part of a domestic system, we must indeed view them as part of an international system.

In addition to the above, Trimble has noted that:

> [t]here are four sources of limitations on countries' discretion to formulate their national conflict of laws rules. First, international treaty obligations may dictate that countries adopt certain rules; this source also includes bilateral treaties and regional instruments that may limit or direct countries' choices in setting their conflict of laws rules. Second, comity, which is not formulated in international treaties but is an internationally recognized principle, impacts how countries design and apply their conflict of laws rules. Third, inter-country cooperation (for example, in the recognition and enforcement of foreign judgments) is a source of limitations on the operation of a country's conflict of laws rules, which are confined de facto by other countries' willingness to accept a country's territorial ambitions, whether those ambitions are expressed in conflict of laws rules or in any other of a variety of norms. Finally, higher laws in a country's national hierarchy of laws may limit a country's discretion in formulating its national conflict of laws rules; for example, conflict of laws rules are typically subject to national constitutional principles.[3]

While it probably falls into the category of things too obvious to mention, it should also be noted that there is an interesting, and complex, interplay between private international law rules, other procedural law, substantive law and constitutional law. As to the latter, Wenander points out that:

> [c]onstitutional rules and principles provide democratic legitimacy of legislation and other forms of exercise of public power. Furthermore, such rules and principles limit the exercise of public power, notably through rules on fundamental rights and on transfer of authority to foreign states and international organisations. All these aspects may be relevant in relation to rules of private international law.[4]

At any rate, the discipline known as private international law, or conflict of laws, can be approached from a variety of angles.[5] The most fundamental approach would involve a discussion of the four elements – (i) the rules regulating jurisdiction, (ii) the rules regulating ways to decline jurisdiction, (iii) the rules regulating choice of law and (iv) the rules regulating recognition and enforcement – that represent the 'distinct but interrelated subjects'[6] of the discipline.

3. M. Trimble, 'Advancing National Intellectual Property Policies in a Transnational Context', (2014–2015) 74 *Maryland Law Review* 203, 226 (internal footnote omitted).
4. H. Wenander, 'The Constitutional Foundations of Private International Law in Sweden', in P. Lindskoug et al. (eds), *Essays in Honour of Michael Bogdan* (Lund: Jurisförlaget I Lund, 2013): 583–584.
5. For a particularly interesting approach see: P.M. Dung and G. Sartor, 'A Logical Model of Private International Law' (15 June 2010). Proceedings of the 10th International Conference on Deontic Logic in Computer Science (DEON 2010), 229–246, Springer, Berlin, 2010. Available at SSRN: < http://ssrn.com/abstract = 1640451 > .
6. F.K. Juenger, *The Need for a Comparative Approach to Choice-of-law Problems, International Conflict of Laws for the Third Millennium: Essays in Honour of Friedrich K. Juenger* (New York: Transnational Publishers Inc., 2001) (originally published: (1999) 73 *Tulane Law Review* 1309–1336, 181).

Such an approach was taken in the introduction and will not be repeated here. Instead this part attempts to identify what qualities could be said to be desirable for good private international law rules. No distinction is drawn here between the four elements of private international law. Instead, where it is not obvious, care has been taken to explain how each of the identified qualities is of relevance for each of the four elements. Particular care has been taken to ensure that the necessary level of generality associated with this structure does not limit the depth of the discussion.

This chapter provides a suitable point of departure for Chapters 11 and 12, in which I outline models for addressing some of the jurisdictional issues of concern in this book. It provides a suitable base for the discussion of the existing rules of private international law found in Chapter 9. As Chapter 3, first and foremost, should be viewed as background material, it, on its own, will not provide the depth of a full discussion of what makes good private international law rules. The general aims, or qualities, are discussed here, but examples illustrating the details of how rules meeting these aims ought to be constructed follow in Chapters 11 and 12.

While I have identified no less than twelve desirable qualities, not all these qualities are of equal significance. As discussed below, I distinguish between fundamental and non-fundamental qualities.

After the desirable qualities that private international law rules ought to possess have been discussed, a few observations are made about the principles that ought to guide the application of the private international law rules. However, first, a few introductory observations are appropriate.

I. UNILATERALISM AND MULTILATERALISM

> *PIL [private international law] is a scholar-made and scholar-dominated field that has, on occasion, attracted the attention and philosophical sensibilities of brilliant, active decisionmakers. Because the PIL scholar has been so influential in the intelligence and promotion functions, there has been a distinct tendency to identify closely with decisionmakers, to concentrate much intellectual energy and material resources developing models of rather than theories about PIL.*[7]

Particularly in relation to the choice of law, there is a wealth of methodological discussions available. Before the qualities identified as desirable are presented and discussed, it is useful to first briefly examine some of these methodologies.

While exclusively focused on choice of law, a useful starting point is found in Juenger's *The Need for a Comparative Approach to Choice-of-Law Problems.*[8] In that

7. W.P. Nagan, 'Conflicts Theory in Conflict: A Systematic Appraisal of Traditional and Contemporary Theories', (1981–1982) 3 *Journal of International and Comparative Law* 343, 397–398.
8. F.K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems, International Conflict of Laws for the Third Millennium: Essays in Honour of Friedrich K. Juenger* (New York: Transnational Publishers Inc., 2001) (originally published: (1999) 73 *Tulane Law Review* 1309–1336).

groundbreaking article, Juenger identifies four main methodologies[9] relating to the choice of law: *lex fori*, multilateralism, unilateralism and the substantive law approach.

The *lex fori* methodology simply means that the *lex fori* – i.e., the law of the forum – is applied to the exclusion of all other laws. While this approach appears extremely parochial at a first glance, it does not, as is discussed further below (Chapter 9, section III.D), necessarily always lead to parochial results.

The substantive law approach could be said to represent the search for a common higher legal order. In other words, it seeks to apply international legal principles:

> [A] respectable array of current scholarly opinion maintains that modern realities, in particular the prevalence of arbitration as the means of resolving commercial disputes, have spawned a new law merchant. Accordingly, the substantive law approach to multistate and multinational problems presents, even now, a possible alternative to the traditional multilateral and unilateral methodologies.[10]

The other two, unilateralism and multilateralism, are more interesting for the purpose of this book since they can be equally applied to jurisdiction (including the issue of declining jurisdiction) as to choice of law, and in a sense also in relation to recognition and enforcement.[11] As far as choice of law is concerned, unilateralist methodology 'focus[es] simply on whether the forum's law applies to the activity in question, without worrying that another forum might also apply its law'.[12] In other words, this methodology permits concurrent legislative jurisdiction. Similarly, it would allow more than one forum to claim jurisdiction and more than one forum being available for the enforcement of a particular judgment. In contrast, the methodology of multilateralism searches for the one law, or forum, with the closest connection to the dispute. This is done by looking at connecting factors, and, as far as choice of law is concerned, multilateralism is aiming to provide 'uniform results irrespective of where a case may be litigated'.[13]

9. Juenger refers to them as approaches (see, e.g., F.K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems, International Conflict of Laws for the Third Millennium: Essays in Honour of Friedrich K. Juenger* (New York: Transnational Publishers Inc., 2001) (originally published: (1999) 73 *Tulane Law Review* 1309–1336, 185)); however, in this book that term is already being used to refer more loosely to manners in which one can view private international law.
10. *Ibid.*
11. Note also the following terminology: '[C]onflict rules are either "one-sided" or "all-sided." [...] A conflict rule is "all-sided" or, in Dr. Morris's much happier phrase, general if it directs which law is applicable to a given set of facts. [...] Conflict rules are "one-sided" or unilateral or particular if they define the circumstances in which [the state's] law is applicable'. F.A. Mann, 'Statutes and the Conflict of Laws', (1973) 46 *British Year Book of International Law* 118–119.
12. W.S. Dodge, 'Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism', (1998) 39(1) *Harvard International Law Journal* 107.
13. F.K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems, International Conflict of Laws for the Third Millennium: Essays in Honour of Friedrich K. Juenger* (New York: Transnational Publishers Inc., 2001) (originally published: (1999) 73 *Tulane Law Review* 1309–1336, 187).

While acknowledging that these four are not the only existing methodologies, Juenger does not appear to see much benefit in the search for alternatives, at least not if such an alternative represents a mixture of elements from the four main methodologies:

> Taking a little bit of this, a little bit of that, and a tad of the other, scholars and judges have devised composites that they find more appealing than any plain vanilla choice-of-law methodology. There is, of course, nothing wrong with borrowing the best elements of various theories and combining them in some coherent fashion to create a new approach. The users and promoters of the various 'mish-mash' or 'kitchen sink' methodologies, however, tend to overlook that the four basic approaches reflect rather different ideologies and incompatible purposes, and therefore do not mix well.[14] (footnote omitted)

Despite Juenger's scepticism towards 'mish-mash' methodologies, neither exclusivity, nor preference, has been given to any of the four main methodologies in identifying the desirable qualities outlined in this chapter. Adopting the terminology that Juenger embraced from Reppy,[15] the qualities described as desirable, have certainly been identified applying a 'kitchen sink' methodology. For, as Juenger himself confesses, 'no particular approach has ever prevailed, to the exclusion of all others, in the history of our discipline'.[16] Indeed, there are qualities identified as desirable that are closely associated with all but the last, the substantive law approach, of the four main methodologies described by Juenger. For example, the quality of policy fulfilment, described below (section 3.II.F), obviously originates in the unilateralist way of thinking, while the quality of efficiency (section 3.II.G) might point to the multilateralism methodology. Furthermore, the *lex fori* methodology could be said to have a strong connection to the desire for simple solutions, and it is also to be remembered that the *lex fori* methodology is embraced as desirable in many, not to say most, states in relation to the procedural rules.[17] In this context it is interesting to observe Weintraub's statement that '[l]abeling an issue "procedural" for choice-of-law purposes is a shorthand way of stating that the law of the forum applies'.[18]

14. F.K. Juenger, *The Need for a Comparative Approach to Choice-of-law Problems, International Conflict of Laws for the Third Millennium: Essays in Honour of Friedrich K. Juenger* (New York: Transnational Publishers Inc., 2001) (originally published: (1999) 73 *Tulane Law Review* 1309–1336, 189).
15. W.A. Reppy Jr, 'Eclecticism in Choice of Law: Hybrid Method or Mishmash?', (1983) 34 *Mercer Law Review* 653.
16. F.K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems, International Conflict of Laws for the Third Millennium: Essays in Honour of Friedrich K. Juenger* (New York: Transnational Publishers Inc., 2001) (originally published: (1999) 73 *Tulane Law Review* 1309–1336, 189).
17. As discussed above, it is common for courts to exclusively apply the forum law as far as procedural issues are concerned, while foreign substantive law is applied when identified as the appropriate law under the forum's procedural rules (i.e., choice of law rules).
18. R.J. Weintraub, 'Getting the Conflict of Laws Y2K Ready' (2001) 37 *Willamette Law Review* 158.

II. DESIRABLE QUALITIES OF PRIVATE INTERNATIONAL LAW RULES[19]

> *Conflict-of-laws questions are amazingly complicated, and they are, probably in good part for this very reason, rather infrequently litigated. It thus seems essential that the scholar pave the way for the judge in this area.*[20]

For a meaningful analysis of the different manners in which jurisdictional issues in Internet contracts, trademarks, copyright and defamation are being, and ought to be, addressed to take place, it is necessary to discuss what qualities good private international law rules should have. The term 'good', as used here, is to be understood as something quite separate from moral values as to what makes rules good, and does not in any sense flow from any alleged higher natural law. Drawing upon examples used by Krygier and others, the type of 'good' referred to here follow the same logic as the suggestion that a good knife should be sharp and a good poison should kill quickly and quietly – '[w]hat it is used for is a quite separate question'.[21]

However, this does not necessarily mean that the Models presented in Chapters 11 and 12 lack moral values simply because they are constructed in a manner that takes account of the qualities identified in this chapter. Indeed, several of the qualities that make 'good' rules, under the definition of 'good' used here, would cater for some form of moral good, at least if this moral good is grounded in a notion of fairness.[22] For example, one of the identified qualities is that good private international law rules should meet the parties' legitimate expectations. Obviously, rules that meet the parties' legitimate expectations often lead to fair results and thereby, depending on the definitions used, morally correct results. It must further be noted that one can view goodness from both the perspective of the receiver of the law and from the perspective of the maker of the law. The qualities I have identified stems from both of these perspectives. For example, policy fulfilment is a desirable quality from the lawmaker's point of view, while the fulfilment of legitimate party expectations is a desirable quality from the law receiver's perspective.

Bearing in mind this definition of 'good', it is submitted that good private international law rules should live up to legitimate party expectations (thereby ensuring predictability as well as flexibility), and should ensure the fulfilment of the underlying policies behind the relevant substantive law. Furthermore, good private international law rules are effective and as simple as possible. In addition, it is desirable that private international law rules are drafted at a suitable level of generalization, with

19. While this section, as the rest of the chapter, is general in its scope, the emphasis of the discussion is placed on concerns associated with Internet communication. In other words, while the discussion is focused on an Internet context, the qualities described as desirable are also desirable in other settings where private international law rules operate.
20. H. Baade, 'Counter-Revolution or Alliance for Progress? Reflections on Reading Cavers, The Choice-of-Law Process', (1967) 46 *Texas Law Review* 141, 145.
21. See, e.g., M. Krygier, 'Rule of Law', in N.J. Smelser and P.B. Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Amsterdam: Elsevier, 2001): 13406.
22. For a similar reasoning that heavily influenced my thinking as expressed above, see M. Krygier, 'Rule of Law', in Smelser and Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Amsterdam: Elsevier, 2001): 13407.

sufficient specificity, and that they are abuse resistant. Good private international law rules ought not to violate public international law and human rights law, and ought to be drafted in forum-neutral language. Finally, such rules benefit from being widely acceptable and independence from substantive law concepts.

However, these qualities are not all of equal importance, and it is useful to distinguish between fundamental and non-fundamental qualities.[23] The fundamental qualities are such that a good private international law rule cannot operate without them. Put differently, the fundamental qualities represent the *limits to any acceptable solution.* The non-fundamental qualities are those that are desirable for every good private international law rule, but not essential.

The identified qualities are only discussed in the context of private international law. However, virtually all of the qualities identified as desirable are of relevance also on a more general level. Indeed, all laws should meet legitimate party expectations, work towards policy fulfilment, be efficient, be simple, be drafted on a suitable level of generalization, be abuse resistant, be drafted in forum-neutral language, be widely accepted and avoid violating public international law.

Furthermore, while all of the qualities discussed here are desirable, it is acknowledged that some are conflicting to an extent. For example, a rule meeting the aim of being drafted on a suitable level of generalization might perhaps be less simple than one not meeting that aim. In addition, some qualities are arguably connected to each other. For example, applying the terminology used in this book, it has been suggested as a possibility that more flexible solutions are more likely to be abuse resistant.[24]

In preparing this chapter, textbooks and other material outlining the current state of private international law were, for obvious reasons, of limited value. In addition,

23. I have discussed the theoretical thinking behind the manner in which such qualities are to be identified elsewhere. See: D. Svantesson, 'A Legal Method for Solving Issues of Internet Regulation; Applied to the Regulation of Cross-Border Privacy Issues', European University Institute Working Paper LAW2010/18.
24. 'Yet it is a major and unresolved issue of socio-legal investigation whether precision of rules yields certainty of law. Not only is it unresolved, it is very difficult to resolve, since it is an empirical question for which it is hard to gather evidence. Such evidence as we have suggests, at least to John Braithwaite, that while rules might be more certain than principles in relation to "simple, stable patterns of action that do not involve high economic stakes" – like driving a car – "with complex actions in changing environments where large economic interests are at stake" principles are more likely to enable legal certainty than rules. Indeed, Braithwaite argues, "When flux is great it can be obvious that radically abandoning the precision of rules can increase certainty". The argument is complex and the evidence, as Braithwaite readily concedes, incomplete and hard to obtain, but his arguments are powerful and the evidence on which he draws, though limited, is strong. A complex order of fixed and rigid rules, for example, is typically more open to "creative compliance," "legal entrepreneurship" and "contrived complexity" particularly at "the big end of town". This is both because certain sorts of precise rules, and regimes where such rules predominate, lend themselves to such exploitation more readily than certain sorts of principles and too because "there is uncertainty that is structurally predictable by features of power in society rather than by features of the law".' (footnote omitted) M. Krygier, 'False Dichotomies, True Perplexities, and the Rule of Law', in A. Sajo (ed.), *Universalism and Local Knowledge in Human Rights* (The Hague: Kluwer Law International, 2003). See also P. Selznick, 'Legal Cultures and the Rule of Law', in A. Czarnota (ed.), *The Rule of Law after Communism: Problems and Prospects in East-Central Europe* (Sydney: Ashgate, 1999): 27.

there seems to be a paucity of current in-depth discussions of the objectives of private international law.[25] Perhaps it is again time to reflect 'on the policies to be pursued and the means to be applied', as suggested in the opening quote of this chapter?

Either way, I am by no means a pioneer in attempting to identify desirable qualities of private international law. Older law journal articles, such as Yntema's *The Objectives of Private International Law*,[26] provide interesting views on what good private international law rules should be like. Yntema provides a rather substantial list of examples of partly overlapping qualities or objectives, including:

> uniformity of legal consequences, minimization of conflicts of laws, predictability of legal consequences, the reasonable expectations of the parties, uniformity of social and economic consequences, validation of transactions, relative significance of contacts, recognition of the 'stronger' law, cooperation amongst states, respect for interests of other states, justices of the end results, respect for policies of domestic law, internal harmony of the substantive rules to be applied, location or nature of the transaction, private utility, homogeneity of national law, [and the] ultimate recourse to the lex fori.[27]

He himself is, however, not embracing all of these objectives and ends up concluding that '[i]nstead of attempting to consider all these formulations in detail, it is suggested that the essential policy considerations peculiar to conflicts law can be subsumed under two heads: *security*, [...] and *comparative justice* of the end result'.[28] He goes on to describe these two 'essential policy considerations' in the following terms:

> Security in law has two faces: on the one hand, it implies the rule of law, or in other words the orderly settlement of disputes in accordance with general rules; on the other hand, it implies equality in the application of the rules, so that the same case will receive the same treatment everywhere.[29]

25. The question has, however, been getting some, although very limited, recent attention. See, e.g., New Zealand Law Commission, *Report 50 Electronic Commerce Part One* (October 1998), [252] stating that: 'the objectives of private international law are generally similar in different jurisdictions, and are strongly influenced by concepts of comity, and mutual respect and recognition of civil justice systems of other states. The basic objectives of New Zealand's private international law are practical, and are intended to ensure the principled and efficient resolution of cross-border disputes and to protect New Zealand's interests both domestically and as a member of the international community. Those objectives are: [1] To ensure, so far as possible, that disputes are heard and decided in the state where the hearing can most appropriately and conveniently be conducted, in the interests of the parties and of justice. [2] To avoid multiple hearings of a dispute, or rehearings of a dispute in a second state. [3] To ensure, so far as possible, that where a dispute could be heard in New Zealand or overseas, the system of law by reference to which substantive issues are decided does not depend on where the case is heard. Thus, even if substantive laws differ on an issue, if the rules of private international law of the available jurisdictions all refer that issue to the same system of law, the incentive to forum shop is substantially reduced.' (footnote omitted).
26. H.E. Yntema, 'The Objectives of Private International Law', (1957) XXV *The Canadian Bar Review*.
27. *Ibid.* 735.
28. *Ibid.*
29. *Ibid.*

And, '[comparative justice refers to the] consideration of the desirable result as indicated by comparative study of the underlying policies of the domestic substantive laws'.[30]

Furthermore, Leflar produced a list of five 'choice-influencing considerations' in relation to choice of law decisions. These are: '(A) Predictability of results; (B) Maintenance of interstate and international order; (C) Simplification of the judicial task; (D) Advancement of the forum's governmental interests; [and] (E) Application of the better rule of law'.[31] No order of priority was intended.[32]

The first thorough attempt to list and analyse 'choice-influencing considerations' is allegedly Cheatham and Reese's 1952 article, *Choice of the applicable law*.[33] As summarized by Felix and Whitten, Cheatham and Reese listed the following nine factors:

> (1) The needs of the interstate and international systems; (2) A court should apply its own local law unless there is good reason for not doing so; (3) A court should seek to effectuate the purpose of its relevant local law rules in determining a question of choice of law; (4) Certainty, predictability, uniformity of result; (5) Protection of justified expectations; (6) Application of the law of the state of dominant interest; (7) Ease in determination of applicable law; convenience of the court; (8) The fundamental policy underlying the broad local law field involved; [and] (9) Justice in the individual case.[34]

In addition, Hay points to the six general principles postulated by Wengler:

> (1) public policy; (2) the forum's 'political' (governmental) interest; (3) substantive 'harmony' [...]; (4) use of the choice-of-law reference that best serves the purpose of the substantive law; (5) enforceability of the decision; and (6) the principle that conflicts should be minimized (harmony of decision amongst States).[35]

In discussing the goals of private international law, Nagan points to the following:

30. *Ibid.* 737.
31. R.A. Leflar, 'Choice Influencing Considerations in Conflicts Law', (1966) 41 *New York University Law Review* 267, 282. See also R.L. Felix and R.U. Whitten, *American Conflicts Law* (6th edn, Durham, NC: Carolina Academic Press, 2011): 196.
32. R.A. Leflar, 'Choice Influencing Considerations in Conflicts Law', (1966) 41 *New York University Law Review* 267, 282.
33. 52 Colum L Rev 959 (1952). R.L. Felix and R.U. Whitten, *American Conflicts Law* (6th edn, Durham, NC: Carolina Academic Press, 2011): 195.
34. R.L. Felix and R.U. Whitten, *ibid.* 195.
    Apparently Professor Reese added a tenth factor in a later Article: 'The court must follow the dictates of its own legislature, provided these dictates are constitutional'. (See *ibid.* fn. 5).
35. P. Hay, 'Flexibility versus Predictability and Uniformity in Choice of Law: Reflections on Current European and United States Conflicts Law', (1991) 226 *Recueil des cours* 347 referring to W. Wengler, *'Die allgemeinen Rechtsgrundsätz und ihre Kollisionen'*, (1943–1944) *Zeitschrift für öffentliches Recht* 473, translated and revised in 1952 Revue critique de droit international privé 595.

