EU provides comprehensive rules on judicial co-operation between Member States, while the US adopts a market-oriented jurisdiction approach. For example, the US employs *Zippo*, 'effects' and 'targeting' tests determining internet jurisdiction, and the EU specifies classical general and special jurisdiction rules in the Brussels I Regulation.

Moreover, both the US and the EU have appeared to be applying their individually developed standards of determining jurisdiction in the context of conventional contracts to the jurisdictional problem of e-commerce. It may be necessary either to reform the law by modifying the normal rules on jurisdiction, or to reform the law by introducing a special regime of rules of jurisdiction for cases of electronic contracting. For the former, a new rule could be introduced into Article 5(1)(b) of the Brussels I Regulation, which would provide how to define the place of performance for digitised products and services. Some scholars have argued that this would be to treat electronic commerce contracts differently from other contracts, which goes against the current philosophy of Article 5(1).[101] In the author's view, to a broader respect, this would not be contrary to the fundamental principle that contracts can be formed by electronic means. But in a narrower view, electronic contracting or transactions do have their unique characters. However, the creation of a special regime of jurisdiction rules for e-commerce cases is a process which is time and money consuming. Even if efforts were made to draft a specific regulation or convention it would still take time and effort to come into force. It is conceivable that in future the new fast-developing

electronic communication industry will develop further techniques that would clearly indicate that existing laws were no longer suitable or applicable. A special regime of jurisdictional rules for electronic commerce would then be introduced on the ground that traditional territorially based concepts of jurisdiction were not entirely appropriate anymore to regulate cyberspace.

Compared with the EU and the US, China has a very similar approach, which comprises party autonomy, general jurisdiction and special jurisdiction. However, unlike the EU, China has no specialised comprehensive single law or regulation in the matter of jurisdiction. Such an instrument should be established in China in the future, learning from the experience of the EU and the US.

10.2 Applicable law for internet-related disputes

Applicable law (also called 'choice of law') is another issue within the regime of private international law or conflict of law. It means which law is chosen to resolve the dispute. Usually after deciding which court will hear the case (that is jurisdiction), the parties will need to be certain about which law will apply to the case. When parties make a choice of jurisdiction to hear the case, for example, the High Court of England, they usually intend to choose the corresponding law in that country, for example, English law, or vice versa. However, it is not absolute.

Regarding internet choice of law, the location and timing of contract negotiation and communication play an important role in the applicable law analysis for contracts. Generally, the location, where contracting occurs, provides the substantive law that governs the agreement under the rules of private international law; hence, the place of contracting determines the outcome. In determining the applicable law to online as opposed to offline commercial transactions the difference only arises when transactions involve digitised goods with electronic delivery.

10.2.1 EU

In the EU the EC Directive on Electronic Commerce does not include a choice of law provision but there is a 'country of origin' principle. It refers to the applicable law for service providers, stating that 'each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field',[102] which relates to 'online activities', such as 'online information, online advertising, online shopping, and online contracting'.[103] The 'country of origin' principle aims to regulate the conduct of service providers in general, but not specifically contracting parties in electronic transactions. Thus, the 'country of origin' principle does not affect the application of the law chosen by the parties to govern a contract.[104]

One of the most important instruments regulating applicable law in the EU is the Rome Convention of 1980 (the Rome Convention).[105] It is an international agreement on uniform conflict of law rules in contract. According to Article 1 of the Rome Convention, the Rome Convention 'shall apply to contractual obligations in any situation involving a choice between the laws of different countries'. The Rome Convention specifies rules of applicable law in a clear structure. Firstly, Articles 3 and 4 are the core provisions of the Convention. Article 3 deals with the applicable law chosen by the parties while Article 4 contains the provisions for ascertaining the applicable law in the absence of choice. Secondly, there are provisions dealing with the mandatory rules of the forum (or of another country) or public policy. Thirdly, choice of law rules apply to specific aspects of a contract, such as material and formal validity, interpretation, performance and the quantification of contractual damages.

In the early 2000s, the European Economic and Social Committee and the European Parliament were in favour of converting the Rome Convention of 1980 into a Community Regulation and modernising certain provisions of the Rome Convention, making them clearer and more precise. The proposal for a 'Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)',[106] was finally adopted by the Commission on 15 December 2005 in Brussels. The Vice-President said: 'By providing foreseeable and simplified rules, the Rome I proposal on the law applicable to contracts will enable Europe's citizens and firms to make more of the possibilities offered by the internal market'.[107]

On 17 June 2008 the European Commission adopted the Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I).[108] The Rome I Regulation replaced the Rome Convention in Member States except for those Member States that fall within the territorial scope of the Rome Convention and to which Rome I does not apply by virtue of Article 299 of the EC Treaty.[109] Rome I shall apply to contracts concluded after 17 December 2009.[110]

The Rome I Regulation intends to establish consistency with the Brussels I Regulation with regard to the relationship between jurisdiction and choice of law. As provided by Recital 7 of the Rome I Regulation, 'the substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[111] (Brussels I)'.

The Rome I Regulation, just like the Rome Convention, does not specifically deal with electronic commercial transactions. However, it provides the provisions relating to the choice of law rules for reference in online contracting. Just as in normal contracts, contracts made via electronic communications may also insert a choice of law agreement/clause. In the absence of a choice of law clause it will be even more difficult to determine applicable law than for normal contracts due to the unique features of electronic communications.

The modernisation and radical reform of Article 3 on choice by the parties of the applicable law, Article 4 concerning determination of the applicable law in the absence of choice and Article 5 on consumer contracts,[112] may make it clearer and easier to ascertain the applicable law for an e-contract than the Rome Convention.

The applicable law in cases of choice

Article 3 of the Rome I Regulation attempts to strengthen the freedom of parties in the business world to choose the applicable law. Article 3(1) and (2) of the Rome I Regulation have slightly changed the wording but retained the same meaning as that of the Rome Convention. Article 3(3) and (4) of the Rome I Regulation replace Article 3(3) of the Rome Convention, providing more comprehensive rules on parties' freedom of choice of law. Article 3(3) and (4) enhance the provision that the chosen law should govern the law rather than the law of the country that has more factual links unless it cannot be derogated from by agreement according to a relevant rule.

