

**Negotiation and Conclusion of the Contract: Formal and Substantive
Validity, Choice of Court and Choice of Law Clauses
– An Introduction –
by
Stefan Leible, Jena**

1. Introduction

Private International Law serves as a tool to determine the applicable national law in cases with contacts to more than one national legal system. Thus, Private International Law is relevant in cross-border or “international” cases. This international character of Private International Law is also shared by the internet, a globally accessible information network and market for goods and services that does not stop at national borders. But the international character of the internet creates as well a tension with Private International Law because the latter is territorial and national in nature. Cross-border relationships are “nationalized” and submitted to an applicable national law for decision. Therefore, International Private Law is considered to be the crucial point or the real problem of the law of the internet. According to this view, Private International Law would not be appropriate for the internet because it requires to link cases geographically to the territory of a country.

2. Classic Private International Law versus Cyberlaw

Some are of the opinion that the internet generally defies any national claims of regulation. In my view, these fears are exaggerated. There are no reasons to think that Private International Law in its classic conception cannot deal with those problems. I will get back on this topic. What seems to me to be more important is the process of convergence between the substantial rules of national laws. If companies can rely on the fact that the rules on contract formation are similar in all national laws, the question of the applicable law will lose some of its relevance.

We do not need any private rules, a new law merchant or *lex mercatoria* for the internet. Legal certainty can only be achieved through state-made law because it is the state that enforces the law. The state and its judiciary usually apply only legal rules enacted by a state. For this reason, the efforts of UNCITRAL are of the utmost importance. They will be presented to us by Mr Estrella Faria. The focus will be on the UNCITRAL Model Law on Electronic Commerce of 1996 and the UNCITRAL Model Law on Electronic Signature of 1996. Certainly even more important than the Model Laws would be a Convention on Electronic Contracting, which hopefully will have a similar success as the Vienna Sales Convention.

For now, these are still dreams of the future. National laws continue to be different. Yet trade is already going on today. It is already now possible to enter online into a contract in a legally secure way, about which we will be told by Mr Nilson.

3. The Country of Origin-Rule

As long as there is no uniform law on the global level, Private International Law continues to be important. Supposing one would like to hold on to the classic conception of Private International Law, one has to ask the question whether its current rules indeed are likely to lead to a just solution in cases involving the internet. This is especially doubtful because a number of these rules use connecting factors that do not lend themselves to application in internet cases, because in these cases it is not easy or even impossible – at least at first sight – to discern a geographic location: For instance, in which cases is the conclusion of the contract preceded by an advertisement made by the entrepreneur in the consumer's

habitual residence, as it is provided in Article 5 of the Rome Convention? Is it sufficient that the advertisement can be seen on a website? Or is it necessary that the advertisement is written in the native language of the consumer?

There are many questions of this kind. They create uncertainty. But what is needed for trade is legal certainty. This was realized by the European Community as well. That is why under Article 3 paragraph 1 of the E-Commerce Directive each Member State is obliged to 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.”*

At first sight, this seems to be a provision on conflict of laws. A case – rendering certain services – is connected geographically with a certain legal system – that is the legal system of the state in whose territory the provider is established. This is precisely the subject of Private International Law. Therefore, it is quite surprising to read in Article 1, paragraph 4: *“This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.”*

Does this mean that Article 3 is not a conflict of laws provision after all? But why then does the Annex to Article 3 expressly mention that this provision does not apply to the freedom of the parties to choose the law applicable to their contract? This provision makes sense only if one assumes that Article 3 is a conflict of laws rule. There are questions everywhere, to which Mr Hellner hopefully will give us the answers.

4. Choice of Court and Choice of Law Clauses

Choice of court clauses are – besides arbitration agreements, which regrettably are not our subject today – an important instrument for procedural planning by the parties. They are of enormous significance in international trade. A choice of court clause serves a number of different objectives. First of all, it serves legal transparency by providing for a court with exclusive jurisdiction instead of the concurring jurisdiction of different courts. Furthermore, a choice of court clause makes jurisdiction immune from later changes, like for instance a change of domicile by one of the parties. Finally, even if a choice of law clause exists, only an additional choice of court really guarantees certainty about the law that will be applied. That is because every court always applies the rules of its own state on Private International Law, which comprises conditions for the validity of a choice of law and also determines the applicable to law in general. In addition, the party that obtains the other’s consent to a favorable choice of court clause can get an advantage by having the dispute decided by the courts of “his” state, whose official language he speaks and with whose judicial system he is familiar, or by obtaining jurisdiction of a state with a favorable legal system or an easy enforcement mechanism.

But how can choice of court clauses agreed upon electronically? According to Article 23, paragraph 1 of the Brussels I Regulation, the agreement needs to be in writing. However, according to Article 23, paragraph 2, any communication by electronic means which provides a durable record of the agreement shall be equivalent to “writing”. Above all, this provision covers the agreement on a choice of law clause by exchanging e-mails. E-mails provide a durable record because they are saved either in the mailbox or on the hard disk and because they can be printed out on paper. An electronic signature according to the rules of the Signature Directive is not required.

In the view of the European Commission, a choice of law clause can also be agreed upon electronically by the customer filling out a space on the website of the offeror or by clicking on an icon. According to an opposing viewpoint, websites are generally not sufficient, because they are only snapshots and in addition they cannot be reproduced in a durable way. I am not convinced of that view. After all, Article 23, paragraph 1 of the Brussels I Regulation does not require that the agreement can be reproduced permanently, but only that a durable record of the agreement is provided. However, it is true that it cannot be sufficient to display the website on the screen of the other party. The offeror must give the other party the opportunity to record the agreement in a durable way. He must provide him with the possibility to save the agreement without any major difficulties or to print it instantly. It can be questioned whether it suffices that the other party can print the content of the whole webpage or that he can save it as an html-file. This is especially doubtful in the case of a website that contains other information than the mere text of the contract, like pictures, or that is even split into different frames. It seems to be preferable that the party receives the text of the choice of law clause (including the other provisions of the contract) separately, for instance in a pop up-window that can be printed and saved as an html-, doc- or pdf-file.

Almost as important as choice of court clauses are choice of law clauses. Article 3 of the Rome Convention lies down the principle of the freedom of the parties to choose the applicable law. Of course, this freedom also applies to contracts that have been entered into electronically. Nevertheless, there are some lurking problems. It is probable that the conditions on the website of the offeror contain a choice of court clause. There would be no problem at all if this was not about general conditions. Can they be controlled according to national law? In my view not, as long as the Rome Convention is applicable. However, Article 3, paragraph 4 in conjunction with Article 8, paragraph 1 of the Rome Convention leaves open the possibility to control whether the conditions became part of the contract under the law chosen by the parties. This leads to problems if the national laws have diverging requirements regarding the possibility of knowing the general conditions. There are many unsolved legal problems here too, which Mrs van der Hof will deal with having regard also to U.S. law.

5. **Comparative Law and Look into the Future**

We will finish with two presentations on comparative law and on the future of e-commerce-law. Looking into United States law is always interesting for Europeans because the technological change in the U.S., which usually goes on much quicker than in Europe, also leads to much quicker changes in the law. Therefore, Mr Rothchild will tell us about the current U.S. case law on electronic commerce and about new laws and legislative projects. We will round up our discussion with a look into the future by Mr Apostolou who will tell us about upcoming and necessary changes of the legal framework for B2B online contracts.