(1) At the highest level of abstraction, the objective of PIL as an indispensable complement to *those p*roblem areas designated as public international law, is the realization of a global public order of human dignity where all values are optimally shaped and shared through the strategies of persuasion rather than coercion.
(2) At a more operational level, one may see the decision-making process as actively structuring the social process to achieve the objectives specified in (1) above. In other words, the process of authoritative decision uniquely geared to the PIL frame should consciously strive for the development of situational patterns geared to institutionalization, in global terms, of each goal value. These value-situations may be structured or patterned according to specialized arenas for the power process (fora); for the wealth process (markets); for the affection process (affection and friendship circles) and so forth. Value-situations may also be patterned with sufficient flexibility so as to respond, in varying degrees of inclusivity and exclusivity, and be reconcilable with the goals evidenced in the human dignity postulate.
(3) All allocations of competences in PIL (applicative and prescriptive; secondary and primary) should, so far as possible, be done to optimize preferred outcomes, viz., that advance the realization of a public order of human dignity.
(4) The allocation of decision-making competencies in PIL should be further conditioned by the realization that the promotion through decision, of common interests as distinct from special interests, approximates the accretion and diffusion of values having the widest relevance for a public order of human dignity.[36]

In highlighting some of the virtues of private international law, Wilkins and John bring attention to some desirable qualities:

> Effective private international law regimes provide clear and certain answers to questions such as which law applies to a transaction and in what forum is a dispute to be resolved. They can also ensure that parties are able to predict with greater clarity and certainty whether the rulings of domestic courts can be enforced in foreign fora. Therefore, a well-designed private international [law] regime can be a fast and cost-effective alternative to unification and harmonization efforts that are traditionally used to effectively reduce, or even eliminate, existing barriers to trade and investment.[37]

It is also relevant to examine what has been said about what desirable qualities for laws are generally. While there is a range of works touching upon this subject, I have chosen to focus on the work of one of the leading commentators, Fuller. Having taken the view that the objective of laws is to regulate human behaviour, Fuller outlines eight 'routes to disaster' in lawmaking, in his greatly influential book, *The Morality of Law*:

> The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize,

36. W.P. Nagan, 'Conflicts Theory in Conflict: A Systematic Appraisal of Traditional and Contemporary Theories', (1981–1982) 3 *Journal of International and Comparative Law* 343, 544.
37. A. Dickinson, T. John and M. Keyes (eds), *Australian Private International Law for the 21st Century: Facing Outwards* (Oxford: Hart Publishing, 2014): 8.

> or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and finally, (8) a failure of congruence between the rules as announced and their actual administration.[38]

Fuller's insists on viewing his eight routes to disaster as making up an 'inner morality of law'. Many commentators, such as Hart and Dworkin, have however objected to this description of the eight routes to disaster, preferring instead to recognize them as matters of 'efficacy.'[39] And even after reading Fuller's vigorous defence on this matter,[40] it is tempting indeed to adopt a more pragmatic approach and view them as matters of procedural fairness, or perhaps as eight practicalities of law, corresponding with, but not for that sake constituting, morality.[41] Whatever their origin, Fuller's eight routes to disaster can usefully be accepted as meta-principles to be taken into account in any law making endeavour, including, but of course not limited to, the making of private international law rules.

While works such as those of Yntema, Leflar, Cheathamand Reese, Wengler, Nygh and Fuller have been studied with great interest, and the majority of the qualities identified below have been discussed at varying levels of detail elsewhere,[42] the qualities identified here as desirable, as well as the chosen terminology and structure used in this chapter, do not conform to any particular earlier work. Instead,

38. L.L. Fuller, *The Morality of Law* (2nd edn, New Haven: Yale University Press, 1969): 39.
39. *Ibid*. 200–202.
40. *Ibid*. 200–224.
41. In the words of Dworkin:

> It *is* morally wrong for an official to harm a citizen groundlessly, to insult him unfairly, or to accuse him unjustly. Those occasions of defying the canons which involve such acts are occasions of moral wrongdoing, but they are so because they have these consequences and not because the canons are themselves moral standards.

(R. Dworkin, 'Philosophy, Morality, and Law: Observations Prompted by Professor Fuller's Novel Claims', (1965) 113 *University of Pennsylvania Law Review* 668, 674–675).
42. See, e.g., H.E. Yntema, 'The Objectives of Private International Law', (1957) XXV *The Canadian Bar Review* 727, discussing what I termed 'flexibility'; H.G. Maier, 'Extraterritorial Jurisdiction at a Crossroads: An Intersection between Public and Private International Law', (1982) 76 *American Journal of International Law* 319, mentioning 'predictability'; F.K. Juenger, *The Need for a Comparative Approach to Choice-of-Law Problems, International Conflict of Laws for the Third Millennium: Essays in Honour of Friedrich K. Juenger* (New York: Transnational Publishers Inc., 2001) (Originally published: (1999) 73 *Tulane Law Review* 1309–1336, 182–183), discussing what I have termed 'efficiency'; L.L. Fuller, *The Morality of Law* (2nd edn, New Haven: Yale University Press, 1969): 63–65 discussing what I termed 'simplicity'; P. Nygh, 'The Reasonable Expectation of the Parties as a Guide to the Choice of Law in Contract and in Tort', (1995) 251 *Recueil des cours*; E. Cheatham and W. Reese, 'Choice of the Applicable Law', (1952) 52 *Columbia Law Review* 959 listing what I termed 'policy fulfilment' and F. Vischer, 'General Course on Private International Law', (1992-I) 232 *Recueil des cours*, discussing what I termed 'abuse resistant'. However, I have been unable to find any mentioning of what I have termed 'suitable level of generalisation'.

the reader should be aware that the chosen structure and terminology, as well as the identified qualities themselves and their respective meaning, are subjective.[43] To draw upon the words of Leflar:

> [The] clearer identification [of the objectives of private international law] and the attachment of appropriate significance to each of them is a task that will have to be worked at indefinitely, with little prospect of complete agreement amongst either judges or commentators.[44]

Before the identified qualities are discussed in detail, it is important to note that all of the qualities discussed below are of relevance to both contractual situations and to defamation, copyright and trademarks. Furthermore, as noted above, although varying in degree, all of the identified qualities are of relevance in relation to both jurisdiction and choice of law, as well as recognition and enforcement. As some of the discussions below are fairly lengthy, due to their complexity or controversial nature, it is suitable to list the identified qualities and very briefly discuss their relevance:[45]

(1) *Legitimate party expectations* – it is of fundamental importance that good private international law rules be equipped to meet both genuine party expectations and constructive party expectations. Therefore such rules must contain a context dependent balance between predictability and flexibility.
(2) *Suitable level of generalization* – it is of fundamental importance that good private international law rules, just as any other rules, be drafted at a suitable level of generalization.
(3) *Abuse-resistance* – it is of fundamental importance that good private international law rules, like any other rules, are drafted in a manner that minimizes the risk of abuse of those rules.
(4) *Non-violation of public international law* – it is of fundamental importance that good private international law rules do not go beyond what is allowed under public international law.

43. As becomes clear below, some desirable qualities are pretty self-explanatory (e.g., efficiency), while other requires lengthy discussions (e.g., policy fulfilment).
44. R.A. Leflar et al., *American Conflicts Law* (4th edn, Virginia: The Michie Company, 1986): 277.
45. It is frequently said that one of the main aims, if not *the* main aim, of conflict of laws rules is harmonization of results. The reader might consequently be interested in why this quality was not deemed to qualify for this chapter. While such a discussion would have been both interesting and meaningful, it has, for obvious reasons, not been deemed possible to discuss all those qualities that were not determined to qualify for the scope of this chapter. However, as 'harmonization of results' is mentioned with such frequency, a few words need to be said about why it was not included as a desirable quality. It is submitted that harmonization alone is not a desirable aim, nor can uniformity of results be an aim on its own. Only if the result from the harmonized rule is desirable, is harmonization itself desirable. Thus, the true aim is the widest possible adoption of the best possible rules. But that cannot be seen as an aim of the private international law rules themselves, but rather this is an aim of the legal system as such. As noted by Vischer: 'Harmony in law is at best a directive but not a compelling principle'. (F. Vischer, 'General Course on Private International Law', (1992-I) 232 *Recueil des cours* 29). Furthermore, as the desire for harmony in results often is expressed in the context of choice of law, one could also question what the purpose of mechanical and objective choice of law rules possibly could be when both the rules of jurisdictional and recognition and enforcement largely remain subjective?

(5) *Non-violation of human rights law* – it is of fundamental importance that good private international law rules do not go beyond what is allowed under human rights law.
(6) *Policy fulfilment* – like other rules, the rules of private international law must work towards the fulfilment of relevant policies.
(7) *Forum-neutral language* – to be applied in a consistent manner, conflict of laws rules likely to be applied by the courts of different jurisdictions must be drafted in a forum-neutral manner.
(8) *Efficiency* – like other rules, private international law rules must be as efficient as possible.
(9) *Simplicity* – while difficult to achieve, private international law rules must be as simple as possible.
(10) *Wide acceptance* – as with other legal rules, private international law rules benefit from being widely acceptable among the stakeholders they affect.
(11) *Independence from substantive law concepts* – it is desirable that private international law rules are not anchored in concepts and terminology stemming from substantive law.
(12) *Sufficient specificity* – it is desirable that private international law rules are drafted with sufficient specificity to be applied in a consistent manner.

Of these, the first five should be seen as fundamental while the others, but one, are always non-fundamental qualities. The seventh quality – forum-neutral language – is the odd one in that it is fundamental in some contexts and not in others.

A. Legitimate Party Expectations (A Fundamental Quality)

> *The focus should be on the position of the parties in an international situation and on their justified expectation, especially when exposed to an unexpected choice of law in an unforeseeable forum.*[46]

The importance of people's legitimate expectations as to the law is neatly described by Krygier:

> We do better, too, in large societies, where we are constantly interacting with non-intimates, if we can know important things about people we may not know well in other respects. Such things include their and our rights, responsibilities, risks and constraints. In small and pre-modern societies, as in families, we can know many of these things from personal everyday experience. In larger, more various, agglomerations such knowledge and the shared normative understandings that make it possible, are often not available. Where the rule of law matters in a society, however, we can know many of these things even about strangers. That makes their and our activities more predictable to each other and might make us less fearful of and more cooperative with them, and, of course, them of and with

46. F. Vischer, 'General Course on Private International Law', (1992-I) 232 *Recueil des cours* 94.

> us. This can lead to a productive spiral of virtuous circles, where each gains by reasonable trust in others.[47] (footnote omitted)

Following the reasoning above, it would seem that the rule of law has a particularly great role to play in relation to online interactions as such interactions frequently involve parties who lack knowledge of each other.

Arguably, the most obvious situations in which parties' legitimate expectations may be met are contracts.[48] If the parties actively and in an informed manner reach an agreement as to, for example, which law shall be applied in, or which court shall determine, a potential dispute, we can speak of *genuine party expectations* being created from the point such agreement is reached. By allowing for party autonomy (i.e., allowing the parties to make such choices and ensuring that the parties' choice is respected), private international law rules can be predictable.[49] This *predictability*,[50] in turn, ensures that legitimate party expectations are met. The term predictability is, thus, given a very specific meaning here; a predictable rule is a rule that aims at the fulfilment of genuine party expectations.

In light of this, it is perhaps not surprising that the concept of 'party autonomy' is held up as corner stone of private international law.[51] However, in my view, we must not lose sight of the fact that party autonomy is merely a subsidiary of legitimate party expectations – the value of party autonomy depends on, and indeed stems from, the fulfilment of legitimate party expectations.

Pertegás has pointed to the following beneficial characteristics of party autonomy:

> First, the principle of party autonomy defers to the expectations of the parties and protects legal certainty. Second, insofar as the parties' choice of law is seen as being part of the contractual regime concerning dispute settlement, the exercise of part autonomy helps to achieve efficiency by reducing the legal costs of dispute resolution. Third, the principle of party autonomy promotes cross-border economic activity by enabling the parties to choose the applicable law, which facilitates their intended transaction. Lastly, increased international mobility and communication accentuate the relevance of party autonomy as the most practical solution for international commercial contracts.[52]

47. M. Krygier, 'False Dichotomies, True Perplexities, and the Rule of Law', in A. Sajo (ed.), *Universalism and Local Knowledge in Human Rights* (The Hague: Kluwer Law International, 2003).
48. P. Nygh, 'The Reasonable Expectation of the Parties as a Guide to the Choice of Law in Contract and in Tort', (1995) 251 *Recueil des cours* 297.
49. Authors have gone as far as to suggest a 'human rights basis for party autonomy' (P. Nygh, 'The Reasonable Expectation of the Parties as a Guide to the Choice of Law in Contract and in Tort', (1995) 251 *Recueil des cours* 303).
50. Or 'certainty'. Predictability and certainty are of course, if not the same, variations of the same theme, and will consequently be treated as one quality for the purpose of this discussion.
51. A. Jaroszek, 'European Online Marketplace – New Measures for Consumer Protection against "Old Conflict of Laws Rules"', (2015) 9(1) *Masaryk University Journal of Law and Technology* 22.
52. M. Pertagás, 'Hague Principles on Choice of Law in International Contracts', in P. Lindskoug et al. (eds), *Essays in Honour of Michael Bogdan* (Lund: Jurisförlaget I Lund, 2013): 464.

While predictability often is the safest way of ensuring the fulfilment of legitimate party expectations, the instances where predictability can be relied upon are limited to those fact-scenarios that involve the mentioned genuine party expectations. In cases not involving genuine party expectations, we must also rely upon *flexibility* to provide for legitimate party expectations to be met. As used here, a flexible rule is a rule that takes account of the individual circumstances of the case at hand. There are several situations in which one cannot speak of any genuine party expectations. For example, a consumer entering into a cross-border contract might not at all have considered in which forum a potential dispute would be heard or which laws would be applied if a dispute should arise. Indeed, most consumers would not have sufficient legal knowledge to properly evaluate the relevance of these questions. Furthermore, the victim in a tort action would ordinarily have even less of an expectation; after all, the victim could not ordinarily know that he or she would become a victim. Yet, one could also perhaps speak of a party expectation in relation to these types of parties. Perhaps it could be said that each and every one of us have some basic expectation as to how we will be treated in the eyes of the law, in case something happens. We could here speak of *constructive party expectations*, as opposed to the genuine party expectation of a party that has properly considered the issues to which the expectations relate. Bearing in mind that party expectations may be both constructive and genuine, a rule of private international law, aiming to meet the parties' expectations must balance the two different, and competing, sub-qualities mentioned above – predictability and flexibility. However, as is illustrated below, the respective importance of these two sub-qualities varies depending on the context.

1. *The Relation between Predictability and Flexibility*[53]

As defined above, predictability and flexibility are each other's opposites. However, not opposites in the sense of 'either or' or 'on or off'. Rather, they are the opposites in the sense that light is the opposite of darkness – a particular situation can be more light than dark, just as a rule can be more predictable than it is flexible.

Another way to distinguish between predictability and flexibility is to look at the factors taken into account in the respective type of approach. A predictable rule would normally be of the following kind: 'if A then X'. In contrast, a flexible rule would ordinarily take the following form: 'if A and B, plus a sufficient degree of C, then X'. For example, in the contracts Model outlined below (Chapter 12) one particular rule states that '[a] contract shall be governed by the law chosen by the parties'. Thus, if the parties choose Swedish law to be applied, then Swedish law will be applied. This is a highly predictable rule. In contrast, the rule of Article 9 of the same Model is flexible indeed:

53. For one perspective on flexibility versus predictability, see P. Hay, 'Flexibility versus Predictability and Uniformity in Choice of Law: Reflections on Current European and United States Conflicts Law', (1991) 226 *Recueil des cours*.

Article 9

1. This Article applies to contracts between a consumer and a business party, unless the business party demonstrates that it neither knew nor had reason to know that the consumer was concluding the contract in the capacity as a consumer, and would not have entered into the contract if it had known otherwise.
2. Subject to paragraphs 5 and 6, a consumer may bring proceedings in the courts of the state in which the consumer is habitually resident, unless the business party establishes that the consumer took the steps necessary for the conclusion of the contract in another state.
3. If the consumer's state of habitual residence was clear to the business party, the consumer may bring proceedings in the courts of the state in which the consumer is habitually resident, subject to paragraphs 5 and 6, even where the steps necessary for the conclusion of the contract were taken in another state.
4. Subject to paragraphs 5 and 6, the business party to the contract may bring proceedings against a consumer under this Convention only in the courts of the state in which the consumer is habitually resident.
5. This Article is not applicable where the business party took reasonable steps to avoid concluding contracts with consumers habitually resident in the consumer's state.
6. A choice of forum agreement between a consumer and the business party is to be respected only if the agreement is entered into after the dispute has arisen, or to the extent that the agreement permits the consumer to bring proceedings in a court other than the consumer's habitual residence.

As is clearly illustrated contrasting these two examples, it seems that predictable rules are more likely to also be simple (another desirable quality, see Chapter 3, section II.H) than flexible rules are.

Starting the discussion on a very general level, it can be noted that in constructing private international law rules we must carefully evaluate and balance the need for predictability and flexibility. The need for such balancing is firmly established. As noted by Lord Slynn, in the context of the flexible exception to the 'double actionability' test:

> Their Lordships, having considered all of these opinions, recognize the conflict which exists between, on the one hand, the desirability of a rule which is certain and clear [i.e. predictable] on the basis of which people can act and lawyers advise and, on the other, the desirability of the court having the power to avoid injustice by introducing an element of flexibility into the rule.[54]

Predictability might not always be worth the sacrifice of flexibility. For example, there is no problem in creating predictability by saying that the applicable law, regardless of which court decides the dispute, always is the law of, for example, the United States, regardless of where the parties are from or where the events in question took place. Yet doing so is doubtlessly undesirable. A good private international law rule must be flexible enough to adapt to the facts of the case in question; only then can fair, reasonable and just outcomes be promoted.

54. *Red Sea Insurance Co Ltd v. Bouygues SA* [1995] 1 AC 190, 206.

Similarly, while, for example, a constant and general application of *lex fori* certainly appears to lead to predictability, that is not really the sort of predictability that is a desired commodity in private international law, unless also the forum question is equally predictable, since the parties only would be able to predict the applicable law after the case had been attached to a certain court.

The need for flexibility has been acknowledged in literature. For example, Vischer discusses what he calls 'escape clauses' allowing a judge to 'deviate from a strict conflict rule if, under the circumstances of the case the rule leads to a result which is regarded as unfair but not necessarily contrary to public policy':[55]

> It is a fact that a legislation can never foresee all factual circumstances. New problems call for new solutions. It is an important experience of civil law States that the great codification of civil law have survived and retained their value. This is namely thanks to the provision of general clauses allowing to close legal gaps and adapt to changed circumstances and values. Those who consider security in law the primary object of legislation have blamed the legislator for the escape into general clauses ('Flucht in Generalklausel'). But only the apertures provided by general clauses can establish an equilibrium between security in law and judicial appreciation in the single case. What is true for the codification of substantive law has even greater validity for the codification of conflict of laws.[56]

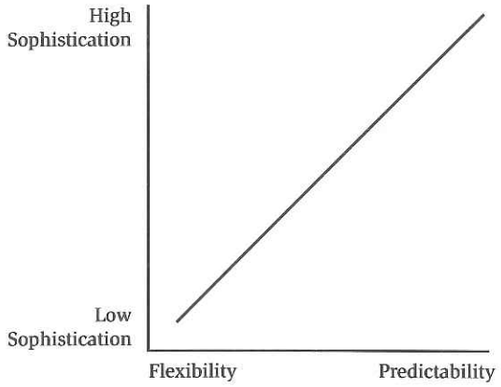
Furthermore, as is illustrated below, quite different factors are at play in relation to contracts, trademarks, copyright and defamation. It has therefore been deemed necessary to address these areas separately in this context. However, in relation to recognition and enforcement, judgments from contractual disputes, trademark disputes, copyright disputes and defamation disputes would involve the same considerations. Rules regulating the recognition and enforcement of foreign judgments must be both predictable and flexible. In practice, this is often achieved by laws outlining under which circumstances a state will recognize and enforce a foreign judgment, but at the same time providing for exception if the foreign judgment is contrary to the public policy of the state in which recognition and enforcement is sought.

2. *Contracts*[57]

As far as contractual situations are concerned, the relationship between predictability and flexibility can be illustrated by the graph (see Figure 3.1).[58]

55. F. Vischer, 'General Course on Private International Law', (1992-I) 232 *Recueil des cours* 106.
56. *Ibid.* 107–108.
57. This chapter is based on D. Svantesson, 'An Update on the Proposed Hague Convention on Exclusive Choice of Court Agreements', (2005) 21(1) *Computer Law and Security Report* 22.
58. Figure 3.1 may also be useful on a more general level as it illustrates that, if we see predictability as black and flexibility as white, most private international law rules would be some shade of grey.

Figure 3.1



While sophisticated[59] contracts, such as a multimillion dollar contract between Microsoft and Nokia, require a high level of predictability and a much lower level of flexibility, unsophisticated contracts, such as a low-value B2C contract, require a high level of flexibility and a lower level of predictability. The reason for this is primarily that high-value contracts between large corporations are invariably under the supervision of legally trained experts. This means that, in most cases, there is an inherent high level of legal awareness behind any such contract.[60] The parties may have negotiated and agreed upon a certain law to apply and a certain forum to decide any potential dispute. With that degree of planning, certainly amounting to genuine party expectations, the most important sub-quality of private international law rules is predictability – the parties expect their expectations to be met. In contrast, in low-value contracts between less sophisticated parties, such as among smaller businesses or between smaller companies and consumers or among consumers, the above-mentioned level of legal planning and awareness, and consequently genuine party expectations, are lacking – there are only constructive party expectations. In such circumstances, the importance of predictability is obviously at a minimum while the importance of flexibility is at its peak.