Article 3(1) is a fundamental rule providing party autonomy in choice of law that 'a contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract'. Contracts frequently contain different obligations, so the parties must have freedom of subjecting the different obligations to different laws. That is known as 'splitting the applicable law'.[113] This may be divided into four different categories: first, it is possible to apply different laws to different aspects of the same obligation; secondly, different terms of one contract may be governed by different laws;[114] thirdly, different groups of obligations may be governed by different laws;[115] fourthly, the obligations of each party may be governed by a different law.[116]

Moreover, parties must have freedom to re-choose their chosen law. Article 3(2) further clarifies that the previous choice of law can be changed by the agreement of the parties after the conclusion of the contract. By virtue of this provision, the parties may, having included a choice of law clause in their contract, subsequently decide to change the applicable law by a new mutual agreement. Alternatively, in a situation where the contract does not include a choice of law, the parties may agree on the applicable law at some later stage. If parties are free to decide on the applicable law, there is no reason why they should not be able to change it.[117]

In the author's opinion, the recognition of electronic means adopted by the Choice of Court Convention should also be used in Choice of Law. The rules concerning the choice of law in the online world can best be explained by the most recent international legislation: the UN Convention on the Use of Electronic Communications in International Contracts (the UN Convention). In the electronic commerce environment parties have the same freedom

to include a choice of law clause when concluding contracts online because the UN Convention explicitly employs 'party autonomy' in the choice of a party's place of business. Thus, party autonomy is the core principle of the UN Convention. Furthermore, parties can amend their choice of law clause. The new choice of law clause that parties agree will not affect the validity of the contract. The provision of 'error in electronic communications'[118] in the UN Convention supports the above principle. It provides that the information system should provide the other party with an opportunity to correct the input error. Thus, parties might have an opportunity to add or amend a choice of law clause in the 'addition information' or 'comments' space box on the website, or they might enclose or upload a document expressing the intention to change the applicable law, or they might put forward another email followed by their transaction noticing the amendment of the applicable law. However, that, which party's proposal prevails, also depends on the rules of battle of forms previously discussed in Part II.

Applicable law in the absence of choice

With regard to the applicable law in the absence of choice, according to Article 4(1) of the Rome Convention, the law of the country where it is most closely connected governs the contract. The closest connection is a vague formula because it leaves it to the courts to weigh up the factors that determine the 'centre of gravity' of the contract.[119] To consolidate certainty Article 4(2) of the Rome Convention establishes a general presumption that 'the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence'. The Rome I Regulation deleted Article 4(1) of the Rome Convention, replacing it with more precise rules whose 'proposed changes seek to enhance certainty as to the law by converting mere presumptions into fixed rules and abolishing the exception clause'.[120] For a contract of sale or the provision of services the Rome I Regulation has reserved the rule in the Rome Convention whereby the applicable law is the law of the place where the party performing the service characterising the contract has his habitual residence.[121] It provides that 'a contract of sale shall be governed by the law of the country in which the seller has his habitual residence'.[122] Where characteristic service of the contract cannot be identified the contract 'shall be governed by the law of the country where it is most closely connected'.[123]

As illustrated above, Article 4 of the Rome I Regulation aims to specify the rules applicable, in the absence of a choice, as precisely and foreseeably as possible so that the parties can decide whether or not to exercise their choice. To assist the application of Article 4, the Proposal also inserted a new provision of the interpretation of 'habitual residence' under Article 19, which is identical to Article 4(2) of the Rome Convention. Article 19(1) of the Rome I Regulation provides that the principal establishment of companies shall be

considered to be the habitual residence, or the habitual residence will be deemed to be the one of a subsidiary/branch, if the contract was made in the course of operation or performance that was the responsibility of that subsidiary/branch. The difference from the Rome Convention is that Article 19(2) of the Rome I Regulation provides that 'where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence', whilst Article 4(2) of the Rome Convention would determine it as the principal place of business.

With regard to requirements as to form, however, the Proposal did not expressly set out the 'function equivalent' rule for electronic mails. The International Chamber of Commerce (ICC) and the UK Government responded to the Green Paper on the conversion of the Rome Convention into a Community instrument[124] (hereafter Green Paper) on whether Article 9 of the Rome Convention[125] should be reformed. According to the opinion of the ICC and the UK, Article 9 adequately covered contracts concluded by email; thus, there should be no need to modify this article.[126] A contract concluded by email in the same country or different countries shall be valid if it satisfies the formal requirements of the law of either of those countries. Moreover, the Green Paper advises that 'as regards contracts concluded at a distance (by fax, mail or email, for example), there is a place of conclusion for each party in the contract, which further multiplies the chances that the contract is valid as to form. This solution has made it unnecessary to take a more or less artificial decision on the location of a contract between distant parties'.[127]

In the author's view, Article 9 of the Rome Convention was drawn up before electronic contracts came into common practice; thus, the determination of the place of conclusion is different from that of offline. According to the UN Convention on the Use of Electronic Communications in International Contracts, the place of dispatch or receipt of an electronic communication is the place where the party has its place of business,[128] but if the party does not have a place of business, reference should be made to his habitual residence.[129] It might be advisable for Article 9 of the Rome Convention to contain an additional rule by adding the law of the country where either of the parties has its habitual residence. It would thus constitute three laws for formal requirements as to form: the law which governs it under this Regulation; the law of the country of the place of conclusion; and the law of either party's habitual residence.[130]

The Commission of the European Communities amended Article 9 of the Rome Convention in Article 10 of the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I),[131] adding 'habitual residence' as a linking factor. Article 10 of the proposal is adopted in Article 11 of the Rome I Regulation, which is more accurate but without substantially changing the content. It provides that:

1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.
2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.
3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.[132]

In the author's opinion, a subsidiary rule concerning the validity of electronic communications should also be addressed in Article 11 of the Rome I Regulation – that a choice of law clause shall be valid both in writing and by electronic means. Employing a provision from Article 3(c) of the Choice of Court Convention, it can be proposed that:

A choice of law agreement can be concluded or documented:

1) in writing; or
2) by any other means of communication which renders information accessible so as to be usable for subsequent reference;[133]

With regard to applicable law in electronic contracts determining the applicable law in absence of choice is a two-stage exercise: firstly, the seller's habitual residence needs to be ascertained; secondly, if the seller's habitual residence cannot be determined, the court will identify the characteristic performance of the contract, the country of the party who is to effect it and determine the law which is most closely connected to the contract. Compared to the Rome Convention, which starts with the close connection principle, the Rome I Regulation explicitly expresses that 'the contract shall be governed by the law of the country in which the seller has his habitual residence'.[134] With regard to consumer contracts, Article 6 of the Rome I Regulation clearly provides that 'a contract shall be governed by the law of the country where the consumer has his habitual residence'. Overall the Rome I Regulation is more precise for parties to determine the applicable law in both B2B and B2C commercial matters.

10.2.2 US

Unlike the EU, the US has a special provision governing choice of law in the Uniform Computer Transactions Act (UCITA). Although UCITA only applies to computer information transactions such as computer software, online databases, software access contracts or e-books[135] involving licensing contracts, the choice of law provision of UCITA can be learned or adopted in general electronic contracting for the reason that the feature of concluding contracts with transferring products online will be identical to that of transacting computer information. Without a uniform piece of the US Private International Law, traditional uniform commercial laws, such as the Uniform Commercial Code (UCC) and the Second Restatement, have to be employed to determine applicable law to contracts concluded and performed electronically.

