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978-0-521-19933-9 - Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China

Faye Fangfei Wang

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PART I

Introduction

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Introduction

1.1 What are electronic commercial transactions?

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

1.1.1 Concepts and features

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

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

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

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

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

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

1.1.2 *Benefits: economic and social impacts*

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

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

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

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

In the **US**, the US Department of Commerce E-Stats Report, released on 28 May 2009, states that manufacturers and merchant wholesalers (so called "B2B") accounted for most e-commerce (93%). E-commerce accounted for US \$1,856 billion of manufacturing shipments in 2007, up from US \$1,567 billion in 2006, an annual increase of 18.4%. US merchant wholesalers' e-commerce sales increased 2.7% annually from 2006 to 2007. E-commerce retail sales reached almost US \$127 billion in 2007, an annual gain of 18.4%.³ In the **EU**, the number of Internet users increased by 218.1% from 2000 to 2008, culminating in a total that represents 61.4% of the total EU population and 18.8% of the world usage.⁴ The percentage of individuals who had ordered goods or services over the Internet for private use rose significantly, from 22% to 34% between 2004 and 2008.⁵ In **China**, the 23rd Statistical Survey Report on the Internet Development of January 2009 estimated that the number of users of online shopping in China had reached 74 million, with 60% growth compared with the previous year.⁶ In the Chinese market, third-party platforms providing electronic payment (e-payment) services generated total transaction values of 130.77 billion yuan (US\$19.15 billion) in the second quarter of 2009, a hike of 19.7% on the previous quarter and of 142.2% on the previous year.⁷

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

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

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

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

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

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

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

1.1.3 *Technical and legal barriers*

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

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

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

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

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1.2 What is contemporary private international law?

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

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

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

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

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

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

1.2.1 *Global regimes*

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

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

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

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

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

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

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

Meanwhile, UNCITRAL has also contributed great efforts in the modernisation and harmonisation of rules of international business. The United Nations Convention on the Use of Electronic Communications in International Contracts 2005¹⁴ complements the United Nations Convention on Contracts for the International Sale of Goods 1980 (CISG).¹⁵ It manifestly increases the legal certainty of the validity of international electronic contracts and helps in predicting the location of the parties in cyberspace,¹⁶ which will be most useful for the determination of jurisdiction and choice of law for contracts concluded online.

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

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

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

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

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Moreover, the “Rotterdam Rules” – the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008¹⁷ – adopted by the UNCITRAL are one of the most impressive pieces of international substantive law and include phrases that acknowledge the existence of “electronic documents” (i.e. “electronic transport documents”) throughout almost every provision. The Rotterdam Rules can be deemed to be one of the greatest steps towards the modernisation and harmonisation of international business in a specialised field.

1.2.2 *Other regimes*

European Union

In the EU, Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I Regulation”)¹⁸ aims to harmonise the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States. The Brussels I Regulation was reviewed by the European Commission in April 2009.¹⁹ The review aimed to modernise the rules of jurisdiction.

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

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

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

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

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

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

United States

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

Currently, the Seventh Conference of the Inter-American Specialized Conference on Private International Law (CIDIP VII) is working on the harmonisation of conflict-of-law rules for consumer contracts and dispute resolution rules for consumer protection. They are: the Draft Model Law of Jurisdiction and Applicable Law for Consumer Contracts²⁴ and the Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims.²⁵ The projects will be a good step towards a predictable, fair, efficient and harmonised legal framework for resolving disputes relating to cross-border consumer contracts.

²¹ *International Shoe Co. v. Washington*, 326 US 310, 320, 66 S.Ct. 160, 90 L.Ed. 104.

²² *Zippo Mfg Co v. Zippo Dot Com, Inc*, 952 F. Supp. 1119 (W. D. Pa. 1997), 1124.

²³ *ALS Scan v. Digital Service Consultants Inc*, 293 F. 3d 707 (4th Circuit 2002).

²⁴ Draft of Proposal for a Model Law of Jurisdiction and Applicable Law for Consumer Contracts, by Canada for CIDIP VII, in May 2008, available at www.oas.org/dil/Draft_of_proposal_for_a_Model_Law_on_Jurisdiction_and_Applicable_Law_for_Consumer_Contracts_Canada.pdf (last visited on 20 September 2009).

²⁵ Draft Model Rules for Electronic Arbitration of Cross-Border Consumer Claims, CIDIP VII, draft / borrador 15 August 2008, available at www.oas.org/dil/Legislative_Guidelines_for_Inter-American_Law_on_Availability_of_Consumer_Dispute_Resolution_Annex_B_United_States.pdf (last visited on 26 September 2009).