Particular considerations are present in relation to contracts between one sophisticated party and one unsophisticated party. In such contractual relations there are never, or very rarely, any real negotiations and all the legal planning is done by the sophisticated party. An emphasis on predictability, in such a case, may lead to the fulfilment of only one party's expectations – the stronger party's genuine party

59. No absolute line can be drawn between sophisticated and unsophisticated contracts. However, generally, it could be said that the level of sophistication of a contractual relation must be judged based on several different factors including: the parties' level of sophistication, the monetary value of the transaction and the extent of legal knowledge applied in forming the contract.
60. Since it allows the parties to make conscious decisions, this legal awareness is of greatest importance also in a situation where the parties are not evenly matched, and perhaps one party is seeking to impose certain conditions on the other party.

expectations would be met, while the weaker party's constructive party expectations would be unlikely to be met.[61]

On the other hand, a too strong emphasis on flexibility may create an undesirable degree of uncertainty. Such uncertainty may discourage business and, thus, amount to a barrier to e-commerce.

Determining the respective importance of predictability and flexibility in such a situation necessarily involves a value-judgment as to the respective rights of, for example, businesses and consumers: a topic reasonable people may disagree upon. It also involves practical considerations such as whether the stronger parties would be willing to contract at all if they were not allowed to dictate the terms, including the choice of the forum and choice of law.

However, whether one takes an idealistic approach wanting to safeguard the rights of the weaker party, or whether one takes a more pragmatic approach simply wishing to encourage e-commerce, one cannot ignore the inherently unequal bargaining powers present in many online contracts. One could argue that as long as the consumer was not coerced into the contract, despite the unequal bargaining powers it could represent both parties' will. However, such an argument would only be valid if two separate requirements were met: first, that the consumer was informed enough to evaluate the potential impact of the relevant contractual terms; and second, that the particular contractual terms in question were not common practice so that the consumer could obtain the same goods or services from another provider that did not try to impose the relevant contractual terms, or equally unfair contractual terms.

Elsewhere, I have suggested that in order to optimize the potential of e-commerce, legal rules must ensure: 'a healthy balance between the consumer's need for protection and the business' need to be able to conduct business in an effective manner'.[62] While this line of reasoning seems appropriate in the context of private international law, it may not be immediately clear how it can be applied in relation to the balance between predictability and flexibility. However, drawing upon some available statistics we can get an insight into consumer behaviour.

Approximately 46% of Internet users think that only about half of the content on the Internet is reliable and accurate.[63] Furthermore, '47 percent of respondents age 18 and older who have a credit card are very concerned or extremely concerned about credit card security when or if buying online.'[64] It must be noted that the use of credit

61. This can of course be avoided where the rules of private international law can be made clear to the businesses, while at the same time be structured so as to protect consumer interests. For example, a rule allowing consumers to always have B2C disputes settled under the law of the consumer's home state are of course prima facie predictable while at the same time providing protection for the consumer.
62. D. Svantesson, 'Optimising the Potential of E-Commerce: A Win-Win Solution', (2001) 3(10) *Internet Law Bulletin* 136.
63. USC Annenberg School Center for the Digital Future, *The 2014 Digital Future Report: Surveying the Digital Future – Year Twelve* (2014), 44 <http://www.digitalcenter.org/wp-content/uploads/2014/12/2014-Digital-Future-Report.pdf>.
64. *Ibid.* 76.

foreign websites in order to limit the amount of foreign content available to its citizens.[4] The effectiveness of this is dependent on the Government's control of Internet access. Thus, access to the global Internet (i.e., information located on servers outside the geographical sphere of the PRC) may, as discussed above, only be had through the national public telecommunications network, controlled by the Government.[5] This structure is significant on several levels. First, it is interesting to note that this method, if taken to the extreme (i.e., blocking access to all foreign websites), can arguably be seen as an alternative to aggressive extraterritorial claims of jurisdiction – foreign material that is blocked cannot cause direct local harm in the PRC, unless the blocking is circumvented. Thus, if blocking was to be taken to its extreme, there would be no need, or indeed any ground, for claims of extraterritorial jurisdiction. It is noteworthy that, so far, the PRC has not made any wide Internet-related jurisdictional claims, while, for example, United States,[6] France,[7] Australia,[8] Italy,[9] Germany,[10] Canada[11] and the United Kingdom[12] have all made such claims. Second, if a people's court were to exercise jurisdiction over a foreign individual based on an act committed outside the territorial sphere of the PRC, but deemed to have consequences within the PRC, the damage suffered, for example, to a person's reputation, would be limited if the website containing the damaging material had been blocked to the great masses.

4. For example, CNN, BBC, Washington Post, New York Times, Yahoo!, Amnesty International, Voice of America and foreign Falun Gong websites. However, the blocking of foreign websites is not static, but comes on and off unpredictably, and may not always affect the whole country. A more detailed discussion of the blocking practice of the PRC, can be found in L.A. Tsui, *Internet in China: Big Mama Is Watching You* (MA Thesis, University of Leiden, 2001) <http://www.lokman.nu/thesis/010717-thesis.pdf>, and *China's Internet 'Information Skirmish'* (US Embassy in Beijing) <http://beijing.usembassy-china.org.cn/report0100internet.html>. For more recent examples, see, e.g., the blocking of Twitter, Flicker, and Facebook (T. Branigan, 'China Blocks Twitter, Flickr and Hotmail Ahead of Tiananmen Anniversary', The London Guardian (online) <http://www.guardian.co.uk/technology/2009/jun/02/twitter-china> and R. Wauters, 'China Blocks Access to Twitter, Facebook after Riots', Washington Post (online) <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/07/AR2009070701162.html>). More generally, see, e.g., W. Zhang, 'Administration of the Internet Information Service in China', (2010) 12(3) *E Commerce Law and Policy* 3–5. Further to the above, in May 2011 China created a new office to manage Internet information called the State Internet Information Office. The new office will investigate and punish websites violating laws and regulations, and oversee service providers in their management of domain names, IP addresses, website registration and Internet access ('Internet oversight office powers up' China Daily 5 May 2011).
5. Interim Rules of the People's Republic of China on International Interconnection of Computer-based Information Networks (Promulgated on 25 April 2007), Art. 6.
6. See, e.g., *Playboy Enterprises Inc. v. Chuckleberry Publishing Inc.*, No. 79 Civ 3525 (SAS), 1996.
7. See, e.g., *International League against Racism & Anti-Semitism (LICRA) and the Union of French Jewish Students (UEJF) v. Yahoo! Inc.* County Court of Paris, 20 November 2000.
8. See, e.g., *Dow Jones & Company Inc. v. Gutnick* (2002) 210 CLR 575.
9. See, e.g., Court of Cassation – section V, Judgment No. 4741 (17 November–27 December 2000).
10. See, e.g., the so-called *Töben* case (BGH, Urteil vom 12. Dezember 2000, 1 StR 184/00, NJW 2001, 624).
11. See, e.g., the decision at first instance: *Bangoura v. Washington Post* (27 January 2004) OSCJ 03-CV-247461CM1.
12. See, e.g., *Berezovsky v. Forbes Inc.* [1999] E.M.L.R. 278.

I. JURISDICTION

Conflict of law questions including jurisdiction are some of the foremost legal challenges facing parties intending to use Chinese courts to redress their disputes.[13]

The fundamental jurisdictional rule in Chinese conflicts is that a civil suit against a Chinese citizen comes under the jurisdiction of the court at the place where the defendant is domiciled,[14] or if not the same, under the jurisdiction of the people's court at the place of his regular abode, or residence.[15] Similarly '[a] civil suit against a legal person or any other organization comes under the jurisdiction of the people's court at the place where the defendant is domiciled.'[16] The domicile of a citizen refers to the place of his or her registered permanent residence, and the domicile of a legal person or any other organization refers to the place of its main administrative office, or if not to be located, the place of its registration.[17] Note also that in civil cases, involving several defendants and coming under the jurisdiction of more than one court based on the rule stated above, each of those courts can claim jurisdiction.[18] Furthermore, in any situation where an action comes under the jurisdiction of more than one court, the plaintiff may file a suit at any of those courts.[19] Thus, the plaintiff has freedom of choice in relation to the selection of forum. The forum in which an action is first filed will have jurisdiction.[20]

However, there is no lack of exceptions, and a range of specific rules compliments the general rule. For example, Article 127 of the *Civil Procedure Law of the People's*

13. M.P. Ramaswamy, 'The Evolution and Status of Jurisdictional Measures Governing Foreign Parties and Internet Transactions in China', (3/2009) *Masaryk University Journal of Law and Technology* 445.
14. *Civil Procedure Law of the People's Republic of China (2012)*, Art. 21. This rule applies both in domestic and international disputes. See Q.J. Kong and M.F. Hu, 'The Chinese Practice of Private International Law', (2002) 3 *Melbourne Journal of International Law* 416.
15. *Civil Procedure Law of the People's Republic of China (2012)* Art. 21. This may be compare to Art. 20 of The Private International Law of the People's Republic of China (Model Law) (Sixth Draft): 'Subject to the exclusive jurisdiction provided for in this law or to the choice of the parties, the courts of the PRC shall have jurisdiction over a defendant in any case whose domicile or habitual residence is located within the territory of the PRC.' See also *Opinions (I-VII) of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*, 14 July 1992, The Supreme People's Court, para. 5 <http://www.isinolaw.com>: 'The habitual residence of the citizen refers to the place inhabited by the citizen for above one year after he leaves his place of domicile till the lawsuit except for the place for the citizen's hospitalisation.'
16. *Civil Procedure Law of the People's Republic of China (2012)*, Art. 21.
17. *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015)*, Art. 3.
18. *Civil Procedure Law of the People's Republic of China (2012)*, Art. 21.
19. *Ibid.* Art. 35.
20. For cases illustrating this, refer to *Notice of the Supreme People's Court on the Designation of Jurisdiction over the Dispute Case Concerning the Exclusive Sales Contract between Yanlin Dayuan Farm of Hunan Province v. Jiangxi Ligang Handcraft Co. Ltd*, 27 June 1995, The Supreme People's Court <http://www.isinolaw.com> and *Reply of the Supreme People's Court on the Jurisdiction over the Dispute Case on the Purchase and Sale Contract between Jiujiang Lushan District Coal Supply Station and Changed United Transport Company*, 25 July 1992, The Supreme People's Court <http://www.isinolaw.com>.

Republic of China provides for so-called construed jurisdiction (i.e., jurisdiction based on submission):

> If, after the people's court entertains a case, a party raises no objection to the jurisdiction of a people's court and responds to the action by making his defence, he shall be deemed to have accepted that this people's court has jurisdiction over the case, unless the case falls under the jurisdiction of another level or the exclusive jurisdiction.[21]

As highlighted by Kong and Hu, 'judicial practice shows that People's Courts take full advantage of this provision.'[22] In fact, it seems that submission by the parties to the jurisdiction of the court always override other jurisdictional grounds in Chinese judicial practice. Other complimenting rules are found in cases involving foreign elements – so-called '*shewai*' cases.

A. Definition of *Shewai* Cases

> *It is virtually impossible to convince a judge or lawyer in a civil country like China as to why service of process alone may give rise to jurisdiction.*[23]

The term '*shewai*' is not expressly defined in the legislation of the PRC. However, a Judicial Interpretation of the Supreme People's Court from 2015[24] provides rather clear guidelines. A case is classed as a *shewai* case if one or both parties are foreigners (including stateless persons, foreign enterprises or foreign organizations), or the regular residence of one or both parties are outside the territorial sphere of the PRC, or the subject-matter is located outside the territorial sphere of the PRC. Furthermore, a case is classed as a *shewai* case if the legal fact that the civil legal relationship between the parties establishes, changes or terminates outside the territorial sphere of the PRC. Although fairly clear, the definition of *shewai* gives rise to the following questions in relation to the Internet. First, can an e-commerce website located on a server within the territory of the PRC fall within the *shewai* category? Second, can an e-commerce website located on a server outside the territory of the PRC, but aimed at doing business in the PRC, fall within the *shewai* category?

The first question is easy to answer. Since all e-commerce operations (i.e., profit-making Internet information services) located on servers within the PRC must

21. *Civil Procedure Law of the People's Republic of China (2012)*, Art. 127(2). For an interesting case on this, refer to: *Sino-Add (Singapore) PTE.Ltd v. Karawasha Resource Ltd* (2001) Gaojin-Zhongzi-No. 257, the final judgment of Tianjin Higher People's Court. See further: M.P. Ramaswamy, 'The Evolution and Status of Jurisdictional Measures Governing Foreign Parties and Internet Transactions in China', (3/2009) *Masaryk University Journal of Law and Technology* 445, 452.
22. Q.J. Kong and M.F. Hu, 'The Chinese Practice of Private International Law', (2002) 3 *Melbourne Journal of International Law* 420.
23. A.A. Yuan, 'Enforcing and Collecting Money Judgments in China from a U.S. Judgment Creditor's Perspective', (2004) 36 *George Washington International Law Review* 770.
24. *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015)*, Art. 522.

have a business license issued by the PRC and must meet certain requirements,[25] such operations could not fit within the *shewai* category; they are Chinese by their very nature. The second question is slightly more complex and will presumably depend on the ownership of the e-commerce operation. If the website is operated by foreign owners, a potential dispute would be between the foreign operator and the Chinese party, and would thus fall within the *shewai* category. However, it is also possible for a dispute arising out of a Chinese contact with a website located on a server outside the territory of the PRC, to fall within the *shewai* category even if the website is operated by a Chinese business. This can, for example, be the case if the contract was formed at the location of the foreign server.

Finally two more rules are to be observed. The foreign party to a *shewai* case enjoys 'the same equal litigant rights and obligations as the citizens, legal persons and other organizations of the PRC',[26] and the *Civil Procedure Law of the People's Republic of China (2012)* further provides that where there are no special rules provided in relation to *shewai* procedures, other relevant provisions of the law will apply.[27]

Different rules apply in relation to jurisdictional claims over contractual relations and jurisdictional claims over situations involving defamation and intellectual property.

B. Contracts

> *[T]he establishment of jurisdiction is short on reasonableness in some cases.*[28]

Chapter XXIV of Part four of the *Civil Procedure Law of the People's Republic of China* supplies the rules of jurisdiction, specific for civil actions over contractual disputes involving foreigners or disputes over property rights against a defendant who does not reside within the territory of the PRC. Article 265 states that, if the defendant has a representative organization within the territory of the PRC, or has detainable property within the territory of the PRC, or the contract is signed or carried out within the territory of the PRC, or the object of litigation is within the territory of the PRC, a civil action against a defendant not residing within the territory of the People's Republic of China is under the jurisdiction of the court of the place where:

(1) the contract was signed;
(2) the contract was carried out;[29]
(3) the object of the litigation is located;

25. See, e.g., Measures on Internet Information Services (2000), Art. 6.
26. *Civil Procedure Law of the People's Republic of China* (2012) Art. 5(1). Note, however, that this right is subject to reciprocity, Art. 5(2).
27. *Civil Procedure Law of the People's Republic of China* (2012) Art. 259.
28. J. Huang and H.F. Du, 'Private International Law in the Chinese Judicial Practice in 2001', (2003) 2 *Chinese Journal of International Law* 416.
29. See, e.g., *Chamber of Japan in Shanghai v. Huida Co. (Hong Kong)* (1994) Higher People's Court of Zhejiang Province, and *Tianjin Native Products Import&Export Company v. A Belgian*

(4) the defendant has property that can be detained;[30]
(5) the infringements of rights have taken place;
(6) the representative organization of the defendant is located.

However, the parties to a foreign related contract have, with some limitations, the right to agree, in writing, to place the case under the jurisdiction of a court that has 'practical connections with the dispute.'[32] If no forum is selected, the rules outlined in Article 265 of the *Civil Procedure Law of the People's Republic of China (2012)* apply.

These rules are examined further in Chapter 9, section I.

1. *Limits on Exclusive Forum Selection*

In addition to the requirement of 'an actual connection with the dispute', mentioned above, there are also other limitations placed on contractual stipulations of the forum to have jurisdiction. Several Articles of *Contract Law of the People's Republic of China (1999)* make the validity of unfair contractual terms, such as some jurisdictional clauses in contracts of adhesion, questionable. For example, in defining what a contract is, Article 2 includes the necessity of 'equal status' between the parties. Furthermore, Article 3 states that 'neither party may impose its will on the other,'[33] Article 4 gives the parties the right to enter into a contract 'voluntarily' and Article 5 states that the parties have to abide by 'the principle of fairness'.

In light of these very general rules, it could be argued that what otherwise would have been a valid contract is not even considered a contract if there is an unreasonably unequal division of power between the parties. However, it seems rather far fetched to assume that the very existence of a power-imbalance between the parties would invalidate the contract, and there are no court decisions indicating that such a strict

Company (1992) Tianjin Intermediate People's Court (Both as outlined in: Q.J. Kong and M.F. Hu, 'The Chinese Practice of Private International Law', (2002) 3 *Melbourne Journal of International Law* 417).

30. For an example of a case where the forum in which the defendant has enforceable property was held to have jurisdiction, in competition with other possible forums, see *Dissent over Jurisdiction of Voyage Charter Dispute Concerning Dalian Huaxing Shipping Company's Action against Heisei Shoji Kaisha, Ltd. of Japan*, 17 March 1994, Xiamen Maritime Court <http://www.isinolaw.com>. See also *Hong Kong Baiyue Financial Services Co. v. Hong Kong Hugli Gourmet Co.* (1991) Guangzhou Intermediate People's Court, Guangdong Province, (as outlined in: Q.J. Kong and M.F. Hu, 'The Chinese Practice of Private International Law', (2002) 3 *Melbourne Journal of International Law* 417).
31. 'Actions brought on 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 fall under the jurisdiction of the people's courts of the People's Republic of China' (Art. 266 of the *Civil Procedure Law of the People's Republic of China (2012)*). See also *Opinions (I-VII) of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*, 14 July 1992, The Supreme People's Court, para. 305 <http://www.isinolaw.com>.
32. *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015)*, Art. 531(1).
33. *Contract Law of the People's Republic of China* (1999), Art. 3.

interpretation is correct. A more reasonable approach is to assume that the focus is not on the power-imbalance as such, but rather on the misuse of a power-imbalance.

Also contracts of adhesion may be governed by the provisions of the *Contract Law of the People's Republic of China (1999)* regulating standard contracts. Article 39 ensures that:

> [i]f standard clauses are used in making a contract, the party that provides the standard clauses shall determine the rights and obligations between the parties in accordance with the principle of fairness, and shall call in a reasonable manner the other party's attention to the exemptible and restrictive clauses regarding its liability, and give explanations of such clauses at the request of the other party.

'Standard clauses' means the clauses that are formulated in anticipation by a party for the purpose of repeated usage and that are not a result of consultation with the other party in the making of the contract.[34]

Furthermore, a standard term of a contract is deemed to be invalid where it exempts itself from the liability, imposes heavier liability on the other party or precludes the other party from its main rights,[35] all of which can obviously be the consequence of a forum, or law, selection clause. Finally, Article 41 provides some regulation for the interpretation of standard clauses. If there is a discrepancy between a standard clause and a non-standard clause, the latter shall prevail.[36] A standard clause shall be interpreted according to common understanding.[37] If a standard clause can be interpreted in more than one way, the interpretation shall not be made in favour of the party who provided the standard clause (*in dubio contra stipulatorem*).[38]

Based on the legislation mentioned above, it seems that in a situation where, for example, there is only one seller of a particular type of goods and that seller imposes an certain choice of forum and/or a choice of law clause on the buyer, such misuse of power-imbalance could be in violation of Articles 2, 3, 4, 5, 39 and/or 40. Furthermore, it is possible that a party's use of standard clauses governing choice of forum and/or choice of law to strongly limit its own liability, increase the liability of the other party or deprive the other party of any of its material rights would be deemed unlawful in accordance with Articles 5 and 40. There is, however, a paucity of judicial interpretations and court decisions illustrating how these provisions would work in an actual

34. *Contract Law of the People's Republic of China* (1999), Art. 39. The definition of 'standard terms' as found in Art. 39(2) can be compared to local legislations. For example, in Art. 2 of the Regulations of *Shanghai Municipality on the Supervision of Format Clauses in Contracts* (2001), it is provided that '[t]he format clause shall mean the clause that the provider of format clauses (hereinafter referred to as the "Provider") works out in advance for repeated use and does not negotiate with the other party in the conclusion of contract. The commercial advertisements, notices, statements, bulletins, vouchers, bills, etc. whose contents satisfy the requirements in the stipulations of an offer and the above provisions shall be deemed format clauses.' Note however, that this law only applies to B2C transactions.
35. *Contract Law of the People's Republic of China* (1999), Art. 40.
36. *Ibid.* Art. 41.
37. *Ibid.*
38. *Ibid.*

dispute.[39] Thus, their practical value has to be seen as somewhat unclear, or at least untested. On the other hand, there are older (i.e., pre-1999, and thereby predating the current contract law) judicial interpretations[40] and cases that discussed some of the principles behind the above-mentioned provisions. This is not strange as some of the principles behind the provisions discussed above date back to older contract laws.