Similar to the EU there are two core doctrines in ascertaining applicable law: freedom of choice and absence of choice. Freedom of choice, so-called 'party autonomy', is the fundamental rule. It means that the parties are free to select the law governing their contract, subject to certain limitations.[136] Party autonomy is recognised by §109(a) of UCITA, §187 of the Second Restatement as well as by §1–105 of the Uniform Commercial Code.[137] In the absence of parties' choice, §109 of UCITA and §188 of the Second Restatement deal with it.

The applicable law in cases of choice

With regard to the applicable law in cases of choice, §1–105 of the Uniform Commercial Code provides that 'the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties'. The Second Restatement, §187(1) also provides that 'The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue'. The Second Restatement, §187(2) further requires that the party's choice should have a close relationship either to them or to the transaction, or there should be a 'reasonable basis', and not be contrary to 'a fundamental policy of a state'.[138] The UCITA expressly deals with choice of law issues. UCITA, §109(a) states that 'parties in their agreement may choose the applicable law', but such choices are not enforced if they are determined to be unconscionable.[139] Under §105(b), a court will also refuse to recognise the chosen law if it violates the fundamental public policy of the forum state.

As illustrated above, it is similar to the Rome I Regulation in the EU that the US laws favour and respect the election of the applicable law by contracting parties. However, the limitation of freedom of choice in the EU and US is different in two aspects: firstly the US requires that the state of the choice of law must have a substantial relationship to the parties or

transactions with a reasonable basis, whilst the EU does not require for the chosen law to have any real connection with the parties or the subject matter of their contract;[140] secondly, in the US the Second Restatement excludes the choice of law if it contradicts the 'fundamental policy' of the state whose law would be applicable to the contract in the absence of any choice by the parties, whilst in the EU, the Rome Convention prevents the parties opting out of the mandatory rule. To illustrate the 'mandatory rules' of the Rome Convention, if contracting parties A and B choose the law of Country B as their governing law, but the law of Country A contains mandatory rules, the mandatory rules of Country A will override any different rule in the law of Country B.

The basic methodology in choice of law is to characterise the issue or question to fit into a category, to determine the connecting factor for that category, and then to apply the law indicated by that connecting factor.[141] Many disputes involving e-commerce arise between parties who are bound by a contract that specifies the terms and conditions upon which they have agreed to interact. Frequently the contract itself may provide that any dispute arising from it is to be heard in the courts of a specified state (i.e. choice of forum or forum selection clause) and is to be determined under the substantive laws of a specified state (i.e. choice of law clause).[142] Generally, contracting parties will choose the applicable law on the basis of the place of contract formation, the place of performance, domicile or the state of incorporation, corporate headquarters and branches.

It may be difficult to determine whether the parties have genuinely consented to a choice of a particular law which appears as a standard term on the seller's website and which might not be immediately visible to the buyer. It becomes therefore a primary concern that a choice-of-law clause contained on an internet site, or included in an email, was sufficiently visible and actually represents the bilateral consent of the parties. Take a clickwrap agreement as an example: a choice of law clause is included by the seller on his website but is not directly visible on screen and can only be seen when scrolling down the screen or clicking on a separate link. The seller alleges that the buyer consents to the clause when he concludes the contract, even though he never properly reads that clause. So can it be deemed to be lack of parties' consent? If the seller performs his duty of making a contract available online,[143] that is, the buyer can get back to the terms and conditions on the website any time he wants (even after the contract is concluded), then it will be the buyer's responsibility to make sure of the choice of law clause before he clicks the 'I agree' button. Once clicking the 'I agree' button, the parties will be deemed to have consented to the terms and conditions.

The applicable law in absence of choice

The Uniform Commercial Code, §1–105 provides that in absence of a choice of law agreement 'this Act applies to transactions bearing an appropriate

relation to this state'. Under §188 of the Second Restatement, where a choice of law provision is absent from a contract, the court has to determine whether to apply the substantive laws of one state over another in resolving the issues presented before it. The Second Restatement, §188(1) determines the applicable law in absence of effective choice by the parties, providing that 'The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in §6'.[144] The Second Restatement, §188(2) further provides the connecting factors in determining the applicable law in the absence of choice, including '(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue'. According to §188(3) the local law of this state will usually be applied, if the place of negotiating the contract and the place of performance are in the same state.[145]

Furthermore, both the Second Restatement, in §191, and the Uniform Commercial Code (UCC), in §1–105(1) in combination with §2–401, deal with the sale of goods. The Restatement provides, subject to the usual exception in favour of an express choice by the parties or a more significantly related law, that the law of the place should be applied 'where under the items of the contract the seller is to deliver the chattel'. The UCC, §1–105(1) provides for the application of forum law whenever the transaction bears an 'appropriate relation' to the forum.[146]

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

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

However, the case law largely ignores the Second Restatement provisions and refers questions of construction either to the contract's 'centre of gravity',[147] or the law of the place of making,[148] whereby the two often coincide on the facts of a given case.[149]

With regard to digitised goods and services, §109(b)(3) of the UCITA

provides that 'In the absence of an enforceable agreement on choice of law, the following rules determine which jurisdiction's law governs in all respects for purposes of contract law: the contract is governed by the law of the jurisdiction having *the most significant relationship* to the transaction', while §109(b)(1) and (2) specifically refers to the location of the licensor in an access contract and the location of the physical delivery in a consumer contract.[150] In the author's view the action and nature of a licensor who transfers computer information and electronically delivers a copy of software containing information, is identical to that of a seller concluding a contract online with electronic delivery of goods. Thus, if the law of the place where the licensor is located governs the applicable law, then it can be presumed that the law of the place where the seller is located should govern the applicable law. In this case where a party is located should be understood as where he has a place of business.[151]

Under the UCITA, in the absence of an applicable choice-of-law provision, the law of a foreign jurisdiction will apply only if it provides substantially similar protections and rights to a party located in a domestic jurisdiction.[152] §109(d) further provides that 'a party is located at its place of business if it has one place of business, at its chief executive office if it has more than one place of business, or at its place of incorporation or primary registration if it does not have a physical place of business. Otherwise, a party is located at its primary residence'.

As illustrated above 'the most significant relationship to the transaction' is a connecting factor to determine the applicable law in the absence of choice both online and offline. The 'most significant relationship' test requires consideration of factors including:

> place of contracting; place of negotiation; place of performance; location of the subject matter of the contract; domicile, residence, nationality, place of incorporation and place of business of one or both parties; needs of the interstate and international systems; relative interests of the forum and other interested states in the determination of the particular issue; protection of justified and other interested states in the determination of the particular issue; protection of justified expectations of the parties; and promotion of certainty, predictability and uniformity of result.[153]

However, the 'place of contracting' appears to be the weakest basis for party autonomy; such a contract is easy to manipulate and may result in an 'interstate contract', that is a contract that becomes valid by virtue of the interstate factor although it would be defective in any state with a more real connection. With regard to 'place of performance', for instance, if the seller A sold the software to the buyer B in the US and installed it in London, under these circumstances, where was the contract performed? It is hard to determine. It should be suggested that the instalment agreement alongside the sales of

goods contract is deemed to be the secondary agreement, thus the place of performance is regarded to be the place of performance of the main contract – that is, in the US.

To summarise, in the US the contract will be governed by the law of the country where it has the most significant relationship to the contract, which is identical to the closest connection principle in the EU. Furthermore the law where the licensor is located, which is at his place of business, will govern the contract under Article 109 of UCITA. According to the findings in the applicable law in B2B electronic contracts, the place that has the most significant relationship to the contract or transaction would be the seller's place of business. Thus, the law of the country that has the closest relationship to electronic contracts or transactions should be the law of the seller's place of business, which is compatible with the Rome I Regulation.

10.2.3 China

In China the two general principles to determine applicable law in contracts are the same as those in the EU and US: first is party autonomy that parties are free to choose the applicable law governing the contract; second, the closest connection or the most significant relationship to the contract or transaction is regarded as a linking factor to determine the applicable law in absence of choice. However, China is a civil law country with written laws. There would be no choice of law contracting matters in China unless the contract includes an 'international' factor.[154] A contract is deemed to be 'international' when (a) at least one party is not a Chinese citizen or legal person, (b) the subject matter of the contract is in a third country (i.e. the goods to be sold or purchased are located outside of China), or (c) the conclusion or performance of the contract is made in a third country.[155]

Party autonomy/freedom of choice

With regard to applicable law in foreign contracts, the National People's Congress of the People's Republic of China enacted a unified Contract Law,[156] which has been in force since 1 October 1999. Article 126 of the Chinese Contract Law provides that 'Parties to a foreign related contract may select the applicable law for resolution of a contractual dispute, except otherwise provided by law'.[157] Furthermore, Chapter VIII of General Principles of Civil Law of P.R. China[158] determines which applicable law should be applied in civil relations with foreigners. Article 145 of the General Principle of Civil Law provides that 'the parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law'.

Applicable law in absence of choice

To determine applicable law in absence of choice, Article 126 of the Chinese Contract Law provides that 'If the parties to a contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied'.[159] It then further tackles specific points, such as 'the contracts for Chinese-foreign equity joint ventures, Chinese-foreign contractual joint ventures and Chinese-foreign cooperative exploration and development of natural resources to be performed within the territory of the People's Republic of China shall apply the laws of the People's Republic of China'.[160] Article 145 of the General Principle of Civil Law also provides that 'the parties to a contract involving foreign interests may choose the law applicable to settlement of their contractual disputes, except as otherwise stipulated by law; If the parties to contract involving foreign interests have not made a choice, the law of the country to which the contract is most closely connected shall be applied'.

The Supreme Court of China has accepted the idea of applying characteristic performance in order to achieve a more efficient determination of the applicable law under the 'closest connection' rule. It decided to make it one of the standards used to judicially determine the applicable law. The reason for the Supreme Court's adoption of the characteristic performance based criteria is twofold: firstly, it makes the determination more objective by limiting the discretionary powers of the courts when determining the applicable law. Secondly, this approach will improve the result's certainty, predictability and uniformity.[161]

The Supreme Court explains the characteristic performance that in a contract for the international sale of goods the law that is most closely connected with the contract is the law of the seller's place of business at the conclusion of the contract. If, however, the contract was negotiated and concluded in the place of the buyer's business, the applicable law shall then be that of the place of the buyer's business.[162] A foreign law cannot be chosen as the applicable law if it violates the social public order of China. At the time of concluding contracts in international sale of goods online, the seller may sit at his place of business, communicating electronically with the buyer who may sit at his place of business. The electronic contract will then be without the seller and buyer's physical presence. Thus, the Chinese Supreme Court's rationale is not applicable to electronic contracting. In an electronic contract the applicable law is the law of the seller's place of business before or at the conclusion of the contract. In short, 'party autonomy' is the principle of ascertaining the applicable law, whereas 'closest connection', the same as the EU and US, is the factor to determine the applicable law in absence of choices. The closest connection to the contract concluded online should be the seller's place of business, if not his habitual residence.

10.2.4 Summary: a comparative study

The EU, US and Chinese choice of law systems are all in favour of party autonomy. The parties are free to choose the governing law and state it in the contract (in cases of express choice or its equivalent). Otherwise the contract will be governed by the law of the country with which the contract is most closely connected or has the most significant relationship to the transaction in cases of absence of express choice. In the author's opinion the place of business and the place of performance are more difficult to determine in electronic transactions. Generally, traditional choice of law principles should still apply to electronic contracts if the delivery of goods involves physical transfer. However, due to the complex and unique nature of online contracting when involving electronic delivery it is necessary to further establish or clarify the methods of determining the applicable law to e-contract disputes. For instance, in the absence of a choice of law clause in electronic contracts, how do we ascertain the 'most closely connected' factor over the internet in order to determine the applicable law?

In the absence of choice of law the law of the country which is most closely connected with the contract will govern the contract. This will be determined by looking at the most closely connected factors: where is the place of performance and do the defendant's activities have effects in that state? According to the findings in the EU, US and China, the seller's place of business seems to be the most enduring connecting factor, which has the economic impact on its area, thus the law of the seller's place of business should be the law governing B2B electronic contracts in the absence of a choice of law clause.

10.3 Online dispute resolution

In the 1980s, alternative dispute resolutions (ADR) were most commonly used to resolve international commercial transactions disputes rather than cross-border litigation. ADR, including arbitration, mediation/conciliation and negotiation, is considered more efficient, flexible, confidential and less costly, compared with traditional litigation. ADR can avoid the long court proceedings for international disputes which are affected by the conflicts of jurisdiction and choice of law. International instruments have been developed to promote the harmonisation of international ADR practices, such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; the UNCITRAL Model Law on International Commercial Arbitration 1985 and the UNCITRAL Model Law on International Commercial Conciliation 2002.

In the early 1990s global internet transactions or usages increased the probability of cross-border disputes. Parties situated in different continents may be opposed over small claims or cyber-related issues. These kinds of disputes challenge the traditional dispute resolutions because:

1) Different countries have different rules for trade and various prohibitive costs of legal action across jurisdictional boundaries;
2) Much less obvious localisation factors on the internet cause difficulties in determining the place of business or the place of performance in cyberspace due to the boundless internet that may be accessed from anywhere in the world;
3) Cyber-related disputes may require a legal expert who is equipped to adapt to the diverse evolving technological, social nature and commercial practice of cyberspace.

So what will be the least costly but most efficient solution to resolve e-disputes?

The modernisation of ADR – online dispute resolutions (ODR) – was introduced in the mid-1990s by the Virtual Magistrate at Villanova University, the Online Ombuds Office at the University of Massachusetts, the Online Mediation Project at the University of Maryland, and the Cyber-Tribunal Project at the University of Montreal, Canada.[163] It aims to provide more efficient, cost effective and flexible dispute resolutions in the information society. ODR takes advantage of this, a resource that extends what we can do, where we can do it, and when we can do it.[164] The ABA Task Force on E-Commerce and ADR provides a generic definition of ODR:

> ODR is a broad term that encompasses many forms of ADR and court proceedings that incorporate the use of the internet, websites, email communications, streaming media and other information technology as part of the dispute resolution process. Parties may never meet face to face when participating in ODR. Rather, they might communicate solely online.[165]

As defined in the ABA Task Force, ODR is also an extension of ADR – online arbitration, online mediation and online negotiation – as well as an application of cybercourts, although online litigation is not as common as eADR.