In *Xu Haiqing (Respondant/Plaintiff) v. Changing Automobiles Repairing Factory (Appellant/Defendant) (summary)*,[41] the Court noted that '[t]he internal contracting of the enterprise in issue in the present case had been made on the basis of *equality, mutual benefit and voluntary consultation* [...] The contract therefore is valid' (emphasis added). Furthermore, in *Lin Yuehua v. Jingxie Corporation*,[42] it was argued that the manner in which a contract had been concluded was a violation of the principles of fairness and mutual benefit. However, there are also cases where perhaps these principles could have been discussed but were not. For example, in *Taiwan Fuyuan Enterprise Co. Ltd v. Xiamen Weige Wood Products Co. Ltd*,[43] the defendant's standard contract was accepted as valid without any discussion as to the plaintiff's possibility not to accept them.[44] In commenting on that case, Yang[45] noted that '[w]hen the consignor fills in such contract without objecting to the choice of law clause in the contract, which stipulates that international conventions will apply, then these conventions become binding on the consignor.'[46]

Further in *Contract Dispute of Taiwanese Hou Ren Shou Accusing Liu Yi of Transferring Contract Management Rights Over Hilly Lands Owned By The Countryside*

39. There is however one provision in the 2009 judicial interpretation of the Supreme People's Court on what can be regarded as 'a reasonable manner' in a standard clause stipulated in Art. 39 of the Contract Law of the People's Republic of China. Article 6(1) of the *Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China (2009)* stipulates, '[W]here, at the time of concluding a contract, the party providing the standard clauses adopted special characters, symbols, fonts and other signs sufficient to arouse the other party's attention to the content of the standard clauses regarding liability exemptions or restrictions in favor of the party providing the standard clauses, and make an explanation of the standard clauses according to the requirements of the other party, the people's court shall determine that the requirement of a reasonable manner in Article 39 of the Contract Law has been satisfied.'
40. See, e.g., 1(3) of *Opinions of the Supreme People's Court on issues in the implementation of the Economic Contract Law*, 17 September 1984, The Supreme People's Court <www.isinolaw.com>, mentioning the 'principles of equality and mutual benefit, reaching consensus through consultation and making compensation for equal value'.
41. *Xu Haiqing (Respondant/Plaintiff) v. Changing Automobiles Repairing Factory (Appellant/Defendant)*, 3 April 1991, Intermediate People's Court of Shanghai City <http://www.isinolaw.com>.
42. As reported in C.D. Paglee, *Contract Law in China: Drafting a Uniform Contract Law* (ChinaLaw Web) (on file with author).
43. *Taiwan Fuyuan Enterprise Co. Ltd v. Xiamen Weige Wood Products Co. Ltd*, 5 May 1996, Xiamen City Intermediate People's Court <http://www.isinolaw.com>.
44. Perhaps it was of relevance that the chosen law was an international convention to which the PRC was a party. On that ground it could be argued that the choice of law had to be seen as fair.
45. H.K. Yang, 'China Applied Law Research Institute of the People's Supreme Court'.
46. *Shanghai Zhenhua Harbour Machinery Co. Ltd v. United Parcel Service, United States for Damages Caused by Delay in International Express Carriage by Air*, 18 September 1995, The People's Court of Jinan District Shanghai <http://www.isinolaw.com> (brief analysis).

Collective Economic Organization (Original Jurisdiction),[47] a Taiwanese citizen argued that he had been misled into signing two contracts and that the defendants had taken advantage of his lack of knowledge of the laws and regulations of the PRC. The Court stated that '[p]laintiff Huang declared that the two defendants had signed illegal contracts with him as they knew Chinese laws and policies much better than he did. However, such reasons for the expiration of the contract are not enough.'[48] There was no mentioning of, or any reference made to, the principles discussed above in that case, and the provisions of the 1999 *Contract Law* did obviously not affect the outcome of the cases discussed above, as it was not adopted at the time. However, it is reasonable to assume that the fundamental attitude towards what constitutes a fair contract existed also before 1999.

In addition to the regulations of the *Contract Law of the People's Republic of China (1999)*, provisions relating to the general requirement of fairness in the performance of civil activities can also be found in the *General Principles of the Civil Law of the People's Republic of China*. For example, Article 59(2) gives a party the right to request that a People's Court deem an 'obviously unfair' civil act as null and void. Article 58 lists a few other categories of civil acts that shall be null and void. One of these categories is civil acts 'performed by a person against his true intentions as a result of cheating, coercion or exploitation of his unfavourable position by the other party.'[49] The application of this provision is exemplified in *Shenzhen Saige Trading Co. (Plaintiff) v. Li Jingyuan (Defendant)*[50] where the defendant entered into a contractual relation while knowing that he would be unable to perform his part of the contract. Furthermore, Article 4 of the *General Principles of the Civil Law of the People's Republic of China* states that '[i]n civil activities, the principles of voluntariness, fairness, making compensation for equal value, honesty and credibility shall be observed.'[51] This very general provision has been applied in relation to activities not contrary to other more specific laws. For example in *Maple v. Crocodile*,[52] a company had purchased clothes of one brand, ripped the labels off, attached new labels and sold the re-labelled clothes for approximately three times the price at which they had been purchased. The company was held liable based on Article 4 of the *General Principles of the Civil Law of the People's Republic of China* and on the *Anti-unfair Competition Law*.[53] A commentator[54] of the case stated that:

47. *Contract Dispute of Taiwanese Hou Ren Shou Accusing Liu Yi of Transferring Contract Management Rights Over Hilly Lands Owned By The Countryside Collective Economic Organization (Original Jurisdiction)*, 8 September 1997, People's Court of Ji Mei District <http://www.isinolaw.com>.
48. *Ibid.*
49. *General Principles of the Civil Law of the People's Republic of China (1986)*, Art. 58.
50. *Shenzhen Saige Trading Co. (Plaintiff) v. Li Jingyuan (Defendant)*, 20 August 1991, Intermediate People's Court of Shenzhen City, Guangdong Province <http://www.isinolaw.com>.
51. *General Principles of the Civil Law of the People's Republic of China (1986)*, Art. 4.
52. *Maple v. Crocodile*, 10 June 1998, Beijing First Intermediate People's Court <http://www.isinolaw.com>.
53. *Ibid.*
54. Analysis attached to the judgment as found on <http://www.isinolaw.com>.

> [t]here is no definite stipulation that the act of changing others' trademark without authority constitutes infringement in Chinese Law, but according to the principles of our General Rules of Civil Law and The Anti-unfair Competition Law, people who are engaged in civil activities must follow the principles of fairness and good faith and observe generally accepted commercial ethics. The judgment passed by the court had legal basis. Socialism market economy is virtually legal economy. In order to allow socialism market economy develop healthy and in an orderly way, any act of damaging others' commercial reputation and engaging in unfair competition with unfair means should be prohibited by law. In the course of developing and perfecting the socialist market economic system, any act without definite stipulation in law should be handled according to basic legal principles and spirit. Mature methods should be continuously developed in order to prepare for more perfect legislation in the future.

As a last line of defence for social justice and fairness, judicial offices should not ignore new cases and problems for the reason that there is no definite stipulation in law; on the contrary, they should adjust social economic relations and order according to legal principles within the limit of law.[55]

This quote is of great interest for several reasons. First, it is relevant in relation to the issue of the validity of contracts of adhesion. Second, as the quote is taken from the analysis of a case involving infringement of reputation, the quote itself and the application of Article 4 may be relevant in relation to defamation. Finally, it is interesting to note that the author of the analysis expresses the view that new phenomena (like the Internet) should be governed by the general fundamental principles that can already be found in the law. That way, existing general laws and regulations can prevent undesirable behaviour while specific legislation is being drafted.

In the context of consumers, there are additional protective arrangements, and the *Law of the People's Republic of China on the Protection of Consumer Rights and Interests* makes the validity of unfair contracts of adhesion even more questionable.[56] For example, Article 4 states that businesses and consumers have to follow the principles of 'voluntariness, equality, fairness, honesty and credibility',[57] and Article 26 is even more direct in stating that:

> [b]usiness operators may not, through format contracts, notices, announcements, entrance hall bulletins and so on, impose unfair or unreasonable rules on consumers or reduce or escape their civil liability for their infringement of the legitimate rights and interests of consumers.
> Format contracts, notices, announcements, entrance hall bulletins and so on with contents mentioned in the preceding paragraph shall be invalid.[58]

55. Analysis attached to *Maple v. Crocodile*, 10 June 1998, Beijing First Intermediate People's Court < http://www.isinolaw.com > .
56. That is, in relation to consumers.
57. *Law of the People's Republic of China on the Protection of Consumer Rights and Interests* (2013), Art. 4.
58. *Law of the People's Republic of China on the Protection of Consumer Rights and Interests* (2013), Art. 26.

The importance of the fairness of the transaction is further amplified in Article 10: 'Consumers shall enjoy the right of fair deal.'[59]

It should also be mentioned that local regulations provide additional provisions in relation to the validity of contracts of adhesion in B2C transactions. For example, *Regulations of Shanghai Municipality on the Supervision of Format Clauses in Contracts* (2001) provide that '[a]ny format clause shall not include the content waiving the following main rights of the consumers: [...] (3) Right of contract interpretation; (4) Right of filing lawsuits against contract disputes; and (5) Other main rights that the consumers enjoy according to law.'[60]

Furthermore, Article 9 of the *Regulations of Shanghai Municipality on the Supervision of Format Clauses in Contracts* (2001) ensures that the provider reminds the consumer of exemptions of, or restrictions to, the provider's liabilities. In addition, notices, statements and bulletins have to be displayed in obvious manners.[61]

Having said that, just as with contracts of adhesion in non-B2C contracts, there is a paucity of judicial interpretations and cases to illustrate the application of this protection. Thus, the practical value of these provisions is difficult to gauge.

In summary, it could be said that the PRC's approach towards jurisdictional claims over contractual situations is rather similar to that of many other states; the people's courts are equipped with the possibility of exercising jurisdiction over a wide range of situations, some of which must be seen as exorbitant. The jurisdictional grounds provided for, in relation to contracts in the PRC, are discussed in greater detail in Chapter 9, section I.

C. Defamation

> *Chinese rock singer Zang Tianshuo says he has no plans to appeal after winning less than anticipated damages in a case against two websites that ranked him among the 'Ten most ugly singers in China'. A Beijing court has ordered websites Wanwa.com and Netease.com to pay Zang about $1,500 and to apologize for damaging his reputation. The amount is far from the $11,000 compensation Zang had originally sued for, but for the moment he says he has no plans to file an appeal. 'At least they were ruled wrong by the court,' Zang told CNN. 'They should not say whatever they like about a person.' Zang, regarded as a pioneer in bringing rock music to China, said earlier that his life had 'fallen apart' after music site Wanwa.com conducted a poll on 'China's ten most ugly singers' last year. [...] He added that his mother had also been upset at the website's poll.*[62]

59. *Ibid.* Art. 10.
60. *Regulations of Shanghai Municipality on the Supervision of Format Clauses in Contracts* (2001), Art. 8.
61. *Ibid.* Art. 9. Note that this Article may be of relevance in relation to the manner, in which, choice of forum (and if allowed choice of law) provisions has to be displayed in online contracts.
62. P. Lai, *China rock star not to appeal 'ugly' case* (CNN, 26 September 2001) (< http://cnn.com.tr/2001/WORLD/asiapcf/east/09/26/china.singer/ > .).

The first Internet defamation case in China dates back to 2000.[63] A defamation case comes under the jurisdiction of the people's court at the place where the infringing acts were committed or at the place where the defendant is domiciled.[64] However, this can be misleading as 'the place of the infringement act includes the place of the occurrence of the infringement act and the place of the occurrence of the results of the infringement',[65] for the sake of determining the question of jurisdiction. This rule applies to all tort cases. As to the tort cases concerning the Internet, the place of the occurrence of the infringement act includes the place where the computer and related information devices used for the infringement are located, and the place of the result of the infringement includes the place where the infringed person is domiciled.[66] With regard to defamation cases, the place of the result of the infringement may be determined as the place of domicile of the defamed person.[67] Having noted that the place of the occurrence of the results of the infringement *may* be determined as the place of domicile of the defamed person, we must obviously question what other place(s) may also be the place of the occurrence of the results of the infringement. However, no official guidance has been found to help clarify this important question. Fu and Cullen state that '[a] defamatory statement must be published for defamation to have occurred. [...] A plaintiff can sue once a defamatory statement has been transmitted to a third party.'[68] While Fu and Cullen do not provide any reference to support this statement, and their writing on defamation draws heavily upon Common Law principles of defamation law,[69] it seems reasonable to assume that the 'place of the occurrence of the results of the infringement', if not defined as the place of domicile of the defamed person, is the place where the defamatory material is received by a third

63. *Max Computer Station Inc v. Wang Hong Life Times & PC World* (2000), Beijing 1st Intermediary Court. See: G.J.H. Smith (ed.), *Internet Law and Regulation* (4th edn, London: Sweet & Maxwell, 2007): 560.
64. *Civil Procedure Law of the People's Republic of China (2012)*, Art. 28. Note that although Art. 28 primarily regulates domestic disputes, Part Four of the *Civil Procedure Law of the People's Republic of China (2012)* supplies no exception from Art. 28 in relation to *shewai* cases, and thus, Art. 28 applies also in relation to *shewai* cases. This may be compared to Art. 32 of The Private International Law of the People's Republic of China (Model Law) (Sixth Draft): 'The courts of the PRC shall have jurisdiction over an action arising from a tortuous act, if the place where the act is committed or the result of the act occur is within the territory of the PRC.'
65. *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015)*, Art. 24. See also *Reply of the Supreme People's Court to the Questions in the Trial of the Cases Concerning the Right of Reputation*, promulgated 7 August 1993, The Supreme People's Court <http://www.isinolaw.com>,and *Opinions (I-VII) of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*, 14 July 1992, The Supreme People's Court, para. 28 <http://www.isinolaw.com>.
66. *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2015)*, Art. 25.
67. *Interpretation of the Supreme People's Court on the Trial of the Case Concerning the Right of Reputation*, promulgated 15 September 1998, The Supreme People's Court, <http://www.isinolaw.com>.
68. H.L. Fu and R. Cullen, *Media Law in the PRC* (Hong Kong: Asia Law & Practice Publishing Ltd, 1996): 195.
69. Which may very well be an appropriate approach if their assertion about 'the tendency of PRC defamation law to track the Common Law of defamation' (H.L. Fu and R. Cullen, *ibid.*) is correct.

party or where the defamatory material enters into the mind of a third party.[70] These definitions are obviously of great relevance in an online context.

In conclusion, the rules mentioned above make it certain that an action of Internet defamation may come under the jurisdiction of either one of these people's courts:

(1) the people's court where the defamatory acts were committed;[71]
(2) the people's court where the plaintiff's reputation was damaged (i.e., where the results of the infringing acts occurred);[72]
(3) the people's court where the plaintiff is domiciled; or
(4) the people's court where the defendant is domiciled.

Finally it should be observed that the plaintiff is, as noted above, free to choose the forum if the matter comes under the jurisdiction of more than one people's court.

The approach taken in the PRC towards jurisdiction over defamation could in summary be said to be very accommodating indeed, and rarely would a people's court find itself prevented from exercising jurisdiction. The different ground upon which the people's courts may exercise jurisdiction over Internet defamation are discussed further in Chapter 9, section I.

D. Intellectual Property

The overall analysis of the statutory evolution and judicial contribution in China relating to jurisdictional questions involving foreign parties and internet transactions challenges the myth that China may not be prepared to meet emerging conflict of law challenges.[73]

Jurisdiction in trademark matters will be determined both by reference to the tort-specific rules mentioned above and by the general rules for *shewai* cases also described above. Those discussions will not be repeated here. However, some relevant questions of subject-matter jurisdiction arise:

> Trademark infringement cases are normally tried by intermediate courts in major cities where the infringer has its domicile, or the infringing act takes place; only a limited number of district courts (usually at the county level or the district level in

70. Also Fu and Cullen's statement fails to clarify this distinction.
71. In an off-line context, one could reasonably suggest that the printing of the defamatory material is the infringing act. However, there simply is no equivalent in an on-line context. Consequently, in the absence of cases addressing this point, a degree of uncertainty exists in regard to the proper application.
72. As discussed above, also the definition of this 'place' is surrounded by a lack of clarity.
73. M.P. Ramaswamy, 'The Evolution and Status of Jurisdictional Measures Governing Foreign Parties and Internet Transactions in China', (3/2009) *Masaryk University Journal of Law and Technology* 445, 464.

The Chinese approach in this area is examined further in Chapters 9, sections I.R and I.S.

II. DECLINING JURISDICTION

Declining to exercise jurisdiction is a topic which is both intellectually challenging and of great practical importance.[81]

As in many, not to say most, other countries following the Civil Law tradition, the doctrine of forum non conveniens is rarely, if ever, applied in the PRC.[82] However, this does not mean that there are no instances where a People's Court may choose to decline exercising jurisdiction. A prior foreign judgment may prevent the same matter from being heard in a People's Court. In the analysis attached to *Huigao Yuntong Co. Ltd v. Uchida Electronics Co. Ltd and the Uchida Electric Appliances Manufacturing (Xiamen) Co. Ltd for Joint Fraud and Act of Tort*,[83] Yang[84] notes that '[a]ccording to the principle that "one case is not to be brought to court twice for suit", the plaintiff is not in the capacity to file a suit against the same defendant for a second time at any court with the same or a different cause of action on the basis of the same fact.'[85]

However, this principle is not always upheld. In *Fujian Provincial Higher People's Court et al. Involving a Loan Contract*,[86] the Intermediate People's Court of Guangzhou City held that since the Hong Kong decision, at the time, could not be directly executed in the PRC, the case could be heard in the PRC. The Court also noted that the parties had not made any exclusive choice of forum (although the selected law was Hong Kong law), and that the plaintiff's legal rights would not be safeguarded unless an action could be brought in the PRC, where the defendants had enforceable property.

On a general level it can be noted that, while Chinese law does not expressly address *lis alibi pendens*, the doctrine is recognized in the practice of the people's courts. In this context it is interesting to note Kong and Hu's assertion that '[i]t is not difficult to observe that People's Courts choose to accept or reject the doctrine of *lis alibi pendens* depending on whether the treatment would be favourable to the Chinese party.'[87] More recently, Ramaswamy has noted that '[a]lthough it is generally considered that the Chinese law does not address the doctrine of lis pendens, it is argued the People's Courts have taken diverse approaches to the question of recognition of the doctrine.'[88]

81. P.B. Carter, 'General Editor's Preface', in J. Fawcett (ed.), *Declining Jurisdiction in Private International Law* (Oxford: Clarendon Press, 1995).
82. Note, however, that Art. 51 of The Private International Law of the People's Republic of China (Model Law) (Sixth Draft) envisages the adoption of the doctrine of forum non conveniens.
83. *Huigao Yuntong Co. Ltd v. Uchida Electronics Co. Ltd and the Uchida Electric Appliances Manufacturing (Xiamen) Co. Ltd for Joint Fraud and Act of Tort*, 5 August 1995, Fujian Provincial Higher People's Court <http://www.isinolaw.com>.
84. Of the China Applied Law Research Institute of the Supreme People's Court.
85. H.K. Yang's analysis attached to *Huigao Yuntong Co. Ltd v. Uchida Electronics Co. Ltd and the Uchida Electric Appliances Manufacturing (Xiamen) Co. Ltd for Joint Fraud and Act of Tort*, 5 August 1995, Fujian Provincial Higher People's Court <http://www.isinolaw.com>.
86. *Fujian Provincial Higher People's Court et al. Involving a Loan Contract*, 13 April 2000, Intermediate People's Court of Guangzhou City <http://www.isinolaw.com>.

III. CHOICE OF LAW

Just like a hungry person is not choosy about his food, the late Qing government studied and introduced whatever western law they happened to know.[89]

The choice of law rules of the PRC may point to foreign law being applicable in *shewai* cases. However, the application of foreign law may, similar to many other states, be prevented if it violates 'the public interest of the People's Republic of China.'[90] Closely connected to the public interest exception, is the issue of fraudulent evasion (*fraude à la loi*). Fraudulent evasion refers to a party's attempt to break existing connecting factors with one forum, or attempts to create connecting factors with another forum, in order to circumvent actual natural connections. This can, for example, be done by changing place of domicile or residence, moving a website from one server to another changing the physical location of a server or simply by downloading something onto your laptop after crossing the geographical border to another country. The relative anonymity of online transactions creates an ideal environment for fraudulent evasions. With this in mind, fraudulent evasion is obviously of importance for the scope of this book. Chen provides an analysis of the attitude towards fraudulent evasion in the PRC:

> Though there are no known statutory enactments nor reported practices on this topic in China, Chinese commentators are of the opinion that if new connecting factors are created for the sole purpose of evading the application of a specific domestic Chinese law, then a transaction which may otherwise be valid under the normal Chinese conflicts rules, will be deemed void under the doctrine. On the other hand, if the purpose of the evasion is to escape the application of a foreign law, then the validity of the evaded law to govern the event will depend on the appropriateness of that foreign law from a Chinese perspective. Thus, if a couple leaves one country to avoid a prohibition against interracial marriages, and marries in a third country, the marriage will be recognized in China. [...] By

87. Q.J. Kong and M.F. Hu, 'The Chinese Practice of Private International Law', (2002) 3 *Melbourne Journal of International Law* 421–422.
88. M.P. Ramaswamy, 'The Evolution and Status of Jurisdictional Measures Governing Foreign Parties and Internet Transactions in China', (3/2009) *Masaryk University Journal of Law and Technology* 445, 457.
89. Z.M. Wang, *The Civil Law Tradition in China and its Future Development* (Department of Law Tsinghua University Beijing, The People's Republic of China) (on file with author).
90. *General Principles of the Civil Law of the People's Republic of China (1986)*, Art. 150. 'The doctrine is vaguely defined by Chinese commentators as to exclude the application of foreign law if it "infringes on China's sovereignty, damages the security, violates the fundamental policy for developing science and technology, is harmful to the public order and moral, as well as committing a serious violation to mandatory laws".' (T.P. Chen, 'Private International Law of the People's Republic of China: An Overview', (1987) 35 *The American Journal of Comparative Law* 455).

> contrast, the evasion of a foreign law which China considered appropriate will lead to China's upholding of that law.[91]

In recent years, China has made progress to regulate fraudulent evasion. Article 11 of the *Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I)* stipulates that the people's court shall rule the foreign law intended not be applied if a party intentionally creates connecting factors in a foreign-related civil relationship to evade the mandatory provisions of the law and/or administrative regulations of the PRC.[92] Further support for the regulation of fraudulent evasion is found in Article 13 of the proposed *The Private International Law of the People's Republic of China* (Model Law) (Sixth Draft): 'Where the parties intentionally evade the mandatory or prohibitive provisions of the law of the PRC, the law intended by the parties shall not apply.'

Having established that commentators already acknowledged the existence of the doctrine of fraudulent evasion back in 1987, and that a judicial interpretation of the Supreme People's Court and a draft legislation arguably representing the future direction of private international law in the PRC contain the doctrine, it is reasonable to assume that the doctrine of fraudulent evasion applies in China. It should, however, be noted that Chen's analysis relates to domestic law in general, while the judicial interpretation and the draft *Private International Law of the People's Republic of China* only refer to *mandatory or prohibitive* legal provisions of domestic law.