10.3.1 Current legislation in the EU, US and China

EU

In the EU, ADR (in particular arbitration and mediation) use is encouraged to resolve cross-border commercial disputes. The importance of arbitration in the community is highlighted in the Commission's Report on the Review of the Brussels I Regulation on 21 April 2009 – that the Brussels I Regulation has in specific instances been interpreted so as to support arbitration and the recognition/enforcement of arbitral awards.[166] The Green Paper that accompanies this Report further explains, 'however, addressing certain specific

points relating to arbitration in the Regulation, not for the sake of regulating arbitration, but in the first place to ensure the smooth circulation of judgments in Europe and prevent parallel proceedings'.[167]

Another common method of ADR, mediation, is also encouraged by the community in resolving civil and commercial matters. The EC Directive of the European Parliament and of the Council on Certain Aspects of Mediation in Civil and Commercial Matters (hereafter EC Directive on Mediation) was approved by the European Parliament on 23 April 2008[168] and entered into force in June 2008.[169] The purpose of the EC Directive on Mediation is to facilitate access to dispute resolution, to encourage the use of mediation, and to ensure a sound relationship between mediation and judicial proceedings.[170] It is considered to be an achievement of regulating out-of-court dispute resolutions. It is in favour of electronic communications and, to an extent, online dispute resolution. It encourages the use of mediation in cross-border disputes and the use of modern communication technologies in the mediation process, which is reflected by Recitals (8) and (9) of the Mediation Directive:[171]

> (8) The provisions of this Directive should apply only to mediation in *cross-border* disputes, but nothing should prevent Member States from applying such provisions also to internal mediation processes.
> (9) This Directive should not in any way prevent the use of *modern communication technologies* in the mediation.[172]

Moreover, the provisions of 'ensuring the quality of mediation'[173] and 'information for the general public'[174] also indicate the support of using ODR in the EU. For example, Article 4 of the EC Directive on Mediation encourages Member States 'by any means which they consider appropriate' to develop voluntary codes of conduct mediation services, as well as other effective quality control mechanisms. In addition, Article 9 of the EC Directive on Mediation explicitly encourages Member States to make service and contact information available to the general public 'by any means which they consider appropriate in particular on the Internet'.

In general, although there are no substantial ODR rules in the EC Directive on Electronic Commerce, it encourages ODR practice by requiring Member States to ensure that their legislation 'does not hamper the use of out-of-court schemes, available under national law, for dispute settlement, including appropriate electronic means'.[175] In addition, it requires Member States to 'encourage bodies, responsible for the out-of-court settlement of, in particular, consumer disputes to operate in a way which provides adequate procedural guarantees for the parties concerned'[176] and to 'encourage bodies responsible for out-of-court dispute settlement to inform the Commission of the significant decision they take regarding Information Society services and to transmit any other information on the practices, usages, or customs relating to electronic commerce'.[177]

US

In the US there is no uniform legislation regulating ODR services. Self-regulation and adoption of best practice guidelines are the approaches recommended by the American Bar Association (ABA).[178] In 2002 the ABA Task Force on Electronic Commerce and Alternative Dispute Resolution final recommendations and report on disputes in electronic commerce emphasised that an ODR transaction is 'an e-commerce transaction in and of itself'. The ABA essentially recommends best practice principles that ODR providers should adhere to, such as adequate standards and codes of conduct and the achievement of transparency through information and disclosure as a basis to attain sustainability.[179] A non-profit, educational and informational entity, iADR Centre, is also recommended by the Task Force.

The US self-regulation arbitration and mediation module rules from the American Bar Association (ABA) and American Arbitration Association (AAA) are most widely used in US ADR practices. In September 2005 the ABA adopted the Model Standards of Conduct for Mediators[180] which specified nine standards of conduct for mediators – they are: self-determination, impartiality, conflicts of interest, competence, confidentiality, quality of the process, advertising and solicitation, fees and charges, as well as advancement of mediation practice. The AAA also promulgated Commercial Arbitration Rules and Mediation Procedures in 1999.

China

In China, on 31 August 1994, the Arbitration Law was promulgated by the Chinese National People's Congress with the aim of establishing a coherent nationwide arbitral system, entering into force on 1 September 1995. The establishment of online arbitration is subject to the restrictions and requirements due to different local market entries in different provinces in terms of registration,[181] conditions for arbitrators' appointment,[182] and requirements of establishment.[183] To harmonise the standard of online arbitration practice in China, China International Economic and Trade Arbitration Commission (CIETAC) promulgated 'Online Arbitration Rules' on 8 January 2009, which came into force on 1 May 2009. These Rules are formulated to arbitrate online contractual and non-contractual economic and trade disputes and other such disputes. The CIETAC Online Arbitration Rules apply to resolution of disputes over electronic commerce transactions, and other economic and trade disputes in which the parties agree to apply these Rules for dispute resolution.[184] The CIETAC has provided successful online arbitration services on .CN domain name disputes since 2002, which offers an ODR pioneer experience in China. The launch of the CIETAC online arbitration rules can be deemed to be one of the outcomes of the harvest of CIETAC ODR experience, and it will facilitate the development of online dispute resolution in China.

Mediation, different from arbitration, is used to resolve commercial dispute resolution to maintain ongoing business relationships.[185] The Chinese legislation is supportive of mediation in civil and commercial disputes. For example, Article 51 of the Civil Procedure Law of the People's Republic of China[186] permits the parties to 'reach a compromise of their own consent'. Article 49 of the Arbitration Law of the People's Republic of China[187] stipulates that parties may reach a private settlement even after the commencement of arbitration proceedings. Article 25 of the Law of the People's Republic of China on Chinese-foreign Contractual Joint Ventures[188] also provides that: 'Any dispute between the Chinese and foreign parties arising from the execution of the contract or the articles of the association for a contractual joint venture shall be settled through consultation or mediation'.

There are not many ADR international instruments that China, the US and the EU all agree on, but China, the US and most of the countries in the EU including the UK have signed and ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter the New York Convention).[189] The New York Convention is considered to be one of the most successful conventions, which gives the certainty of recognition and enforcement of a cross-border arbitral award. As the New York Convention was adopted long before the birth of the electronic communication society it did not include the function equivalent rule to recognise the validity of electronic arbitration agreements and awards. According to Article 2(1) of the New York Convention each contracting state shall recognise an agreement in writing. Online arbitration has been challenged as to whether the electronic arbitration agreements and awards can meet the requirements on the written form under the New York Convention. It is suggested that if the digital arbitral awards can be printed and signed, it would satisfy the written requirement. However, if electronic arbitration agreements and arbitral awards can be treated as 'electronic contracts' their validity will be automatically recognised by the UN Convention on the Use of Electronic Communications in International Contracts and other national electronic contract laws.