On 28 October 2010, the Standing Committee of China's National People's Congress adopted the *Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations*. That law came into effect on 1 April 2011. Article 2 makes clear that this new law shall govern the choice of law in foreign-related civil relations. However, Article 2 also makes clear that choice of law rules found in other pieces of legislation will still apply. Thus, the discussion below involves both this new legal instrument and principles stemming from older PRC law.

Article 3 caters for party autonomy by stating that '[t]he parties concerned may explicitly choose the laws applicable to foreign-related civil relations according to law.' However, the *Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations (2011)* also emphasizes that policy considerations may override the parties' choice.[93]

Finally, by way of introduction, Article 2 highlights that where no applicable choice of law rules can be found in either this new law or in other law, the choice of law should nominate the law that has the closest relation with the dispute.

91. T.P. Chen, 'Private International Law of the People's Republic of China: An Overview', (1987) 35 *The American Journal of Comparative Law* 459.
92. *Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I) (2012)*, Art. 11.
93. *Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations* (2011), Arts 4 and 5.

Having noted these limitations placed on the application of foreign law, we can examine the choice of law rules of the PRC in more detail, particularly how they deal with Internet contracts, intellectual property and defamation.

A. Contracts

> *To many foreigners (and probably to many Chinese as well), the People's Courts are mysterious, arbitrary, and unpredictable.*[94]

The parties to a contract involving foreign interests are free to choose the law applicable to disputes regarding the contract, except as otherwise stipulated by the laws of the PRC.[95] This important principle is re-emphasized in Article 41 of the *Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations (2011)*:

> The parties concerned may choose the laws applicable to contracts by agreement. Where the parties fail to choose the applicable laws, the laws at the habitual residence of the party whose fulfillment of obligations can best reflect this contract or other laws that have the closest relation with this contract in question shall apply.[96]

This provision is, however, not applicable in relation to B2C contracts. In such contracts, the *Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations (2011)* extends particular protection to the consumer:

> The laws at the habitual residence of consumers shall apply to consumer contracts. Where a consumer chooses the laws at the locality of the provision of goods or services as applicable laws or where an operator has no relevant business operations at the habitual residence of the consumer, the laws at the locality of the provision of goods or services shall apply.[97]

Contracts relating to Sino-foreign equity joint ventures, Sino-foreign cooperative joint ventures and exploration and development of natural resources that are performed within the PRC shall, however, always be governed by the laws of the PRC.[98]

There are no requirements for any connection between the chosen law and the parties or the transaction, but the choice must be explicit and made orally or in writing.[99] Although Article 126 of the *Contract Law of the People's Republic of China*

94. A.A. Yuan, 'Enforcing and Collecting Money Judgments in China from a U.S. Judgment Creditor's Perspective', (2004) 36 *George Washington International Law Review* 763.
95. *General Principles of the Civil Law of the People's Republic of China (1986)*, Art. 145 and *Contract Law of the People's Republic of China (1999)*, Art. 126.
96. *Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations* (2011), Art. 41.
97. *Ibid.* Art. 42.
98. *Contract Law of the People's Republic of China (1999)*, Art. 126.
99. Q.J. Kong and M.F. Hu, 'The Chinese Practice of Private International Law', (2002) 3 *Melbourne Journal of International Law* 429.

(1999) states that '[the parties] may choose a country's law as an applicable law', [100] the chosen law must not be the law of a nation, but can also be an international agreement. For example, in *Shanghai Zhenhua Harbour Machinery Co. Ltd v. United Parcel Service, United States*,[101] the parties had stipulated that the *Warsaw Convention* and the protocol to amend the *Warsaw Convention* would be applied to any dispute. This raises an important question: Does the convention chosen by the parties to govern the contract have to be one to which the PRC is a party? In both the actual judgment and the attached analysis,[102] significance was attached to the fact that the PRC has acceded to the convention in question. However, in discussing the clause stipulating the applicability of the *Warsaw Convention*, the judgment states that these provisions were clearly printed on the back of the defendant's airbill, and shall be deemed agreeable to both parties Furthermore, Yang notes that:

> [w]hen the consignor fills in such contract without objecting to the choice of law clause in the contract, which stipulates that international conventions will apply, then these conventions become binding on the consignor. Thus, the parties to the contract may be considered to have chosen the laws governing the contract. Under Article 145 (1) of the General Principles of the Civil Code of the People's Republic of China, the parties to a contract involving foreign interests may choose the law governing the resolution of their contractual disputes except as otherwise provided by law. Therefore, the law governing the substantive issues should be the Warsaw Convention and the Protocol to Amend the Warsaw Convention.[103]

Although the fact that the PRC is a party to the *Warsaw Convention* and the protocol to amend the *Warsaw Convention* was discussed in the case, it cannot be concluded with certainty that *only* conventions to which the PRC is a party may be chosen as applicable law. In fact, Article 9 of the *Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I)* explicitly stipulates that unless in contrary to the public interest or the mandatory provisions of the law and/or administrative regulations of the PRC, the people's court may decide upon the civil relationships between the parties according to an international treaty which has not taken effect in the PRC if the parties concerned refer to that international treaty in their contract.[104] Kong and Hu also state that '[the parties may choose to apply

100. W. Luo, *The Contract Law of the People's Republic of China: With English Translation and Introduction*, Chinese Law Series, vol. 2, (New York: William S. Hein & Co., 1999).
101. *Shanghai Zhenhua Harbour Machinery Co. Ltd v. United Parcel Service, United States*, 18 September 1995, The People's Court of Jinan District Shanghai <http://www.isinolaw.com>.
102. Provided by H.K. Yang, China Applied Law Research Institute of the People's Supreme Court.
103. *Shanghai Zhenhua Harbour Machinery Co. Ltd v. United Parcel Service, United States*, 18 September 1995, The People's Court of Jinan District Shanghai <http://www.isinolaw.com> (brief analysis).
104. *Interpretation of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I) (2012)*, Art. 9.

Chinese law, foreign law, or even international treaties and customary international law to the resolution of their contractual disputes.'[105]

Furthermore, there are no time limitations as to the parties' choice:

> In Hong Kong Baiyue Financial Services Co. v Hong Kong Hungli Gourmet Co, the parties agreed to apply Hong Kong law to their contract. However, in the proceeding, the parties instead chose Chinese law as the applicable law. Consequently, the People's Court applied Chinese law.[106]

In the absence of a valid choice of law clause, the 'law of the country to which the contract is most closely connected shall be applied.'[107] According to Zheng, '[t]his rule ordinarily results in the application of the law of the place where the contract is made or the law of the place of performance. Some regional rules, however, contain different provisions.'[108] Furthermore, Kong and Hu state that in determining which law is most closely connected to the contract 'People's Courts take into account the nationalities and domiciles of [the] parties, the place where the contract is concluded or performed, and the place where the disputed object is situated.'[109]

In summary, the PRC's approach in relation to choice of law in contractual situations is accommodating party autonomy in the same manner as most other states, and providing a 'closest connection' solution in the absence of a valid choice by the parties. These approaches are discussed in more detail in Chapter 9, section III.

1. *Limits on the Selection of Applicable Law*

The absolute majority of the limitations placed on the choice of forum, discussed in Chapter 7, section I.B.1 are also applicable to choice of law clauses, and will not be repeated here. However, some additional rules are of relevance. Article 16(2) of the Consumer Protection Law states that a B2C contract 'shall not contravene the provisions of laws and regulations.'[110] Furthermore, Article 16(1) of that law provides that '[b]usiness operators shall, in their supply of commodities and services to consumers,

105. Q.J. Kong and M.F. Hu, 'The Chinese Practice of Private International Law', (2002) 3 *Melbourne Journal of International Law* 429.
106. *Ibid.* 428 (footnote omitted).
107. *General Principles of the Civil Law of the People's Republic of China (1986)*, Art. 145 and *Contract Law of the People's Republic of China (1999)*, Art. 126.
108. Zheng, 'Private International Law in the People's Republic of China: Principles and Procedures', (1987) 22 *Texas International Law Journal* 239. As the current *Contract Law of the People's Republic of China (1999)* was introduced well after that Zheng's Article was published, and one of the main aims with the introduction of the Contract Law of the People's Republic of China was to eliminate regional differences in the contract law of the PRC, it might very well be that the regional rules that Zheng refers to have been repealed.
109. Q.J. Kong and M.F. Hu, 'The Chinese Practice of Private International Law', (2002) 3 *Melbourne Journal of International Law* 429.
110. *Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013)*, Art. 16(2). It has to be assumed that this refers to 'laws and regulations' of the PRC.

fulfil their obligations stipulated in this Law and other laws and regulations concerned.'[111] Thus, it seems that mandatory laws of the PRC are applicable and overriding in B2C contracts involving consumers of the PRC. Indeed, as also is clear from the 2011 law, it even seems possible to argue that the laws of the PRC cannot be departed from in B2C contracts involving consumers of the PRC, and choice of law clauses seem likely to be deemed invalid. Such a conclusion is arguably supported by Article 3 of the *Law of the People's Republic of China on the Protection of Consumer Rights and Interests*: 'Business operators shall, in their supply of commodities produced and sold by them or services to consumers, abide by the present law, or abide by other relevant laws and regulations in absence of stipulations in the present law.' In addition, Article 101(18) of *The Private International Law of the People's Republic of China* (Model Law) (Sixth Draft) makes clear that, with respect to a consumer contract, the law to apply is that of the place where the consumer is domiciled or ordinary resident.

B. Defamation

> *Freedom of expression suffered further restrictions in 2003. In May, almost three years after Internet activist Huang Qi was first detained, a court in Sichuan province sentenced him to a five-year prison term on charges of subversion. He was the first webmaster to be sentenced in China. Between September and November, many others were apprehended or sentenced for posting political opinions on bulletin boards and chat rooms. Yang Zili and three other young intellectuals were sentenced to prison terms of eight and ten years. Chinese users cannot access foreign sites that government officials consider 'sensitive,' domestic sites are irregularly shut down, and sites are not allowed to publish news that has not been officially cleared. Monitoring and censorship of electronic mail and bulletin boards is routine, and China is reportedly training 'cyber police' to monitor the activities of Chinese activists who live outside of China. Chinese officials routinely censor media reports on many subjects.*[112]

Article 146(1) of the *General Principles of the Civil Law of the People's Republic of China* states that '[t]he law of the place where an infringing act is committed shall apply in handling compensation claims for any damage caused by the act.' In addition, the same Article also provides for an exception for this general rule: 'If both parties are citizens of the same country or have established domicile in another country, the law of their own country or the country of domicile may be applied.'

111. *Law of the People's Republic of China on the Protection of Consumer Rights and Interests (2013)*, Art. 16(1).
112. 'Human Rights Overview (January 1, 2004): China' (2004) *Human Rights Watch*, <http://www.hrw.org/legacy/english/docs/2003/12/31/china7001.htm>. See also: O. Lam, China Human Rights Webmaster Sentenced to Three Years (27 November 2009) <http://advocacy.globalvoicesonline.org/2009/11/27/china-human-rights-webmaster-sentenced-to-three-years/> and Uyghur Webmasters Sentenced (28 July 2010), <http://www.rfa.org/english/news/uyghur/webmasters-07282010170425.html>.

While this provision remains in force, Article 51 of the *Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations (2011)* makes clear that priority should be given to this more recent piece of legislation over Article 146 of the *General Principles of the Civil Law of the People's Republic of China* where there are inconsistencies.

Interestingly, the *Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations (2011)* contains a provision dealing specifically with Internet defamation. Article 46 reads as follows:

> Where such personal rights as the right of name, portrait, reputation and privacy are infringed upon via network or by other means, the laws at the habitual residence of the infringed shall apply.[113]

This approach is discussed in depth in Chapter 9, section III.I.

C. Intellectual Property

> *Intellectual property rights (IPRs) have been acknowledged and protected in the PRC since the late 1970s when the Country adopted a new policy of reform and opening up to the world.*[114]

Chapter VII of the *Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations (2011)* contains three provisions dealing specifically with choice of law in relation to intellectual property rights. Those provisions are reproduced here and discussed further in Chapter 9, section III.H:

> **Article 48**
>
> The laws at the locality where protection is claimed shall apply to the ownership and contents of the intellectual property right.
>
> **Article 49**
>
> A party may choose the laws applicable to the assignment and licensed use of intellectual property right by agreement. Where the parties fail to choose the applicable laws, the relevant provisions on contracts of this Law shall apply.
>
> **Article 50**
>
> The laws at the locality where protection is claimed shall apply to the tort liability for intellectual property right, and the parties concerned may also choose the applicable laws at the locality of the court by agreement after the tortious act takes place.

113. *Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations (2011)*, Art. 46.
114. Z. Huo, 'China's Codification of Conflicts Law: Latest Efforts', (September 2010) 51(3) *Seoul Law Journal* 279–323, at 308.

I. THE RELEVANT EUROPEAN INSTRUMENTS

> *[T]he Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.*[4]

There are several relevant European instruments in place. The ones to varying degrees discussed below include the *Brussels I bis Regulation*, the *new Lugano Convention*, the *Brussels Convention/Lugano Convention*, the *Rome I Regulation*, the *Rome Convention*, the *Rome II Regulation*, the *Directive on Unfair Terms in Consumer Contracts*, the *Directive on Consumer Rights*, the E-commerce Directive, the *Regulation establishing a European Small Claims Procedure*, the *Directive on consumer ADR and Regulation on consumer ODR*, the *European Convention on Human Rights*, the *Proposal for a common European Sales Law* and the proposals for *Directives concerning contracts for the supply of digital content and concerning contracts for the online and other distance sales of goods*. Other European instruments, such as the *2005 Framework Decision on Financial Penalties*,[5] the *Regulation on Uncontested Claims*,[6] the *Trade Mark Regulation*[7] and the *2009 Injunction Directive*,[8] that all potentially impact on areas of concern in this book, have been left outside the coverage provided here due to space restrictions.

4. Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('*Rome II*'), Recital 7.
5. Council Framework Decision 2005/214 (24 February 2005) on the application of the principle of mutual recognition to financial penalties.
6. Regulation No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims. For a discussion of this instrument in an e-commerce setting, see D. Kloza, 'E-Commerce and the Recognition and Enforcement of Judgements in the EU – Latest Developments', (1/2010) *Masaryk University Journal of Law and Technology* 21-33.
7. EC Regulation 40/94 on the Community trade mark [1994] OJ L11/1. See, P. Stone, *EU Private International Law* (Cheltenham: Edward Elgar Publishing Ltd, 2006): 148–151.
8. Directive 2009/22, 23 April 2009, on injunctions for the protection of consumers' interests. In the context of that Directive, it will be relevant to follow the development of Case C-191/15: Request for a preliminary ruling from the Oberster Gerichtshof (Austria) lodged on 27 April 2015 – *Verein für Konsumenteninformation v. Amazon EU Sàrl* (OJ C 221, 6 July 2015, pp. 3–4). One of the questions referred to the CJEU is as follows: 'In an action for an injunction within the meaning of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests must the law applicable be determined in accordance with Art. 4 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) where the action is directed against the use of unfair contract terms by an undertaking established in a Member State that in the course of electronic commerce concludes contracts with consumers resident in other Member States, in particular, in the State of the court seised?' (footnotes omitted).

A. Brussels I *bis* Regulation[9] /New Lugano Convention[10]

> *The 1997 proposal for new jurisdiction rules was met with a long and contentious debate that ended on 22 December 2000, when the Council of the EU issued the Brussels Regulation. It is significant that the form chosen was a regulation, binding in its adopted form on all Member States, rather than a convention or a Directive.*[11]

The *Brussels I bis Regulation*, *along with* the *Brussels I Regulation* and the 1968 *Brussels Convention* before it, address jurisdiction as well as recognition and enforcement amongst the Member States of the European Union.

The 1968 *Brussels Convention* could be said to be a closed double convention. Such a description aims at highlighting that the Convention regulates jurisdiction as well as recognition and enforcement, and that only the jurisdictional grounds provided in the Convention are viewed as valid. The two versions of the Regulation that from 2002 largely have replaced the 1968 *Brussels Convention*,[12] adopt the same structure as its predecessor. However, in some circumstances, the rules of the Regulation will also affect claims against persons not domiciled in an EU Member State.[13]

As the *Brussels I Regulation*, now *Brussels I bis Regulation*, only applies amongst EU Member States, the modernization it provides needed to be replicated in relation to those countries that followed the Lugano Convention. As a result of this need, a *new Lugano Convention*[14] was drafted reflecting the changes made from the *Brussels Convention* (which is mirrored in the old *Lugano Convention*) to the *Brussels I Regulation*. This *new Lugano Convention* came into force 1 January 2010 between the Member States of the European Union (including Denmark) and Norway. From 1 January 2011, it also applied in relation to Switzerland, and it became applicable in

9. Council Regulation (EC) No. 1215/2012, 12 December 2012, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
10. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (deposited with the Government of the Swiss Confederation) 30 October 2007: Lugano.
11. M. Berliri, 'Jurisdiction and the Internet, and European Regulation 44 of 2001', in D. Campbell and S. Woodley (eds), *E-Commerce: Law and Jurisdiction* (The Hague: Kluwer Law International, 2003): 6.
12. See Brussels I bis Regulation 1215/2012, Recital 9: 'The 1968 Brussels Convention continues to apply to the territories of the Member States, which fall within the territorial scope of that Convention and which are excluded from this Regulation pursuant to Article 355 of the TFEU.' As Denmark does not participate in the adoption of Regulations in the field of Title IV of the Amsterdam Treaty (Arts 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community), and is therefore not bound by the Regulation, which binds the other EU Members, a special agreement had to be concluded in 2005 between the European Community and Denmark (see OJ L 299, 16.11.2005, pp. 62–70) in order to provide that the provisions of the Regulation apply to the relations between the Community and Denmark. See also: Brussels I bis Regulation 1215/2012, Recital 41.
13. See Brussels I bis Regulation 1215/2012, Recital 14.
14. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (deposited with the Government of the Swiss Confederation) 30 October 2007: Lugano.

Iceland on 1 May 2011. Consequently, what is said below about the provisions of the *Brussels I bis Regulation* is equally applicable to the provisions of the *new Lugano Convention*.

The discussion below is focused on the *Brussels I bis Regulation*. This is of course natural given that, since 10 January 2015, it replaces the *Brussels I Regulation* in its entirety.[15] However, as is natural under the circumstances, the relevant case law stems almost entirely from the *Brussels I Regulation*. There can be no doubt that the validity of those pre-reform cases survives the reform, and Recital 34 emphasizes that '[c]ontinuity between the 1968 Brussels Convention, Regulation (EC) No 44/2001 and this [the recast] Regulation should be ensured'.

As far as the *Brussels I bis Regulation* is concerned, the basic jurisdictional rule is found in Article 4(1), which states that 'persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'[16] The application of this fundamental principle would ordinarily be relatively uncomplicated. However, issues may arise in the context of identifying the applicable domicile. This matter has been discussed in detail elsewhere.[17] However, there are no specific Internet-related issues associated with this jurisdictional principle (see Chapter 9, section I.A).

The special jurisdictional rules of particular concern for this book are found in Articles 7, 17, 18, 19, 24, 25 and 35.

Article 7 provides a range of additional grounds for jurisdiction to the main ground expressed in Article 4(1). For example, jurisdiction may be exercised in the courts for the place where a branch is established, if the dispute arises out of the operation of that branch.[18] The potential applicability of this jurisdictional ground to e-commerce has been subjected to some academic discourse. In more detail, it has been discussed whether a website and/or server can constitute a branch. This jurisdictional ground is analysed further in Chapter 9, section I.R, where an account is given for the academic discourse on point.

Furthermore, jurisdiction may be exercised in 'the courts for the place of performance' in a contractual situation.[19] The place of performance is determined to be the place of delivery of goods or performance of a service unless otherwise agreed.[20] However, particularly in the context of e-commerce, one can imagine situations where the place of performance is difficult to ascertain, for example, due to there being multiple locations for the delivery of goods. How such situations should be dealt with is illustrated in *Color Drack GmbH v. Lexx International Vertriebs GmbH*. There the ECJ first noted:

> First of all, the first indent of Article 5(1)(b) of the regulation must be regarded as applying whether there is one place of delivery or several.

15. Brussels I bis Regulation 1215/2012, Arts 80 and 81.
16. Brussels I bis Regulation 1215/2012, Art. 4(1).
17. See, e.g., F. Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (Cambridge: Cambridge University Press, 2010): 45–47.
18. Brussels I bis Regulation 1215/2012, Art. 7(5).
19. *Ibid.* Art. 7(1)(a). This ground for jurisdiction is analysed in detail in Chapter 9, section I.C.
20. Brussels I bis Regulation 1215/2012, Art. 7(1)(b).

> By providing for a single court to have jurisdiction and a single linking factor, the Community legislature did not intend generally to exclude cases where a number of courts may have jurisdiction nor those where the existence of that linking factor can be established in different places.
> The first indent of Article 5(1)(b) of Regulation No 44/2001, determining both international and local jurisdiction, seeks to unify the rules of conflict of jurisdiction and, accordingly, to designate the court having jurisdiction directly, without reference to the domestic rules of the Member States.[21]

Having provided these initial observations, the Court then went on to consider the question at hand in more detail:

> [W]here there are several places of delivery of the goods, 'place of performance' must be understood, for the purposes of application of the provision under consideration, as the place with the closest linking factor between the contract and the court having jurisdiction. In such a case, the 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.
> [...]
> If it is not possible to determine the principal place of delivery, each of the places of delivery has a sufficiently close link of proximity to the material elements of the dispute and, accordingly, a significant link as regards jurisdiction. In such a case, the plaintiff may sue the defendant in the court for the place of delivery of its choice on the basis of the first indent of Article 5(1)(b) of Regulation No 44/2001.
> [...]
> That conclusion cannot be called into question by the fact that the defendant cannot foresee the particular court of that Member State in which it may be sued; it is sufficiently protected since it can only be sued, in application of the provision under consideration, where there are several places of performance in a single Member State, in the courts of that Member State for the place where a delivery has been made.[22]

Article 25(1) ensures that choice of forum clauses is respected:

> [i]f the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes, which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.[23]

In contrast, the corresponding Article (Article 23) of the Brussels I Regulation did not address the question of the substantive validity of prorogation of jurisdiction clauses. Pocar notes that the amendment serves a twofold purpose:

21. *Color Drack GmbH v. Lexx International Vertriebs GmbH*, Case C-386/05, ECLI:EU:C:2007:262; [2007] ECR I-03699, [28]–[30].
22. *Color Drack GmbH v. Lexx International Vertriebs GmbH*, Case C-386/05, ECLI:EU:C:2007:262; [2007] ECR I-03699, [40]–[44].
23. Brussels I bis Regulation 1215/2012, Art. 25. For an analysis of this jurisdictional ground, see Chapter 9, section I.D.

> First, the new text implies that the court designated in the agreement has priority in determining jurisdiction, irrespective of it being seised before or after a court in another Member State. [...] Second, by establishing the law of the court of the Member State designated in the agreement as the governing law, the new text provides a uniform choice-of-law rule on the substantive validity of choice-of-court agreements.[24]

Article 25(1) goes on to require that the forum selection be in writing[25] or in accordance with either the parties' practice[26] or another relevant practice '[of] which the parties are or ought to have been aware.'[27] Communication by electronic means is equated to 'in writing' where the communication form provides a durable record.[28]

Importantly, the parties' freedom to nominate that a particular court of a Member State is to have jurisdiction under Article 25 is not limited to courts with which the parties or the dispute has an objective connection.[29] However, any choice made must be clearly incorporated into the agreement.

Estasis Salotti v. Rüwa related to whether a choice of forum clause, stated on the back of a contract amongst other standard terms, formed part of the contract despite there being no reference to the standard terms in the actual contract:

> [W]here a clause conferring jurisdiction is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of a writing under the [Brussels Convention, now Regulation] is fulfilled only if the contract signed by both parties contains an express reference to those general conditions.[30]

Commenting upon this case, Wang noted that '[i]t will be even harder to prove/guarantee consensus between the contracting parties in contracts formed over the Internet, as, in a split second, someone might click the "I accept" or "I agree" button on the website by mistake without carefully reading the terms and conditions.'[31] However, this suggestion may represent a conflation of the two distinct questions of (1) proving incorporation and (2) proving consensus. Despite the language of the Court swaying into the territory of consensus, *Estasis Salotti v. Rüwa* related to the proper incorporation of terms into the contract. For this question, it may not necessarily matter whether both parties have read the contractual terms properly or merely clicked 'I agree' without considering the terms as such. As long as the contract makes a clear choice of forum, that choice is incorporated into the contract. It is then an entirely

24. F. Pocar, 'On the Substantive Validity of Choice-of-Court Agreements under the EU Brussels I Regulation Recast', in P. Lindskoug et al. (eds), *Essays in Honour of Michael Bogdan* (Lund: Jurisförlaget I Lund, 2013): 472–473.
25. Brussels I bis Regulation 1215/2012, Art. 25(1)(a).
26. *Ibid.* Art. 25(1)(b).
27. *Ibid.* Art. 25(1)(c).
28. *Ibid.* Art. 25(2).
29. See, F. Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (Cambridge: Cambridge University Press, 2010): 39, referring to *Castelletti v. Trumpy* [1999] Case C-159/97, ECR I-1597, ECLI:EU:C:1999:142.
30. *Estasis Salotti di Colzani Aimo e Gianmario Colzani s.n.c. v. Rüwa Polstereimaschinen GmbH*. Case C-24/76, ECLI:EU:C:1976:177; [1976] ECR I-1831, [9].
31. F. Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (Cambridge: Cambridge University Press, 2010): 42.

different matter whether we ought to hold that there was consensus as to the terms of the contract where the contract was formed in the manner described by Wang. Consequently, the judgment in *Estasis Salotti v. Rüwa* does not appear to represent any barrier for the inclusion of choice of forum clauses in click-wrap agreements. However, one can image situations where the validity of a browse-wrap agreement may be called into question by reference to this case.

The application of the jurisdictional rules outlined above is, however, restricted in certain situations; most importantly for this book, the validity of choice of forum clauses is limited in relation to consumer contracts.[32]

A 'consumer' under the *Brussels I bis Regulation* is a person who concludes the contract in question for a purpose, which can be regarded as being outside his trade or profession.[33] In *Johann Gruber v. Bay Wa AG*, the ECJ had to examine the limits of the term 'consumer'. In more detail, the case raised the question of how the courts should approach a contract that was partly concluded for personal purposes, and partly for professions purposes. The result was as follows:

> In that regard, it is already clearly apparent from the purpose of Articles 13 to 15 of the Brussels Convention, namely to properly protect the person who is presumed to be in a weaker position than the other party to the contract, that the benefit of those provisions cannot, as a matter of principle, be relied on by a person who concludes a contract for a purpose which is partly concerned with his trade or profession and is therefore only partly outside it. It would be otherwise only if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety. [...]
>
> That is in no way altered by the fact that the contract at issue also has a private purpose, and it remains relevant whatever the relationship between the private and professional use of the goods or service concerned, and even though the private use is predominant, as long as the proportion of the professional usage is not negligible.
>
> Accordingly, where a contract has a dual purpose, it is not necessary that the purpose of the goods or services for professional purposes be predominant for Articles 13 to 15 of the Convention not to be applicable.[34]

The ECJ also concluded that it is for the party alleging to be a consumer to show that 'in a contract with a dual purpose the business use is only negligible.'[35] Furthermore, the ECJ made clear that the consumer protection provisions will not apply where the consumer has acted so as to make the other party reasonably believe that the contract is for business purposes.[36]

32. For a detailed discussion of cross-border consumer contracts generally, and how the Brussels I Regulation affects such contracts, refer e.g., to: J. Hill, *Cross-Border Consumer Contracts* (Oxford: Oxford University Press, 2008) or to L.E. Gillies, *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* (Hampshire: Ashgate Publishing Company, 2008).
33. Brussels I bis Regulation 1215/2012, Art. 17(1).
34. *Johann Gruber v. Bay Wa AG.*, C-464/01, ECLI:EU:C:2005:32, [2005] ECR I-439, [39]-[42].
35. C-464/01 [46].
36. C-464/01 [51]–[53].

was met with the defendant (based in Germany) arguing that the Court lacked jurisdiction.

In *Hotel Alpenhof*, the defendant (Mr Heller – a consumer) had stayed at the claimant's hotel, but had not paid the full amount contracted for. Hotel Alpenhof (the claimant – a business) based in Austria, sought to take action against the defendant who lived in Germany. Mr Heller argued that the Austrian Court lacked jurisdiction.

To understand the jurisdictional matters arising in the two cases, one must turn to Article 18(1) (previously Article 15(1)). That Article provides the consumer with the right to 'bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or, regardless of the domicile of the other party, in the courts for the place where the consumer is domiciled'.[45] Thus, provided that Reederei Karl Schlüter GmbH & KG's conduct fell within Article 18(1)(c), Mr Pammer would be entitled to take action in an Austrian court.

At the same time, Article 18(2) (previously Article 15(2)) also states that '[p]roceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.'[46] Consequently, if it is concluded that Hotel Alpenhof's conduct falls within Article 18(1)(c), Mr Heller should be successful in his argument that the Austrian Court, at which Hotel Alpenhof had instigated the proceedings, lacked jurisdiction.

The ECJ's approach is analysed in detail in Chapter 9, section I.T. Here, it suffices to note that the Court reached the following main conclusions:

(1) the mere fact that a website can be accessed in the consumer's jurisdiction does not mean that the business has directed its activities to that state;[47] and
(2) whether a trader has directed its activity to the Member State of the consumer's domicile, should be ascertained by reference to 'whether, before the conclusion of any contract with the consumer, it is apparent from those websites and the trader's overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer's domicile, in the sense that it was minded to conclude a contract with them.'[48]

It is worth taking note of Gillies' observation that:

> [D]espite the aim for uniformity, it is for the courts of the Member State to determine whether the activities were directed to consumers in that Member State using the criteria provided by the CJEU. One wonders if reference back to the national court will provide a consistent approach to the interpretation of 'Europeanised' conflicts rules whilst at the same time observing developments towards the maximisation of consumer protection. If there was ever a connecting factor that merited an autonomous interpretation from the CJEU, the connecting factor 'directing activities' qualified as such.[49]

45. Brussels I bis Regulation 1215/2012, Art. 18(1).
46. *Ibid*. Art. 18(2).
47. Joined Cases C-585/08 and C-144/09, ECLI:EU:C:2010:740, [2010] ECR I-12527, [95].
48. Joined Cases C-585/08 and C-144/09 [95].

Finally, in the context of the consumer protection found in the *Brussels I bis Regulation*, Article 19 provides that:

> [t]he provisions of this Section may be departed from only by an agreement:
> 1. which is entered into after the dispute has arisen;
> 2. which allows the consumer to bring proceedings in courts other than those indicated in this Section; or
> 3. which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.[50]

This ensures that consumers cannot be deprived of the protection afforded under Article 18 by the business using standard form contracts seeking to nominate a different forum. On this point, it is however, worth examining the consequences of a weaker party entering an appearance before a court without contesting that court's jurisdiction by reference to the special protection afforded to weaker parties. This matter is important in light of Article 26(1) (previously Article 24):

> Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 24.

In the setting of an insurance contract, the ECJ was asked to provide guidance as to:

> whether Article 24 of Regulation No 44/2001 must be interpreted as meaning that the court seised, where the rules in Section 3 of Chapter II of that regulation are not complied with, has jurisdiction where the defendant enters an appearance and does not contest the court's jurisdiction.
> That question concerns whether, even for disputes to which the rules of special jurisdiction provided for by Regulation No 44/2001 apply, such as those contained in Section 3 of Chapter II of that regulation in matters relating to insurance, the entering of an appearance by the defendant, who does not contest the jurisdiction of the court seised, amounts to a tacit prorogation of jurisdiction.[51]

The Court noted that:

> since the rules on jurisdiction set out in Section 3 of Chapter II of Regulation No 44/2001 are not rules on exclusive jurisdiction, the court seised, where those rules

49. L.E. Gillies, 'I. Clarifying the "Philosophy of Article 15" in the Brussels I Regulation: C-585/08 *Peter Pammer v Reedere Karl Schluter Gmbh & Co* and C-144/09 *Hotel Alpenhof Gesmbh v. Oliver Heller*', (2011) 60 International and Comparative Law Quarterly 557–564, at 563.
50. Brussels I bis Regulation 1215/2012, Art. 19.
51. Case C-111/09, ECLI:EU:C:2010:290, [2010] ECR I-04545, [19–20].

are not complied with, must declare itself to have jurisdiction where the defendant enters an appearance and does not contest that court's jurisdiction.[52]

Interestingly, the Czech and Slovak Governments had sensibly argued that:

in order to treat the entering of an appearance by the defendant as amounting to the prorogation of jurisdiction in a dispute such as that in the main proceedings, the defendant, the weaker party, should be put in a position to be fully aware of the effects of his defence as to substance. The court seised should therefore ascertain of its own motion, in the interest of the protection of the weaker party, whether that party's manifestation of intention is in fact deliberate and designed to give that court jurisdiction.[53]

However, while stressing that it is always open to the court seised to ensure that the defendant is fully aware of the consequences of his agreement to enter an appearance, the Court stated that '[s]uch an obligation could not be imposed other than by the introduction into Regulation No 44/2001 of an express rule to that effect.'[54]

In relation to torts, Article 7(2) states that 'the courts for the place where the harmful event occurred or may occur'[55] have jurisdiction, thereby making clear that jurisdiction also is provided for injunctive relief. Article 7(2), or more accurately its predecessors under the *Brussels I Regulation* (Article 5(3)) and the *Brussels Convention*, has been given a fairly wide interpretation in a range of EC cases.[56] One of the most important, for the scope of this book, is that in *Shevill v. Presse Alliance SA*[57] the European Court of Justice concluded that:

the victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised [the so-called mosaic principle].[58]

However, the European Court of Justice has also stated:

[T]hat term ['place where the harmful event occurred'] cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere. Consequently, that term cannot be construed as including the place where, as in the

52. Case C-111/09 [26].
53. Case C-111/09 [31].
54. Case C-111/09 [32].
55. Brussels I bis Regulation 1215/2012, Art. 7(2).
56. See primarily, *Handelskwekerij G.J. Bier B.V. and Stichtung Reinwater v. Mines de Potasse d'Alsace SA*, Case C-21/76, ECLI:EU:C:1976:166, [1976] ECR I-01735 and *Shevill v. Presse Alliance SA*, Case C-68/93, ECLI:EU:C:1995:61, [1995] 2 WLR 499.
57. *Shevill v. Presse Alliance SA*, Case C-68/93, ECLI:EU:C:1995:61, [1995] 2 WLR 499. Note that this case was decided under the Brussels Convention. However, since Art. 7(2) is virtually the same in both the Convention and the Regulation (recast), the decision in the *Shevill v. Presse Alliance SA* is no less relevant than if decided under the Regulation.
58. *Shevill v. Presse Alliance SA*, Case C-68/93, ECLI:EU:C:1995:61, [1995] 2 WLR 499, 500.

present case, the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State.[59]

Of the greatest importance, the ECJ provided guidance as to how all this applies in the Internet setting in two particularly interesting cases that it dealt with jointly. The first – *eDate Advertising GmbH v. X*[60] – involved allegedly defamatory content about a German citizen having been placed on a website in Austria. The second – *Olivier Martinez, Robert Martinez v. MGN Ltd*[61] – related to an infringement of personal rights allegedly committed by the placing of information and photographs on a website in another Member State. Advocate General Cruz Villalón's Opinion delivered on 29 March 2011 provides valuable guidance. The Advocate General prudently highlighted the impact Internet communications have on the legal questions involved in the two cases, and noted a need to expand on the principles that stem from the *Shevill* case.[62] At the same time, the Advocate General stressed that any interpretation that results in a change to the *Shevill* principles must be technologically neutral.[63] With those regards in mind, Advocate General Cruz Villalón suggested that, in addition to the heads of jurisdiction that flow from the *Shevill* principles, the victim in a situation such as those arise in the cases at hand, would be entitled to commence proceedings in the courts in the Member State where the 'centre of gravity of the conflict' is found. That 'centre of gravity of the conflict' is to be located by reference to the location at which the victim has her/his 'main interests' and to the location at which the content in question is of particular relevance.[64] A court that has jurisdiction on this basis will be competent to award damages for all the harm caused.[65]

The ECJ largely adopted Advocate General Cruz Villalón's reasoning and concluded that:

Article 5(3) [now 7(2)]of the Regulation must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or

59. *Antonio Marinari v. Lloyds Bank plc and Zubaidi Trading Company*, Case C-364/93 (9 September 1995), ECLI:EU:C:1995:289, [1995] ECR I-02719, [14]–[15].
60. Case C-509/09 (Referring court Bundesgerichtshof, Germany), ECLI:EU:C:2011:685, [2011] ECR I-10269.
61. Case C-161/10 (Referring court Tribunal de grande instance de Paris, France), ECLI:EU:C:2010:685, [2011] ECR I-10269.
62. Opinion of Advocate General Cruz Villalón delivered on 29 March 2011, [42]-[54], ECLI:EU:C:2011:192.
63. *Ibid.* [53].
64. *Ibid.* [67].
65. *Ibid.*

> has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.[66]

The Court made clear that:

> [t]he place where a person has the centre of his interests corresponds in general to his habitual residence. However, a person may also have the centre of his interests in a Member State in which he does not habitually reside, in so far as other factors, such as the pursuit of a professional activity, may establish the existence of a particularly close link with that State.[67]

This 'new' ground for jurisdiction introduces additional flexibility into the application of Article 7(2), and it was motivated by reference to how 'the internet reduces the usefulness of the criterion relating to distribution, in so far as the scope of the distribution of content placed online is in principle universal.'[68] Moreover, the Court pointed to how 'it is not always possible, on a technical level, to quantify that distribution with certainty and accuracy in relation to a particular Member State or, therefore, to assess the damage caused exclusively within that Member State.'[69] This was seen as particularly severe given 'the serious nature of the harm which may be suffered by the holder of a personality right who establishes that information injurious to that right is available on a world-wide basis.'[70]

Staying with the *eDate* case a little longer, one additional point should be made since it has been reemphasized in a later case. Referring to the *eDate* decision, the ECJ in *Wintersteiger* stressed that:

> the rule of special jurisdiction laid down, by way of derogation from the principle of jurisdiction of the courts of the place of domicile of the defendant, in Article 5(3) of the regulation is based on the existence of a particularly close connecting factor between the dispute and the courts of the place where the harmful event occurred, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of proceedings[.][71]

This is clearly an observation of the utmost importance as it guides the interpretation of the special rule previously found in Article 5(3) and now in Article 7(2).

Finally, in the setting of Internet defamation, it is important to note that the Recitals of the *Brussels I bis Regulation* state:

> In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close connection between the court and the action or in order to facilitate the sound administration of justice. The existence of a close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which he could not reasonably have foreseen. This is important, particularly in disputes concerning non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.[72]

Achieving such reasonable foreseeability is no doubt particularly challenging in the online environment.

Article 7(2) also impacts trademark disputes since a trademark violation may amount to a tort and, thus, fall within the scope of Article 7(2).[73] This matter came before the ECJ in *Wintersteiger AG v. Products 4U Sondermaschinenbau GmbH.*[74] There, the ECJ had to consider the conditions under which the advertising by use of a trademark registered in one Member State, on a website operating under a country-specific top-level domain of another Member State, may confer jurisdiction on the courts where the mark is registered. In more detail, the questions referred to the ECJ were as follows:

> 1. In the case of an alleged infringement by a person established in another Member State of a trade mark granted in the State of the court seised through the use of a keyword (AdWord) identical to that trade mark in an internet search engine which offers its services under various country-specific top-level domains, is the phrase 'place where the harmful event occurred or may occur' in Article 5(3) of Regulation (EC) 44/2001 ('Brussels I') to be interpreted as meaning that:
>   1. jurisdiction is established only if the keyword is used on the search engine website the top-level domain of which is that of the State of the court seised;
>   2. jurisdiction is established only if the search engine website on which the keyword is used can be accessed in the State of the court seised;
>   3. jurisdiction is dependent on the satisfaction of other requirements additional to the accessibility of the website?
> 2. If Question 1.3 is answered in the affirmative:
>
>   Which criteria are to be used to determine whether jurisdiction under Article 5(3) of Brussels I is established where a trade mark granted in the State of the court seised is used as an AdWord on a search engine website with a country-specific top-level domain different from that of the State of the court seised?[75]

The factual background to the case was neatly summarized by the Court:

> Since 1 December 2008, Products 4U [a German company selling products worldwide, including in Austria] has reserved the keyword ('AdWord') 'Wintersteiger' [a trademark held by an Australian company selling the same type of

66. *Martinez v. MGN Limited and X v. eDate Advertising*, C-509/09 and C-161/10, ECLI:EU:C:2011:685, [2011] ECR I-10269, [52] (emphasis added).
67. C-509/09 and C-161/10 [49].
68. C-509/09 and C-161/10 [46].
69. C-509/09 and C-161/10 [46].
70. Case C-509/09 and Case C-161/10, ECLI:EU:C:2011:685, [2011] ECR I-10269, [47].
71. Case C-523/10, ECLI:EU:C:2012:220, [18]. See also: C-228/11, ECLI:EU:C:2013:305, [26]; C-133/11, ECLI:EU:C:2012:664, [37] and C-387/12, ECLI:EU:C:2014:215, [28]. In C-360/12, ECLI:EU:C:2014:1318, [47] and in C-441/13, ECLI:EU:C:2015:28, [19], the CJEU instead referred to 'particularly close linking factors'.
72. Brussels I bis Regulation 1215/2012, Recital 16.
73. See, e.g., U. Maunsbach, *Svenk domstols behörighet vid gränsöverskridande varumärkestvister – särskilt om Internetrelaterade intrång* (Lund: Juridiska fakulteten, 2005): 132.
74. Case C-523/10 (Referring court Oberster Gerichtshof (Austria)), ECLI:EU:C:2011:192.
75. Case C-523/10 (Referring court Oberster Gerichtshof (Austria)), ECLI:EU:C:2012:220 (internal footnote omitted).

> products worldwide] in the advertising system developed by the referencing service provider on Google Internet. Following that reservation, which was limited to Google's German top-level domain, namely the website 'google.de', an internet user who enters the keyword 'Wintersteiger' into the search engine of that referencing service receives a link to Wintersteiger's website as the first search result. However, doing a search of that same term also leads to an advertisement for Products 4U appearing on the right-hand side of the screen with the heading 'Anzeige' ('advertisement'). The text of the advertisement bears the heading 'Skiwerkstattzubehör' ('Ski workshop accessories'), underlined and in blue font. It also contains the words 'Ski und Snowboardmaschinen' ('ski and snowboard tools') and 'Wartung und Reparatur' ('maintenance and repair') in two lines. Products 4U's website address is given in green lettering in the last line. Clicking on the heading 'Skiwerkstattzubehör' ('Ski workshop accessories') brings up the 'Wintersteiger-Zubehör' ('Wintersteiger accessories') on offer on Products 4U's website. The advertisement on 'google.de' does not give any indication that there are no economic links between Wintersteiger and Products 4U. On the other hand, Products 4U has not entered any advertisement linked to the search term 'Wintersteiger' in Google's Austrian top-level domain, namely the website 'google.at'.[76]

While Google was not a party to the matter, key aspects of the disagreement between the parties stemmed from how Google's structure was to be viewed. In support of the idea that Austrian courts would have jurisdiction over the matter, Wintersteiger pointed to the fact that '"google.de" can also be accessed in Austria and that the referencing service is configured in German.'[77] In contrast, Products 4U argued that 'since "google.de" is directed exclusively at German users, the advertisement in issue is therefore also intended only for German customers',[78] which may support the idea that Austrian court should not have jurisdiction.