10.3.2 Global successful examples of ODR services

In the author's view, up until 2009, the most successful ODR services in the world are:

1 eBay and SquareTrade;
2 AAA (the American Arbitration Association) and Cybersettle;
3 ICANN (the Internet Corporation for Assigned Names and Numbers) and WIPO-UDRP (the World Intellectual Property Organization – Domain Name Dispute Resolution Policy);
4 CIETAC (China International Economic and Trade Arbitration Commission); and HKIAC (Hong Kong International Arbitration Centre).

eBay and SquareTrade

eBay is one of the world's largest online marketplaces providing trading platforms and was established in 1995. SquareTrade is an industry-leader in online merchant verification and dispute resolution, created in 1999. Both eBay and SquareTrade are independent private companies. Although they are engaged in different internet industries they have a common aim of promoting customers' confidence in doing business or using services online.

This aim is reflected in eBay e-trust strategies. The eBay e-trust strategies are designed to make customers comfortable with buying and selling online so that a maximum number of sellers and buyers will be attracted to its online marketplace. The trust building measures of eBay include: 1) the mutual rating system of trade satisfaction; 2) identity verification; 3) secure online payment services like PayPal or Escrow; 4) insurance policy; and 5) last but not least the online dispute resolution (ODR) service provided by SquareTrade.

SquareTrade, eBay's preferred dispute resolution provider, helps eBay users who have disputes in eBay transactions. SquareTrade's position is practically that of an in-house dispute resolution provider as eBay refers its users exclusively to SquareTrade through a link on its website. There are two stages in the general operation of the eBay–SquareTrade system. At the first stage SquareTrade offers eBay users a free web-based forum which allows users to attempt to resolve their differences on their own. It is known as an 'automated negotiation platform'. When settlement cannot be reached at the first stage SquareTrade offers the use of a professional mediator with a nominal sum of fees as eBay will subsidise the rest of the cost.[190] This second stage is called 'online mediation'.

The usage of SquareTrade by eBay will be of benefit in resolving misunderstandings fairly, providing a neutral go-between for buyers and sellers, reducing premature negative feedback and generating trust in the eBay community.[191]

AAA and Cybersettle

The American Arbitration Association (AAA), established in 1926, is a non-profit making public service organisation and a global leader in conflict management, providing services to individuals and organisations who wish to resolve conflicts out of court. It also serves as a centre for education and training, issues specialised publications and conducts relevant research.[192] Cybersettle, founded in the mid 1990s, is a pioneer in online negotiation and an inventor and patent-holder of the online double-blind bid system. Both AAA and Cybersettle have their profound reputation and exclusive merits in their fields.

On 2 October 2006 AAA and Cybersettle announced a strategic alliance that will provide clients of both companies with the opportunity to use the

dispute resolution services of both companies exclusively – the goal is 'ensuring that no one walks away without a resolution' said Cybersettle President and CEO Charles Brofman. AAA clients using the AAA's online case management tools will be able to attempt settlement with Cybersettle before AAA neutrals are selected. Cybersettle clients who have not been able to reach settlement through online negotiation will be able to switch to the AAA's dispute resolution processes, including conciliation, mediation and arbitration.[193]

This strategic alliance not only makes full use of the reputation and merits of both parties, but also takes advantage of their different successful experiences. For example, AAA offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government, while since 1996 Cybersettle has handled more than 162,000 transactions, with more than $1.2 billion in settlements.[194]

AAA, an experienced public sector entity, cooperates with Cybersettle, a young enthusiastic private sector entity, which can be a model or a good strategic plan for the development of the ODR industry. Professional regulations of AAA, such as Commercial Arbitration Rules and Mediation Procedures, can be integrated into the self-regulation of private ODR services, which enhance the standardisation of the ODR order in society. AAA's dispute resolutions rules are professional and comprehensive, and contain Procedures for Large, Complex Commercial Disputes, as well as Supplementary Rules for the Resolution of Patent Disputes and a Practical Guide on Drafting Dispute Resolution Clauses, including negotiation, mediation, arbitration and large, complex cases. On the other hand Cybersettle can also contribute its private practices and work with AAA to promote other services when appropriate and to make joint proposals and business presentations under certain circumstances.

ICANN and WIPO-UDRP

The Internet Corporation of Assigned Names and Numbers (ICANN) and the World Intellectual Property Organization (WIPO) are both public international organisations but with different functions. ICANN is responsible for managing the generic top level domains in urgent need of a solution to a dispute resolution problem,[195] while WIPO is responsible for developing a balanced and accessible international intellectual property (IP) system.[196] In 1994 the WIPO Arbitration and Mediation Centre was established to provide ADR services – arbitration and mediation for the resolution of international commercial disputes between private parties. Its WIPO Electronic Case Facility (WIPO ECAF) has been designed to offer time and cost-efficient arbitration and mediation in cross-border dispute settlements.[197]

ICANN adopted the Uniform Domain Name Dispute Resolution Policy

(UDRP), which came into effect on 1 December 1999, for all ICANN-accredited registrars of internet domain names. WIPO is accredited by ICANN as a domain name dispute resolution service provider.[198] Since then WIPO Centre has been providing ODR services for resolving domain name disputes and has administered over 30,000 proceedings, of which over 15,000 have been under the WIPO-UDRP adopted by ICANN.[199]

In December 2008 WIPO submitted a proposal, 'eUDRP Initiative',[200] to ICANN. The eUDRP Initiative proposed to remove the requirement to submit and distribute paper copies of pleadings relating to the UDRP process, primarily through the use of email in order to eliminate the use of vast quantities of paper and improve the timeliness of UDRP proceedings without prejudicing either complainants or respondents.[201]

Scholars identify the reasons for the success of the WIPO-UDRP domain name dispute resolution system, such as credibility, transparency, self-enforcement, accountability, etc.[202] Firstly, WIPO and ICANN are both pubic organisations with authorities. WIPO's participation in dealing with domain main disputes particularly adds **credibility** to the process due to its professional expertise and resources. Secondly, every dot.com registrant is **compulsorily** governed by the WIPO-UDRP without conflict of rules and procedures when disputes occur. Thirdly, domain name case decisions are available online immediately in full text,[203] which increases **transparency** of the procedure and imposes a degree of public **accountability**, which protects the rights of lawful domain name holders. Fourthly, the case is usually closed two months after filing and an administrative panel decision is implemented by the registrar 10 days after the decision is rendered.[204] No foreign authorities can block the outcome, which promotes the **enforceability** of settlement. Lastly, but most importantly, WIPO provides an **efficient** domain name dispute resolutions service, as all complaints and responses can be completed and submitted directly online.[205] The supplementary rule of the eUDRP Initiative reflects on the efforts of WIPO on promoting efficiency and improving **quality** in domain name online dispute resolutions.