In dealing with the issue of identifying the place where the damage occurred, the ECJ emphasized that the 'centre of interests' test established in the *eDate* case 'does not apply also to the determination of jurisdiction in respect of infringements of intellectual property rights, such as those alleged in the main proceedings.'[79] The reasoning behind this distinction was as follows:

> Contrary to the situation of a person who considers that there has been an infringement of his personality rights, which are protected in all Member States, the protection afforded by the registration of a national mark is, in principle, limited to the territory of the Member State in which it is registered, so that, in general, its proprietor cannot rely on that protection outside the territory.[80]

Having disposed of that issue, the Court proceeded to conclude that:

> [w]ith regard to jurisdiction to hear a claim of infringement of a national mark in a situation such as that in the main proceedings, it must be considered that both the objective of foreseeability and that of sound administration of justice militate in favour of conferring jurisdiction, in respect of the damage occurred, on the courts of the Member State in which the right at issue is protected.
> It is the courts of the Member State in which the trade mark at issue is registered which are best able to assess [...] whether a situation such as that in the main proceedings actually infringes the protected national mark. Those courts have the power to determine all the damage allegedly caused to the proprietor of the protected right because of an infringement of it and to hear an application seeking cessation of all infringements of that right.
> Therefore it must be held that an action relating to infringement of a trade mark registered in a Member State through the use, by an advertiser, of a keyword identical to that trade mark on a search engine website operating under a country-specific top-level domain of another Member State may be brought before the courts of the Member State in which the trade mark is registered.[81]

The remaining issue to consider was then the place where the event giving rise to the damages occurred. In introducing that topic, the Court stressed that 'the territorial limitation of the protection of a national mark is not such as to exclude the international jurisdiction of courts other than the courts of the Member State in which that trade mark is registered.'[82] Furthermore, the Court remarked:

> In the case of an alleged infringement of a national trade mark registered in a Member State because of the display, on the search engine website, of an advertisement using a keyword identical to that trade mark, it is the activation by the advertiser of the technical process displaying, according to pre-defined parameters, the advertisement which it created for its own commercial communications which should be considered to be the event giving rise to an alleged infringement, and not the display of the advertisement itself.
> [...]
> The event giving rise to a possible infringement of trade mark law therefore lies in the actions of the advertiser using the referencing service for its own commercial communications.
> It is true that the technical display process by the advertiser is activated, ultimately, on a server belonging to the operator of the search engine used by the advertiser. However, in view of the objective of foreseeability, which the rules on jurisdiction must pursue, the place of establishment of that server cannot, by reason of its uncertain location, be considered to be the place where the event giving rise to the damage occurred for the purpose of the application of Article 5(3) of Regulation No 44/2001.
> By contrast, since it is a definite and identifiable place, both for the applicant and for the defendant, and is therefore likely to facilitate the taking of evidence and the conduct of the proceedings, it must be held that the place of establishment of the advertiser is the place where the activation of the display process is decided.
> It follows from the foregoing that an action relating to alleged infringement of a trade mark registered in a Member State through the use, by an advertiser, of a keyword identical to that trade mark on a search engine website operating under a country-specific top-level domain of another Member State may also be brought before the courts of the Member State of the place of establishment of the advertiser.[83]

76. Case C-523/10 [12].
77. Case C-523/10 [13].
78. Case C-523/10 [14].
79. Case C-523/10 [24].
80. Case C-523/10 [25].
81. Case C-523/10 [27–29].
82. Case C-523/10 [30].
83. Case C-523/10 [34–38].

of gravity' test between *eDate* and *Wintersteiger*. In other words, are copyright infringement actions to be treated in the same way as disputes involving the infringement of personality rights, resulting in the application of the 'centre of gravity' test? Or are such disputes more similar to trademark conflicts with the result that the 'centre of gravity' test does not apply? On this, the Court entered into a rather detailed discussion culminating in the conclusion that 'if the protection granted by the Member State of the place of the court seised is applicable only in that Member State, the court seised only has jurisdiction to determine the damage caused within the Member State in which it is situated.'[91]

Importantly, the Court also observed that:

> Article 5(3) lays down, as the sole condition, that a harmful event has occurred or may occur.
> Thus, unlike Article 15(1)(c) of the Regulation, which was interpreted in Joined Cases C-585/08 and C-144/09 Pammer and Hotel Alpenhof [2010] ECR I-12527, Article 5(3) thereof does not require, in particular, that the activity concerned to be 'directed to' the Member State in which the court seised is situated.
> It follows that, as regards the alleged infringement of a copyright, jurisdiction to hear an action in tort, delict or quasi-delict is already established in favour of the court seised if the Member State in which that court is situated protects the copyrights relied on by the plaintiff and that the harmful event alleged may occur within the jurisdiction of the court seised.[92]

Based on the above, the Court reached the following overall conclusion:

> [I]n the event of alleged infringement of copyrights protected by the Member State of the court seised, the latter has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State and which has, in the latter State, reproduced that work on a material support which is subsequently sold by companies established in a third Member State through an internet site also accessible with the jurisdiction of the court seised. That court has jurisdiction only to determine the damage caused in the Member State within which it is situated.[93]

Through the *Hejduk* case,[94] decided on 22 January 2015, the reasoning in *Pinckney* has been extended to copyright infringements in digital, rather than physical, form. The facts in *Hejduk*, were as follows:

> According to the order for reference, Ms Hejduk is a professional photographer of architecture and is the creator of photographic works depicting the buildings of the Austrian architect, Georg W. Reinberg. As part of a conference organised on 16 September 2004 by EnergieAgentur, Mr Reinberg used Ms Hejduk's photographs in order to illustrate his buildings, which he was authorised to do by Ms Hejduk. Subsequently, EnergieAgentur, without Ms Hejduk's consent and without providing a statement of authorship, made those photographs available on its website for viewing and downloading.

91. Case C-170/12 [45].
92. Case C-170/12 [41–43].
93. Case C-170/12 [47]. See also: C-387/12, ECLI:EU:C:2014:215, [35, 38 and 39].
94. C-441/13, ECLI:EU:C:2015:28.

> Taking the view that her copyright had been infringed by EnergieAgentur, Ms Hejduk brought an action before the Handelsgericht Wien for damages in the sum of EUR 4 050, and for authorisation to publish the judgment at the expense of the defendant.[95]

EnergieAgentur disputed the jurisdiction of the Court based on the idea that 'its website is not directed at Austria and that the mere fact that a website may be accessed from Austria is insufficient to confer jurisdiction on that court.'[96] Thus, the matter before the CJEU was described as follows:

> [W]hether Article 5(3) of Regulation No 44/2001 must be interpreted as meaning that, in the event of an allegation of infringement of rights related to copyright which are guaranteed by the Member State of the court seised, that court has jurisdiction to hear an action for damages in respect of an infringement of those rights resulting from the placing of protected photographs online on a website accessible in its territorial jurisdiction.[97]

The Court confirmed much of the thinking previously expressed in *Pinckney*. For example, it was emphasized that 'although copyright rights must be automatically protected, in particular in accordance with Directive 2001/29, in all Member States, they are subject to the principle of territoriality. Those rights are thus capable of being infringed in each Member State in accordance with the applicable substantive law'.[98]

In the context of identifying the event giving rise to the alleged damage, noted that:

> [i]n a situation such as that at issue in the main proceedings, in which the alleged tort consists in the infringement of copyright or rights related to copyright by the placing of certain photographs online on a website without the photographer's consent, the activation of the process for the technical display of the photographs on that website must be regarded as the causal event. The event giving rise to a possible infringement of copyright therefore lies in the actions of the owner of that site (see, by analogy, judgment in Wintersteiger, C-523/10, EU:C:2012:220, paragraphs 34 and 35).
> In a case such as that in the main proceedings, the acts or omissions liable to constitute such an infringement may be localised only at the place where EnergieAgentur has its seat, since that is where the company took and carried out the decision to place photographs online on a particular website. It is undisputed that that seat is not in the Member State from which the present reference is made.

95. C-441/13 [10–12].
96. C-441/13 [13].
97. C-441/13 [15]. The actual questions referred to the CJEU were: 'Is Article 5(3) of [Regulation No 44/2001] to be interpreted as meaning that, in a dispute concerning an infringement of rights related to copyright, which is alleged to have been committed by keeping a photograph accessible on a website, the website being operated under the top-level domain of a Member State other than that in which the proprietor of the right is domiciled, there is jurisdiction only – in the Member State in which the alleged perpetrator of the infringement is established; and – in the Member State(s) to which the website, according to its content, is directed?' C-441/13 [14].
98. C-441/13 [22].

I. RULES OF JURISDICTION

> *In cyberspace, jurisdiction is the overriding conceptual problem for domestic and foreign courts alike.*[3]

This section examines the jurisdictional grounds identified in previous chapters. Two categories of jurisdictional grounds are mentioned and presented briefly, without any deeper analysis. These two groups are 'uninteresting and uncontroversial grounds' and 'uninteresting but controversial grounds': that is, those grounds that do not give rise to any particular issues in the online context. The rest of the jurisdictional grounds are discussed, and their implications in the online context analysed, in greater detail.

A. Uninteresting and Uncontroversial Jurisdictional Grounds

Several of the jurisdictional grounds discussed in the country-specific chapters are both uncontroversial and, for the scope of this book, uninteresting. For example, it is hardly controversial for a state to claim jurisdiction over people domiciled or habitually residing within that state. Similarly, states may claim jurisdiction over its nationals. Thus, these jurisdictional grounds will not be discussed in depth. Nevertheless, it is interesting to note that, while the definition of domicile, as we have seen, varies (which may be a concern in relation to the aim of using forum-neutral language and the aim private international law rules being drafted with sufficient specificity), it is undeniable that the use of domicile as a basis for jurisdictional claims is increasing at the expense of nationality. As pointed out by Eek already in 1965, '[i]t is obvious that people nowadays to a greater extent than at the turn of the century reside outside the countries in which they are citizens, and it is a consequence of this that domicile is gaining in importance.'[4]

Comparing focus being placed on domicile with focus being placed on habitual residence, the latter has certain advantages. As noted by Nygh, although never defined, '[t]he term "habitual residence" is an old standby of the Hague Convention with a history of over 100 years.'[5] In contrast to domicile, it further has the advantage of not being associated with differing national interpretations.

It would further seem uncontroversial for a court to claim jurisdiction where the proceedings are initiated to have a foreign judgment enforced in the forum state,[6] and the suitability of a court claiming jurisdiction in relation to disputes arising out of arbitration proceedings held within the forum state can, ordinarily, not be questioned.[7]

3. D.C. Menthe, 'Jurisdiction in Cyberspace: A Theory of International Spaces', (1998) 4 *Michigan Telecommunications and Technology Law Review*, 70.
4. H. Eek, *The Swedish Conflict of Laws* (The Hague: Martinus Nijhoff, 1965) 4.
5. P. Nygh, 'The Preliminary Draft Hague Convention on Jurisdiction and Foreign Judgment in Civil and Commercial Matters', in P. Brochers and J. Zekoll (eds), *International Conflict of Laws for the Third Millennium: Essays in Honour of Friedrich K. Juenger* (New York: Transnational Publishers Inc., 2001), 271.
6. See Chapter 4, section I.
7. *Ibid.*

Furthermore, there is no need to discuss jurisdiction based on the defendant being a 'necessary and proper party' to the dispute,[8] or jurisdiction based on the defendant being under the criminal jurisdiction, and the civil action being closely related to the criminal proceedings as is done, for example, in Sweden[9] and under the *Brussels I bis Regulation*.[10] It is likely that other states provide their courts with civil jurisdiction where the court already has criminal jurisdiction and the civil claim arises out of the criminal action. However, this was only examined in relation to Sweden, as Swedish defamation law is largely criminal in its nature.

B. Uninteresting but Controversial Jurisdictional Grounds

There are a few jurisdictional grounds that do not raise any particular issues in the online context but that are highly controversial.

Jurisdiction can, as we have seen, be based on the presence of the defendant within the forum at the time he/she is served in traditional Common Law jurisdictions[11] and in the United States,[12] and it can be assumed that this ground for jurisdiction is also allowed in other countries (particularly, if not exclusively, in Common Law countries). The motivation for this jurisdictional basis is found in its results.[13] However, in today's more and more global society with excellent travel opportunities, this ground must be seen as exorbitant. It cannot ordinarily be right that a person be served with a writ, perhaps while changing planes at Hong Kong Chek Lap Kok airport, relating to an act that he/she has done while in his/her home state and having no knowledge that it could have effects in Hong Kong. It could reasonably be questioned whether this jurisdictional ground meets the quality of predictability,[14] and it can only be hoped that von Mehren is right in stating that 'personal service as a basis for asserting jurisdiction will probably be abandoned by common law systems.'[15] Fortunately, the practical damage done by the application of this jurisdictional ground is often mitigated by the doctrine of *forum non conveniens*.

Another jurisdictional base that must be seen as controversial is where a court claims jurisdiction based on the dispute falling partly within the rules outlining when the court may claim jurisdiction. It is, however, essentially only New South Wales and Queensland that have adopted this approach (see Chapter 4, section I above), and it does not raise any particular issues in relation to the scope of this book.

8. See Chapters 4, section I and 8, section I.A.
9. See Chapter 6, section I.
10. See Chapter 8, section I.A.
11. See Chapter 4, section I.
12. See Chapter 5, section I.
13. See M. Davies, A.S. Bell and P.L.G. Brereton, *Nygh's Conflict of Laws in Australia* (9th edn, Sydney: Lexis Nexis Butterworths, 2014): 29.
14. For further criticism raised against this jurisdictional ground, see, e.g., F. Vischer, 'General Course on Private International Law', (1992-I) 232 *Recueil des cours* 213; P. Hay, 'Flexibility versus Predictability and Uniformity in Choice of Law: Reflections on Current European and United States Conflicts Law', (1991) 226 *Recueil des cours* 311.
15. (footnote omitted) A.T. von Mehren, 'Recognition and Enforcement of Foreign Judgments – General Theory and the Role of Jurisdictional Requirements', (1980-II) 167 *Recueil des cours* 59.

forum. Should that influence take a form that the court deems to be unconscionable, or otherwise unreasonable, the court should have the option of refusing jurisdiction. However, it is necessary to keep this sort of situation separate from the situations discussed below, where the forum is chosen by one party *before* the dispute arises. In the type of situation discussed here, the court must, due to fairness and predictability concerns, require a much higher standard of 'unreasonableness' in order to hold invalid the forum choice occurring after the dispute arises. We must remember that in this situation, at least in theory, even a weaker party can negotiate since it can always fall back on the forums provided by law if no choice is made by the parties.

2. *Contract Nominating Forum (Submission before the Dispute Arises)*

The respect for the parties' choice of forum is universal amongst the examined states, and, indeed, it appears that a large number of other states also share this attitude towards party autonomy.[21]

The desirability of upholding party autonomy is widely recognized, and Keyes has provided a nice summary of why this is so:

> The justification for enforcing mutual agreements as to jurisdiction and arbitration are widely agreed to be compelling. The fundamental justification is that the parties' freedom to contract should be respected by enforcing their agreements. This gives effect to certainty and predictability, which are essential to supporting international trade and commerce. Upholding the parties' agreements as to venue and type of dispute resolution should simplify and discourage litigation about venue, and this should save both public and private costs.[22]

These are strong arguments, and holding the parties to their agreement would clearly address the risk of vexatious litigation in a court other than the chosen one, aimed at delaying the process or even sabotaging the proper resolution of the dispute.

At the same time, it must be remembered that a valid choice of court provision, nominating a forum that is inaccessible to the other party, is likely to represent an effective barrier preventing legal action being taken against the party nominating the forum. Indeed, where the selected forum is out of reach for the weaker party (e.g., due to the costs associated with taking action there), it does not matter which law that forum would have applied or whether the weaker party would have been likely to succeed in an action taken there – the weaker party is, in effect, blocked from access to justice. Consequently, no other type of contractual clause (including choice of law and limitation of liability clauses) can be as detrimental to the power balance between the contractual parties as a choice of forum clause, and no other type of contract clause can be as severely misused as a choice of forum clause.

21. See P. Nygh, 'The Reasonable Expectation of the Parties as a Guide to the Choice of Law in Contract and in Tort', (1995) 251 *Recueil des cours*.
22. M. Keyes, 'Jurisdiction under the Hague Choice of Courts Convention: Its Likely Impact on Australian Practice', (2009) 5 *Journal of Private International Law* 181.

The particular difficulties associated with web-based choice of forum clauses are discussed further in Chapter 10, section III, and have already been discussed in some depth above in Chapter 3, section II.A.2. There, it was observed that a large percentage of people do not read the online contracts but still click 'I agree' or the equivalent. This obviously raises the question: why do people in general not read the terms and condition to which they agree? One explanation is that people do not think the terms and conditions are binding. Thus, consumer protection organizations worldwide may have to intensify their efforts to increase consumers' understanding of the relevant issues – a difficult task that requires substantial governmental spending.

Another reason for people's lack of interest in reading web-agreements is perhaps found in the fact that this type of contract is not negotiable. If we cannot change the terms and conditions, our only real choice is whether or not we want to go through with the action regulated by the terms and conditions. Thus, a person will weigh his/her desire to go through with the action regulated by the terms and conditions on the one hand, and the potential risks associated with going through with the action on the other. In performing this balancing, most people rely on their constructive party expectations instead of spending the time and effort of reading the terms and conditions to obtain an understanding amounting to genuine party expectations.

A problem in this context is that the ones constructing the terms are doing little to encourage people to read those terms. Indeed, one can legitimately question whether those who construct the terms really want people to read them. For example, it is still relatively rare for there to be any convenient 'print button' on the web pages containing the contractual terms.

Against this background, it is desirable that rules (or at least guidelines) be developed on an international level, outlining the manner in which web-based agreements are to be formed. The solution, however, does not lie in banning web-based agreements or holding them generally unenforceable. The better approach is to regulate what types of terms and conditions are deemed unfair as is done, for example, in the EU and in Australia.[23]

3. *The Hague Convention on Choice of Court Agreements*[24]

The *Hague Convention on Choice of Court Agreements* was described in some detail in Chapter 8, section II.C. While the Convention has the potential to become an important and welcomed instrument in international trade, and while the work carried out by the *Hague Conference on Private International Law* is to be encouraged, the Convention contains, at least, one significant problem – it lacks appropriate flexibility (in the form

23. Council Directive (93/13/EEC), 5 April 1993, on unfair terms in consumer contracts <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31993L0013&from=EN>, 25 April 2006.
24. This part of the chapter is based upon D. Svantesson, 'An Update on the Proposed Hague Convention on Exclusive Choice of Court Agreements', (2005) 21(1) *Computer Law and Security Report* 22 and D. Svantesson, 'The Choice of Courts Convention – How Will It Work in Relation to the Internet and E-Commerce?', (2009) 5(3) *Journal of Private International Law* 517–535.

of weaker-party protection). Put in the terms used in Chapter 3, section II.A, the proposal not only caters for *predictability* but also covers contracts that need *flexibility*.

As may be recalled from Chapter 8, section II.C, the Convention excludes B2C and C2C contracts from its scope. However, not all contracts falling outside those two categories are of such a level of sophistication that it is justified to only cater for predictability. In fact, with the limitations in place the Convention will cover a large number of relatively unsophisticated contracts. This fact was highlighted,[25] but arguably given too little attention, in the discussion preceding the conclusion of the Convention. One reason for this is presumably found in that the Convention was frequently referred to as a B2B convention. It could be said that the term B2B was used for convenience, but this simplification was unsuitable as it potentially distorted the picture of what actually was under negotiation.

First, the Convention does not only deal with business-to-business contracts; rather it deals with a range of parties such as not-for-profit organizations and other parties that are not business, but do not fit within the Convention's narrow definition of 'consumers'. Second, the two Bs lead the mind to think of two equal parties, which is not always the case. A contract between a small unincorporated one-person business and a major international corporation is a B2B contract, but the parties may be far from equal in strength. Furthermore, no distinction is drawn between situations where a business is engaged in a once-off transaction for consumption and situations where a business is engaged in its primary area of trade.

As noted above, the validity of the choice of court agreement is to be determined by reference to the law of the state of the designated court. This is logically troublesome, for several reasons. There is no doubt that talented company lawyers who construct the choice of forum clauses will be able to identify forums with laws that not only provide them with favourable liability limitations, but also with party autonomy of the kind that would uphold unfair choice of forum clauses. In other words, a stronger party designating a forum would not choose a forum with laws that would hold their choice to be invalid. This can doubtless lead to injustice.

If a party wishes to challenge the validity of the choice of court agreement, it has two options. An action can be taken in a court other than the one designated, and reliance placed on Article 6(c) (as discussed in Chapter 8, section II.C). However, Article 6(c) is arguably too limited and could have been replaced by an Article along the lines of Article 10 of the Model proposed in Chapter 12, causing the result that:

> [i]f the parties have entered into an exclusive choice of court agreement, a court in a Contracting State other than the State of the chosen court shall suspend or dismiss the proceedings unless the forum in which the action is brought finds that a balance of the parties interests, the convenience of the parties, the parties' individual power and the circumstances of the formation of the contract indicates that declining jurisdiction would render the plaintiff, effectively, without reasonable access to justice.

25. See, e.g., Prel. Doc. No 20 of November 2002 – Report on the first meeting of the Informal Working Group on the Judgments Project of October 2002, 10.

Under the *Hague Convention on Choice of Court Agreements*, the best option for a party wishing to challenge the validity of the choice of court agreement is found in the public policy clause (Article 9(e)) in relation to recognition and enforcement. The typical contractual party deserving extra protection would ordinarily only have assets in one state, and if enforcement cannot be effected there, due to this provisions, the weaker party is rather well protected. However, there are at least two serious downsides to this approach. First, in many, if not most, weak party-strong party relations it is the weaker party who tries to obtain a judgment against the stronger party. In such situations the structure of the Convention provides little comfort, and the alternative of relying on Article 6(c) is the only option. Second, the chosen structure is wasteful when it comes to the costs associated with international litigation. By the time in the process a party can rely on non-enforcement it is possible that both the parties to the dispute, as well as the society at large, will have spent a considerable amount of money on the litigation.