CIETAC and HKIAC

China and Hong Kong enacted the 'One Country, Two Systems' policy, which means that the laws in Hong Kong will be different from those in China. The business link between China and Hong Kong is very close. Lots of companies have their headquarters in China but branches in Hong Kong, or vice versa. If a company registers a .com or .net domain name and has offices in both China and Hong Kong it can file a case when its rights in domain names are infringed.

To bridge the two systems the Asian Domain Name Dispute Resolution Centre (ADNDRC) was set up as a joint undertaking of the China International Economic and Trade Arbitration Commission (CIETAC) and the Hong Kong International Arbitration Centre (HKIAC) to deal with

gTLDs (.com/.org) domain name disputes.[206] There are two offices – Beijing and Hong Kong – in the Asian Domain Names Dispute Resolution Centre. Both offices comply with the same policy – WIPO UDRP for gTLDs disputes. Complainants can choose one of them to file a case.

At the same time both CIETAC in Beijing and HKIAC in Hong Kong are also appointed by the China Internet Network Information Center (CNNIC) providing dispute resolution services with regard to .CN domain names, known as 'CIETAC Domain Name Dispute Resolution Centre'[207] and 'HKIAC .cn Domain Name Resolution Centre'.[208] The .CN domain name disputes are carried out under the CNNIC Domain Name Dispute Resolution Policy (CNDRP)[209] in both the China and Hong Kong centres, while HKIAC uses its own policy for .HK disputes.

With these two ODR service providers (CIETAC and HKIAC) the complainant should submit the Complaint Form and submit it in electronic form by email.[210] Generally a decision should be made on the basis of the statements and documents submitted by the parties. A panel has 14 days to render a decision.[211] The panel's decision will be submitted both in electronic and paper form signed by all the panellists. The decisions will be published on the websites of the service providers, except in special circumstances.[212]

For example, the case *Avon Products, INC v Ni Ping*[213] was filed with ADNDRC Beijing Office on 27 April 2007. The complainant is one of the world's most well known direct sellers of cosmetic products. The claimant claims that since 1886 it has built up distribution networks covering 145 countries, 8 million customers and 4.8 million independent sales representatives. The claimant has expended extensive amounts of fiscal and temporal capital in preserving the value of its AVON and 'Ya Fang' trademarks in Roman and Chinese characters, including registration of these trademarks throughout the world, including mainland China, Hong Kong, Taiwan and Singapore. It entered into the PRC market in 1990 and now has 77 branches in China and over 6,000 specialty shops; and sales between 2000 and 2004 of products marked with 'Ya Fang' in Chinese characters (or derivative marks) totalled over US$681 million, thereby providing substantial evidence of a global association of the complainant's 'Ya Fang' marks with its cosmetic products. The claimant asserted that the respondent's use of domain name 'yafang.net', which was registered on 12 August 2003 in Beijing, would confuse existing and future customers and constitute use and registration in bad faith. When visitors type in www.yafang.net, it will directly connect to www.x-y-f.com. The respondent Ni Ping also registered 'avon.cn', 'yafang.cn' and 'niping.cn' on 17 March 2003, and sold cosmetic products online. Ni Ping transferred the link of 'yafang.net' to 'avon.cn', 'yafang.cn' and 'niping.cn' after the complaint was filed. The Panel ordered that the domain name 'yafang.net' be transferred to the complainant, pursuant to Article 4(a) of the UDRP.

In the author's opinion the characteristics or advantages of CIETAC and HKIAC ODR services for domain name disputes are very similar to the

WIPO domain dispute resolution service in terms of efficiency, accountability, transparency and self-enforceability. The CIETAC and HKIAC centres provide valuable experiments and cornerstones for developing a Chinese ODR system for disputes arising from e-commerce transactions. The launch of the Asian Domain Name Dispute Resolution Centre successfully combined the two systems in China and Hong Kong – in one country. It serves as a joint venture providing domain name online dispute resolutions, which generate consistency, harmony and certainty.

Summary: lessons to be learned

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

Firstly, they provide advanced technology support and make a very attractive offer for easily accessible, quick, effective, and low-cost dispute resolution. For example, eBay users only need to pay US$15 for the online mediation service provided by SquareTrade, and if they choose automated online negotiation to resolve their trade disputes, it will even be free.[214] The mediation process on SquareTrade for eBay users generally takes only 10 days.[215]

Secondly, they have succeeded in integrating their offer to the primary markets.[216] The four ODR services mainly target resolving e-commerce related disputes; for example, the SquareTrade dispute resolution service provider deals with eBay users' online trading disputes. WIPO-UDRP or CIETAC and HKIAC deal with ICANN domain names users' disputes.

Thirdly, the integration is brought about by co-operation agreements with the primary market makers. For example, SquareTrade is appointed by eBay (a primary market maker) for resolving eBay users' trading disputes. AAA and Cybersettle create a strategic alliance. WIPO-UDRP is accredited by ICANN as the domain name dispute service provider, while CIETAC and HKIAC are accredited by ADNDRC.

Fourthly, the ODR service is promoted by creating socio-legal bonds for potential dispute parties to commit to the process.[217] That is, the ICANN UDRP administrative procedure is mandatory to domain name holders, whilst the SquareTrade mediation process is mandatory to eBay-sellers.

Fifthly, the self-enforcement or self-execution mechanisms to enforce dispute settlements are a credential that makes ODR services successful. For example, ICANN and WIPO have self-enforcement mechanisms. The ICANN-accredited registrars have the right to transfer or cancel a domain name directly when the decision of settlement is made.[218]

Sixthly, ODR service has the expertise to resolve certain internet disputes, such as cross-border small claim disputes and domain names disputes. Take the feature of domain name disputes equipped with ODR service as an example. The growth in the use of domain names appears to have increased the number of bad faith registrations and further raised concerns that trade mark owners' rights are increasingly infringed or diluted by the use of trade marks in domain names.[219] That is, domain names have come into conflict with trade marks. The main reason for such conflict can be attributed to the lack of connection between the system of registering trade marks and the registration of domain names. The former is a system granting territorial rights enforceable only within the designated territory; the latter is a system of granting rights that can be enforced globally.[220] Because trade mark law is territorial, a mark may be protected only in the geographic location where it distinguishes its goods or services. Thus, trade mark law can tolerate identical or similar marks in different territories even within the same classes of goods and services. Domain names, by contrast, are both unique and global in nature.[221] Only one entity in the world can own the right to use a specific domain name that can be accessed globally.[222] According to the specific features of a domain name, in particular, without territory but with a registrar, ODR will be one of the most suitable methods to resolve domain names disputes.

10.3.3 The future of ODR: international standardisation

ODR not only provides speedy and cost-effective techniques in resolving cross-border disputes, but also boosts trust and confidence in electronic commercial transactions in the e-marketplace, because it diminishes the risk that e-commerce users are left with no redress if contracts are not performed.[223] A continuing challenge and demand for resolving cross-border commercial disputes resulting from globalisation calls for the improvement of ODR services. International standardisation of ODR services should be deemed as a measure to enhance the quality of its services. International standardisation can possibly be reached through the promulgation of regulations, codes of conduct, guidelines, frameworks, model laws or even conventions by international legislative organisations.

A number of provisions should be considered and included in such an international ODR service legislative instrument:

1 ODR service providers should encourage, by any means which they consider appropriate, the development of the ODR system generating a balanced function of convenience, trust and expertise.

   Convenience, trust and expertise are generally not independent of each other. In other words, if the level of one factor is changed the level of some other factor may be affected. Raising one factor a lot may lower another factor a little, often a beneficial trade-off. Or, raising one factor a

lot may, at the same time, also raise the level of some other factor, almost certainly a desirable outcome.[224] Therefore, the balance of the three elements can contribute to the building of a more user-friendly and efficient ODR system.

2 ODR service providers should ensure that the content of a mediation agreement or arbitral award is enforceable, or may be made enforceable by a court or other competent authority in a judgment.

The validity of the mediation settlement and arbitral award as to form is one of the obstacles of ODR services. The ODR service provider should clearly provide mediation rules or procedures about the validity and enforcement of a mediation settlement. A mediation settlement may be valid when it is signed by both parties according to the mediation agreement. Or if parties pre-agree an open basis the mediation settlement may be agreed upon during the mediation process or after the mediation, either expressly or impliedly. For example, in the UK case *Brown v Rice*,[225] both parties agreed to mediate and entered into a mediation agreement, which provided that any settlement reached in the course of the mediation would not be binding until it was reduced to writing and signed by, or on behalf of, the parties. The judge held that no binding agreement was reached because it was never reduced to writing and signed by, or on behalf of, each of the parties, as required by the mediation agreement, although Brown argued that on the morning following the mediation he agreed to the settlement made the previous evening.

The EC Directive on Mediation in 2008 is also aware of the importance of this issue and it aims to ensure the enforceability of agreements resulting from mediation.[226] For example, the EC Directive on Mediation enables parties to request a written agreement concluded following mediation. It is specified that the content of the agreement is similar to a court judgment, which shall be made enforceable. Such a mediation agreement can be achieved by way of 'a court or other competent authority in a judgment or decision or in an authentic instrument'.[227]

3 ODR service providers shall ensure that, unless the parties agree otherwise, the disputants' personal information, the materials of evidence and the decision of settlement will be kept confidential.

Confidentiality is one of the challenging issues of ODR services, as it conflicts with accountability which is one of the fundamental principles of ODR service. Confidentiality seems to be upheld in most of the ODR self-regulation rules as it is linked with the protection of trade secrets and individual privacy. One of the reasons that parties choose out-of-court dispute resolutions is that they don't feel comfortable being exposed to the public. Moreover, when parties choose out-of-court dispute resolutions, particularly in an electronic platform (so called 'ODR'), sometimes it may also mean that they don't even feel comfortable with resolving the dispute face-to-face. The EC Directive on Mediation supports the enhancement of the confidentiality of mediation[228] by preventing

mediators or those involved in the mediation process from giving information or evidence in civil and commercial judicial proceedings or arbitration.[229] However, in order to boost confidence and increase usage of ODR services, ODR providers should still be allowed to disclose certain mediation settlements or arbitral awards by pre-agreement with users.

SquareTrade provides a good pioneer experience in balancing the rights of confidentiality and accountability. As discussed, accountability hinges on transparency and structure, while mediation's strength is drawn, to a large extent, from its confidentiality and flexibility.[230] An essential component in SquareTrade's accountability system is its substantial database on resolution efforts. SquareTrade has managed to gather extensive information internally without completely foregoing confidentiality externally. SquareTrade collects a vast amount of information on the services it provides, which will remain accessible to SquareTrade, the mediator and the parties for up to one year. SquareTrade also collects other data information through the seal program and users' registration. SquareTrade also records 'Resolution Behaviour Information' at the end of ODR service, which contains information on whether a party participated in the process to completion, whether an agreement was reached, whether the party accepted or rejected a mediator's recommendation, and, with respect to a respondent, whether the person had been involved in multiple cases of this type.[231] Such data will be kept confidential, but the outcome of statistics can be used in the market promotion analysis of ODR service.

4 ODR service providers shall ensure that, by any means which they consider appropriate, the code of conduct of ODR services, including administrative duties and procedures, will be made available to the general public.

It should include, as recommended by the ABA Task Force on E-commerce and ADR Recommended Best Practices for Online Dispute Resolution Service Providers: (i) publishing statistical reports; (ii) employing identifiable and accessible data formats; (iii) presenting printable and downloadable information; (iv) publishing decisions with whatever safeguards necessary to prevent party identification; (v) describing the types of services provided; (vi) affirming due process guarantees; (vii) disclosing minimum technology requirements to utilise the provider's technology; (viii) disclosing all fees and expenses to use ODR services; (ix) disclosing qualifications and responsibilities of neutrals; (x) disclosing jurisdiction, choice of law and enforcement clauses; for example, ODR providers should disclose the jurisdiction where complaints against the ODR provider can be brought, and any relevant jurisdictional limitations.[232]

5 ODR service providers shall encourage, by any means appropriate, the use of Trust Mark Schemes in online trading or service and voluntarily provide out-of-court dispute resolutions to those disputes. Such schemes

> are used to establish trust in electronic commerce, ensure the global order of online electronic commercial transactions and protect the fundamental human right of privacy.
>
> ODR service providers can also boost the confidence of commercial website users by assisting the operation of trust programs or directly offering seal programs. For example, the SquareTrade seal program is a distinctive eBay service. Under this system, Square Trade verifies the identity and address of eBay sellers, who, in return, commit to a specified set of selling standards and pay a low fee to SquareTrade. The seal is an icon that is displayed by the seller's ID on eBay but remains under the complete control of SquareTrade. SquareTrade can follow trends on buyer activities and habits since these patterns are recorded when buyers click on the seal. It can also remove the seal icon at any time should a seller no longer meet the requirements.[233]

In conclusion, from the examination of the four successful examples of eBay with SquareTrade, AAA with Cybersettle, ICANN with WIPO–UDRP, as well as CIETAC and HKIAC it can be suggested that the corporation agreement of ODR service providers and primary market makers, the expertise of technological and legal issues in internet-related disputes, the self-enforcement mechanism of resolution outcomes, are key factors for their success, as well as the other measures that bolster users' trust and confidence in doing business online.

In the author's view international ODR guidelines are needed to harmonise the standard of ODR services in the global market. Such international instruments should clarify at least five main areas as evaluated earlier – appropriation of ODR technology, protection of confidentiality, conditions of enforceability, requirements of ODR administration and implementation of trust mark schemes.

Meanwhile, national legislative organisations should amend or update the offline ADR rules by recognising electronic means of communication in resolving disputes and incorporating concepts of online dispute resolution.