In light of this, it would have been desirable to include a balancing provision already at the stage of the initial trial (i.e., not to uphold unfair forum selection clauses). I have suggested elsewhere[26] that the Convention would have done well to include a provision along the lines of Article 4 paragraph 3 of the 1965 *Hague Convention on the Choice of Court*: 'The agreement on the choice of court shall be void and voidable if it has been obtained by an abuse of economic power or other unfair means.' This would admittedly have lowered the predictability of the Convention, and would inevitably cause additional litigation. However, predictability must always be balanced with flexibility (i.e., justice in the individual case). A will to strive towards such a balance exists already in the domestic laws of many states (e.g., the United States and the PRC), it exists in Europe, and it certainly should exist in an international instrument like the *Hague Convention on Choice of Court Agreements*.

If the unwillingness to introduce flexibility into the *Hague Convention on Choice of Court Agreements* was of such a magnitude that it was politically impossible to introduce an Article with similar content to that of Article 4 paragraph 3 of the *1965 Hague Convention on the Choice of Court*, the least that could have been done was to expand the *ordre public* exception in relation to recognition and enforcement, and to rework Article 6(c) as outlined above.

A third alternative would have been to choose a more sophisticated definition of 'consumers'. The chosen definition of 'consumers' has the advantage of being in line with other international instruments such as the *Brussels I bis Regulation* and the *Vienna Sales Convention*.[27] However, one way of addressing the concerns expressed above would have been to adopt a definition similar to that expressed in section 3 of the *Australian Consumer Law*.[28]

26. D. Svantesson, 'An Update on the proposed Hague Convention on Exclusive Choice of Court Agreements', (2005) 21(1) *Computer Law and Security Report* 22.
27. *United Nations Convention on Contracts for the International Sale of Goods* (Vienna, 11 April 1980), Article 2(a).
28. *Competition and Consumer Act* (Cth) Sch. 2 – Australian Consumer Law.

Under that provision, a distinction is made between a business engaged in a once-off transaction for consumption (i.e., a business-consumer), and situations where a business is engaged in its primary area of trade. Businesses are provided the same protection as consumers where they contract for goods or services, (1) the purchase was not for re-supply or otherwise for being used up or transformed in trade or commerce and (2) the purchase was either (a) for goods/services of a kind ordinarily acquired for personal, domestic or household use or (b) for an amount lower than the prescribed amount (currently AUD 40,000). If a similar definition of 'consumers' would have been adopted in the Convention, its scope would clearly have been more limited. However, as 'business-consumers' would have fallen outside the scope, there would have been significantly less of a need for flexibility.

In light of the Convention's broad scope, countries considering whether or not to sign the Convention would do well to carefully explore ways of limiting its broad scope. One way of limiting the Convention's scope stems from the possibility for signatories to declare, under Article 21(1) that they will not apply the Convention to certain matters:

> Where a State has a strong interest in not applying this Convention to a specific matter, that State may declare that it will not apply the Convention to that matter. The State making such a declaration shall ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined.[29]

Bearing in mind the manner in which click-wrap and browse-wrap agreements are concluded, all signatories could consider nominating non-negotiated contracts, such as click-wrap and browse-wrap agreements, as one area to which they will not apply the Convention. This would exclude many contracts of the type requiring a degree of flexibility that the Convention simply does not provide. At the same time, as major business transactions rarely would be concluded using non-negotiated contracts click-wrap or browse-wrap agreements, such a limitation to the scope could not be said to undermine the significance or relevance of the Convention. Consequently, the Convention would still be applicable to virtually all the contracts of the type it should be applicable to. Put simply, the Convention's focus on predictability would then be justifiable by reference to its scope.

While this is an attractive solution, the question is whether both Article 3(c) and Article 21(1) allow for such a broad exclusion. Article 3(c) outlines rules as to the form which an exclusive choice of forum agreement must take. Hartley and Dogauchi's Explanatory Report explains that 'no further requirements of a formal nature may be imposed under national law.'[30] This may exclude the possibility of a declaration being made under Article 21(1) nominating non-negotiated contracts, such as click-wrap and browse-wrap agreements, as one area to which a signatory will not apply the Convention.

29. Hague Convention on Choice of Court Agreements (Concluded on 30 June 2005), Art. 21(1).
30. Hartley and Dogauchi, Explanatory Report on the 2005 Hague Choice of Court Agreements Convention (2007), 40.

Even if the issues stemming from Article 3(c) could be overcome, Article 21(c) itself may make impossible the type of declaration discussed here. Article 21(c) contains three separate requirements. First, the state seeking to make the declaration must have a 'strong interest' in not applying the Convention to the matter in question. In light of the discussion above, it seems arguable that states may, indeed, have a strong interest in limiting the scope of the Convention so as to exclude non-negotiated contracts, such as click-wrap and browse-wrap agreements. The second and third requirements are related; the subject matter of the declaration should be no broader than is necessary and must be clearly and precisely defined. In light of these requirements, great care must be taken in the wording of any Article 21(1) declaration. If a declaration, for example, is limited to exclude e-commerce transactions, it may be clear and precise enough, but could be said to be unnecessarily broad. A similar objection could be raised against a declaration excluding non-negotiated contracts – it may be clear and precise enough, but could be said to be unnecessarily broad. In contrast, a declaration excluding non-negotiated e-commerce contracts, or alternatively click-wrap and browse-wrap agreements, specifically ought to meet both the second and the third requirement. However, Hartley and Dogauchi's Explanatory Report casts doubt upon the validity of such a declaration. They state: 'The declaration cannot use any criterion other than subject matter.'[31]

In light of this, the better option for states wanting to become signatories to the Convention, yet avoiding the Convention being applied in the type of scenarios requiring a degree of flexibility not provided under the Convention, may be to make a declaration excluding 'consumer contracts', using the definition of 'consumer' as found in Australian law (discussed *above*). Such a declaration would arguably meet all three requirements found in Article 21(1), as well as the added hurdle presented by the statement in Hartley and Dogauchi's Explanatory Report.

Sceptics may object also to this approach, as focusing on 'consumer contracts' would, at a first glance, appear to involve the use of a party-related criterion rather than a subject-matter criterion. However, as is made clear above, the *Australian Consumer Law* defines a 'consumer' by reference to subject-matter criterion, rather than by reference to party-related criterion. Consequently, any declaration excluding 'consumer contracts', using the definition of 'consumer' as found in Australian law, is indeed an exclusion based on subject-matter criterion. Whether such an exclusion will be allowed remains to be seen.

Should it be the case that Article 21(1) does not cater for the necessary exclusions discussed above, some countries may in fact be unable to become signatories to the Convention.

31. *Ibid.* 66.

E. The Location of Contract Formation

As has been illustrated in the country-specific chapters, the location of contract formation is being used as a ground for jurisdiction in the PRC,[32] Hong Kong,[33] England,[34] Australia[35] and, to an extent, in Sweden[36] and the United States.[37] Furthermore, the location of contract formation is used in determining choice of law (however, in a less determinative manner). All of the states examined in this study deem a contract to be formed upon the acceptance, by a party having legal capacity to enter into a contract, of an offer from a party having legal capacity to enter into a contract.[38] This principle applies online as well as offline.

Mann has stated that this head of jurisdiction is 'surely exorbitant and, perhaps, contrary to international standards',[39] and one really must question its relevance, as a jurisdictional ground, in our modern society:

> The rule that contracts have to be judged by the law of the place of making is very old. It was developed at a time when the conclusion of contracts through the mail was unknown. When parties made a contract they were both present on one spot. Very often a judge or notary was called in to give the contract the proper form. In this situation the application of the law of the place of making is reasonable. This is the law the application of which the parties expect, and it is convenient and often even unavoidable to observe the formalities prescribed by the law of the place of making.
>
> As soon as a contract is concluded through the mail or over the telephone between persons residing in different jurisdictions all these considerations lose their force. Only in a figurative sense one of the places where the parties acted or resided can be called the place of the making.
>
> Under the prevailing American doctrine [and the doctrine of many other states] one finds the place of contracting by asking where the last act necessary to make the contract binding occurred. This is an objectionable method because it transposes a rule, which was developed for quite different purposes to a field where it is possibly wholly inappropriate. The rule has been developed in order to answer the question when the power of the offeror to revoke the offer ends and when the offeree is bound. Even to these questions different answers would be possible. No policy argument has as yet been made for the proposition that the same act should fix the applicable law. The task of the jurist in this situation is not to find through some construction, even if it were as simple as Beale strongly asserts, the place of making, but to find policy considerations, which indicate which of the different legal systems to which the factual situation is related should be given preference.[40] (footnotes omitted)

32. See Chapter 7, section I.B.
33. See Chapter 4, section I.A.
34. *Ibid.*
35. *Ibid.*
36. See Chapter 6, section I.A.
37. See Chapter 5, section I.A.
38. See, e.g., Chapter V of The Contract law of China, at <http://www.isinolaw.com>; The Swedish contracts law (*'Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område'*); and M. Davies, A.S. Bell and P.L.G. Brereton, *Nygh's Conflict of Laws in Australia* (9th edn, Sydney: Lexis Nexis Butterworths, 2014): 460–477. It is, in addition, not uncommon for the law to provide the parties with the opportunity to agree upon where the contract is said to have been formed. Such party discretion does, however, not normally preclude a court from determining the actual place of contract formation. See, B. Fitzgerald et al., *Jurisdiction and the Internet* (Sydney: Lawbook Co., 2004), 13, referring to *Sheldon Pallet Manufacturing Co. Pty Ltd v. New Zealand Forest Products Ltd* [1975] 1 NSWLR 141, 147. Note, however, the so-called 'Postal acceptance rule'.
39. F.A. Mann, 'The Doctrine of International Jurisdiction Revisited after Twenty Years', (1984) iii *Hague Recueil* 70. See also critique expressed in: Q.J. Kong and M.F. Hu, 'The Chinese Practice of Private International Law', (2002) 3 *Melbourne Journal of International Law* 417.

These quoted words were written already in 1942. The critique expressed against the location of contract formation being used to determine the question of jurisdiction and choice of law is even more justified and potent today, not the least due to the widespread use of the Internet. Any determination of the location of contract formation is necessarily artificial when the parties are not at the same place at the time of the contract formation. While it typically is reasonable to say that a contract is formed where the last act necessary to make the contract binding occurs (i.e., where the offeror receives the acceptance), since only then is the contract actually concluded, one must still question why this should decide the jurisdictional and choice of law questions. What makes that place the proper focal point? One can picture a situation where two parties exchange offers and counter-offers only to come to an agreement after several rounds of counteroffers. In such a situation, the place of formation and thereby the jurisdictional and choice of law questions are determined rather by coincidence under the focused on where the last act necessary to make the contract binding occurs.

Against this background, it could be submitted that placing focus on the artificially constructed place of contract formation makes little sense in cross-border contracts, and is an inappropriate foundation for jurisdictional claims. However, it may not be necessary to disregard the location of contract formation in full. The solution adopted in Swedish law illustrates that a suitable balance can be found. As seen in Chapter 6, section I.A, Swedish law attaches significance to the location of contract formation only when both parties are present at the location of contract formation. This approach seems reasonable. However, a slight clarification is necessary in the online context. The location of contract formation should be of relevance only where both parties *knowingly* are at the same location when the contract is concluded. This avoids significance being attached to the location of contract formation where parties are not aware that they are located at the same place during the formation of the contract.[41]

On a more general note, it could, as observed above, be said that grounding jurisdictional rules, or choice of law rules, on concepts stemming from substantive law areas such as the concept of contract formation, is associated with the risks of: (1) inheriting any and all of the substantive law rule's weaknesses; and (2) the substantive law concept developing and thereby taking on a new direction which the private international law rule has to follow.

40. R. Neuner, 'Policy Considerations in the Conflict of Laws', (1942) XX(6) *The Canadian Bar Review* 498–499.
41. This type of situation may not be as rare as it first may appear. It would, for example, not be unusual for a contract to be formed online between a seller and a buyer, both located in New York, without either of the parties being aware of the other party's location.

J. US Contractual Specific Jurisdiction

As seen in Chapter 5, section I.A, the US approach to jurisdiction over contractual disputes is somewhat different to the other approaches discussed here. While arguably exorbitant, little needs to be said about the US contractual specific jurisdiction. The only point to observe is that a foreigner entering into a contract with a US party must ensure that the contract designates an exclusive forum, if it wants to avoid coming under US jurisdiction.

(US specific jurisdiction, in the context of Internet defamation, is discussed below as part of Chapters 9, sections I.K and I.N.)

K. The Place of the Wrongful Act and the Place of Harm[46]

It is suitable to deal with jurisdiction based on the place of the wrongful act and jurisdiction based on the place of harm together. Indeed, the law often deals with them as the two sides of the same coin.[47]

While these grounds for jurisdiction may be of interest both in the setting of cross-border defamation and in relation to intellectual property disputes, focus is here placed on defamation actions. However, that is not to say that the discussion, or parts thereof, cannot be equally applied in the context of trademark or copyright infringements.

The first thing to be done to properly evaluate these rules and their implications for Internet defamation is to outline the sequence of events, which potentially result in harm. In doing so, it is useful to adopt a somewhat simplified six-step conceptual model.[48] Under this model, the first step is taken when the defamatory material is created (i.e., written, painted, filmed, recorded, etc.). Thus, step one may actually occur over a period of time and at a variation of locations, but is only completed when the material contains the allegedly defamatory meaning. Steps two and three involve the transfer of possession of the defamatory material. The second step consists of the dispatch of the defamatory material (i.e., through the delivery of a newspaper, the posting of a letter, etc.), while the third step consists of the third person taking possession of the defamatory material (i.e., the acquisition of a newspaper or DVD, the

46. This Part is largely based on D. Svantesson, '"Place of Wrong" in the Tort of Defamation - Behind the Scenes of a Legal Fiction', (2005) 17(2) *Bond Law Review* 149–180.
47. See, e.g., chapters relating to PRC, Hong Kong, Australia and Sweden.
48. In a situation where the party creating the defamatory material is not the one making the defamatory material available to the third person (e.g., a DVD rental place), additional steps might take place. Also, slander could arguably be described as a six-step process, but less obviously so than libel. Another respect in which this model is somewhat simplified is that the creation (i.e., step one) must not necessarily take the form of one identifiable act. The creation of a newspaper article, for example, would ordinarily consist of several sub-steps such as writing and editing. Fortunately only step one consists of sub-steps, and no legal system places the focus on step one.

delivery of a letter into a post-box, etc.).[49] The fourth step takes place when the substance of the defamatory material enters the mind of a third person in the sense of being comprehended by that person (i.e., when a person reads the newspaper or letter, views the DVD, views the painting, etc.).[50] It is from this point onwards that injury is suffered. Step five is, in contrast to the other steps, not really a specific step but rather a group of events. It occurs when and where consequences of defamation occur, such as the defamed being fired, an order being cancelled or the defamed person's spouse taking out a divorce. Thus, step five may consist of multiple acts. Finally, step six occurs when and where the plaintiff feels the effects of the consequences of defamation (i.e., where the plaintiff economy is affected, or where emotional injury is suffered). Thus, step six may occur wherever the plaintiff is located, and when the plaintiff moves, the injury, and thereby also step six, may move with the defamed person.

Applying this six-step model to e-mail communication, the first step obviously takes place when the sender writes the e-mail, the second step reasonably takes place when the sender presses 'send' in his/her e-mail programme, the third step would seem to take place when the message enters the receivers 'inbox' and the fourth step clearly takes place when the receiver reads the e-mail.[51]

Turning to WWW communications, and e.g., online video content such as via YouTube, step one undeniably takes place when the material is written, filmed or otherwise created and step two takes place upon the uploading of the material onto a server or video platform. Steps three and four would ordinarily occur at virtually the same time – upon the receiver accessing the website or the relevant part of the video platform. However, it is important to remember that people do not always read all the material that is presented on their screen. It is, for example, not uncommon for people to visit a website and, instead of reading the material there and then, print it for later reference. In such a case, step three would take place when the receiver accesses the website, while step four does not take place until the receiver reads the printed material. Steps five and six are not affected by the technology used to transmit the defamatory material.

49. Guidance, in relation to the distinction between dispatch and receipt, can be found in contract law, with its extensive experience in dealing with the transfer of possession. See, e.g., section 14 of the *Electronic Transactions Act 1999* (Cth).
50. As many, not to say most, other conceptual models, the one argued for above, can rightly be said to be too simplistic in some aspects. One could, for example, envisage a situation in which a person writes a defamatory statement one letter at the time while constantly moving between different forums. In such a somewhat unusual situation, what is said to be step one – the creation of the defamatory material – could either be divided into step one (a), step one (b), step one (c) and so on, or one could simply say that step one took place at the time and place where the defamatory meaning of the material was created (which, of course, does not necessarily have to coincide with the completion of the creation of the entire material in dispute). This type of extreme fringe situation is, however, beyond the scope of this book.
51. Regarding when steps two and three take place, one could imagine alternatives. For example, step two could be argued to take place when the all of the packets constituting the e-mail message have left the sender's network, and similarly one could argue that step three takes place when all the packets constituting the e-mail message have entered the receiver's network (compared to some approaches taken in relation to e-commerce). On a practical level, this type of alternative does not seem to have any direct consequences for the analysis.

Obviously, the application of the six-step model to social media varies between different forms of media. Some – particularly those involving a 'push' element like on Twitter – will in many ways be more similar to e-mail, while others – particularly those characterized by a 'pull' structure – will be more similar to WWW communication.

It is unfortunate that this type of conceptual model has not been applied in the discussion associated with the controversial topic of jurisdiction over Internet defamation. Indeed, the absence of this type of model has arguably contributed to the present state of confusion apparent in certain legal systems.

Before the six steps are analysed in more detail, it is important to note the view taken in this book that injury to reputation, just as many other forms of injuries, may be ongoing for a period.[52] In illustrating the flaws of Findly J.'s statement that 'damage in Hong Kong in libel case can flow only from a publication in Hong Kong', I relied upon the example of a Hong Kong factory owner 'A' reading, while in Denmark, a newspaper alleging disloyalty amongst certain senior workers at A's factory, and firing those workers upon his return to Hong Kong. This example should make clear that injury to reputation may be ongoing and that defamation damage thus does not always lend itself to being pinned down to one certain location – and any attempt to do so represents a misguided legal fiction.

Viewing the ongoing nature of injury/damage suffered through defamation in light of the mobility associated with our modern society, it is clear that relying upon the place of injury/damage in determining jurisdiction or choice of law, however, widespread this practice happens to be, is a seriously flawed approach. Focusing on the place of injury/damage in determining jurisdiction and/or choice of law would either provide the plaintiff with extraordinarily wide possibilities of forum shopping, or require a fictive definition of 'the location of injury/damage'. In practice, those states that do focus on the location of injury appear to have opted for the creation of a legal fiction.

Viewing injury in the manner advocated here does not necessarily correspond with traditional approaches, but the approach advocated here is much closer to reality than traditional views of 'injury' pinpointing it to one specific location.

1. *Jurisdiction Exercised over Step One*

None of the examined states exercise jurisdiction based on step one. This is only logical as creation without transfer of possession cannot possibly cause harm, and consequently no defamation has occurred in step one. Indeed, step one may be taken without any transfer of possession ever being intended. In this regard, step one is unique – it is the only step that may be taken without the intention of the defamatory material coming to another person's knowledge.

Making the place of creation the focal point in the jurisdictional inquiry could be argued to constitute a violation of the right to hold opinions without interference, as

52. If, for example, a person breaks his/her foot while trekking in the Andes, an injury may very well be suffered for an extensive period and in multiple locations, not just at the very moment the foot was broken.

provided e.g., through Article 19(1) of the ICCPR. After all, in creating defamatory material, the creator has done nothing more than make a material representation of his opinion, and as long as no other person comes into contact with this material representation, it makes no difference on a practical level whether the opinion exists only as thoughts in a person's head or as a material representation of those thoughts.

Even if focusing on step one has the advantage of being identifiable as occurring in one specific location,[53] and may be advantageous in relation to the defendant's predictability, it must, in light of the disadvantages highlighted above, be seen as unsuitable as a focal point for the jurisdictional and choice of law questions.

2. *Jurisdiction Exercised over Step Two*

The laws of several states place part of their focus on the place where the damaging act was performed.[54] As the uploading constitutes the last active act by the publisher, one would perhaps think that it was this, step two, to which such rules refer. But as is illustrated that is not always the case. Under traditional Common Law, 'publication' constitutes the actionable act, and 'publication' occurs where the defamatory material enters the mind of a third person,[55] which obviously excludes step two (indeed, the possible alternative approach arguably taken in the *Gutnick* case also excludes step two).

In contrast, as discussed in Chapter 6, section I.B, it seems reasonable to suggest that Swedish and German law, in referring to the 'where the damaging act took place', aim at step two. In addition, as explained in Chapter 7, section I.C, there are reasons to believe that a PRC court would place part of its focus on step two, at least if guidance is found in Article 1 of the *Interpretation of the Supreme People's Court on Application of Laws When Trying Dispute Cases Concerning Computer Network Copyright*.[56]

While it is clear that uploading constitutes step two in the case of e.g., WWW publication, it is nevertheless necessary to define what constitutes 'uploading'. There are essentially three alternatives: uploading takes place: (1) where the person doing the uploading is located; (2) where the computer from which the material is sent, is located; or (3) where the server, to which the material is uploaded, is located. In the *Gutnick* case, Kirby J. appears to suggest that uploading takes place where the server, to which the material is uploaded, is located:

> If the place of uploading were adopted as the place of publication, which also governs the choice of applicable law, the consequence would often be, effectively,

53. That is, if focus is placed on the location where the material being created is complete to such a degree that it has become defamatory.
54. The PRC (see Chapter 7, section I.C), England, Hong Kong and Australia (see Chapter 4, section I.B), and Sweden and Germany (see Chapter 6, section I.B). It would, indeed, also seem possible that a US court could exercise jurisdiction, in conformity with the minimum contact test, over a person having undertaken step two within the forum state.
55. *Webb v. Bloch* (1928) 41 CLR 331, 363.
56. *Interpretation of the Supreme People's Court on Application of Laws When Trying Dispute Cases Concerning Computer Network Copyright*, 22 November 2000, The Supreme People's Court, <http://www.isinolaw.com>.