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Choice-of-Law in the Internet Age—US and European Rules

Abstract: With use of the Internet, a new form of contract has appeared: the electronic contract, which is concluded online. Most of these involve a relationship of two parties: a consumer who is in a relatively vulnerable position, and a business entity. There are numerous examples of such transactions: youngsters downloading music from a website and paying for it—as they would in a music store. Many physical goods can also be purchased online—e.g. even though they live in Europe, the authors of this article regularly purchase books from the US. There are numerous ways such transactions can take place: one of the most obvious ways is buying goods on Amazon or eBay, on the website of a company, or purchasing goods using e-mail communication. The article attempts to summarize the choice of law rules affecting electronic contracts in the US and in Europe—i.e. to give an overview of which country's or state's law would apply to a contract concluded online, what the limits are on such a transaction and which state's laws can protect us in case of a breach.

Keywords: Private international law, internet law, choice-of-law, electronic contracts, consumer sales, Rome I. Regulation, U.C.C., Restatement (Second) of the conflict of laws

I. Introduction

With widespread usage of the Internet, a special field of private international law has emerged (hereinafter referred to as: “*PIL*” or, using its US name, “*conflict-of-laws*”), growing strongly over the last decade: the law of electronic contracts. Consumers conclude contracts through the Internet in developed countries every day: they buy goods, reserve hotel rooms and other services, download paid music from websites, etc. In such transactions, choice-of-law clauses are used regularly. Reviewing the latest developments, we discover numerous cases and statutes in the United States dealing with this topic, with a similar situation in the European Union.

In this area of private international law, we believe that both Europe and the US have a lot to learn from each other. In general, the US leads with proactive thinking in applying new technologies and in reflecting the latest developments in the world. On the other hand, Europe has a tradition—continuously eroding, but still existing—of making clear rules with the public can become relatively easily acquainted. Furthermore, consumer law is traditionally at the centre of EU commercial law and additionally, there is currently an on-going wave of consumer legislation activity. A new law for consumer contracts was adopted

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at the end of 2011,¹ and a separate proposal was also made for a common European sales law,² all indicative of the continued importance of the field.

In this paper we wish to focus on the rules of e-sales and not on provisions related to other contract types. We will be dealing with the laws of consumer contracts; laws governing other kinds of private contract may contain different provisions. Importantly, we will only deal with the problem of applicable law, and will not discuss substantive law, jurisdiction and other related issues.

II. The parties' choice of law

1. General rules

The question of which law to apply to a contract has an elementary effect on remedies for any breach, since there are enormous differences between the Anglo-Saxon and European continental legal approaches affecting contracts.³ On the other hand, with the unification efforts of the EU, some parts of the problem in Europe appear to have been resolved. As with substantive law, we rarely find specific, written rules targeted at electronic consumer contracts—in this regard the US and the EU systems are similar. Thus we must consider the general landscape of consumer law and contract law. Equally for applicable law, we need to have a broad view of the general rules in order to consider special cases.

Reviewing the laws applicable to contracts, we discover only small differences between US and EU rules: on both sides of the Atlantic Ocean, the law chosen by the parties must by default be applied to an e-sales contract. In the US, the Second Restatement on conflict-of-laws⁴ expresses this idea, and even though it is not a law with binding force, the approach is followed by all states. Article § 187 of the Restatement states the following:

“(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not

¹ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council Text with EEA relevance. OJ L 304, 22.11.2011, 64–88. Cf. Micklitz, H.-W.–Reich, N.: Crónica de una muerte anunciada: The Commission Proposal for a Directive on Consumer Rights. *Common Market Law Review*, 46 (2009) 2, 471–519; van Boom, W. H.: The Draft Directive on Consumer Rights: Choices Made & Arguments Used. *Journal Of Contemporary Research*. 5 (2009) 3, 452–462.

² Proposal for regulation of the European Parliament and of the Council on a common European sales law. COM (2011) 0635 final.

³ Smits, J. M.: Diversity of Contractual Law and the European Internal Market. In: Smits, J. M. (ed.): *The Need for a European Contract Law—Empirical and Legal Perspectives*. Groningen, 2005. 156–163; Lando, O.: Performance and Remedies in the Law of Contracts. In: Hartkamp, A.–Hesselink, M. et al. (eds): *Towards a European Civil Code*. Dordrecht–London–Boston, 1994. 201–222; Tallon, D.: Breach of Contract and Reparation of Damage. In: *Towards a European... op. cit.* 223–237.

⁴ Restatement (Second) of Conflict of Laws § 187 (1)–(2) (1971).

have resolved by an explicit provision in their agreement directed to that issue, unless either

- (a) The chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or
- (b) Application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
- (3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.”

We find similar provisions in the Uniform Commercial Code (hereinafter referred to as: “U.C.C.”). The U.C.C. cannot be considered a black letter law since it was published as a uniform model act by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute (ALI). However, since it is built into each state’s law and is applied similarly throughout the US, it has a key role in US sales law. U.C.C. § 1–301 2003 asserts the following:

“Territorial Applicability; Parties’ Power to Choose Applicable Law

- (a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.
- (b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), [the Uniform Commercial Code] applies to transactions bearing an appropriate relation to this state.
- (c) If one of the following provisions of [the Uniform Commercial Code] specifies the applicable law that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified:
 - (1) Section 2- 402
 - (2) Sections 2A- 105 and 2A- 106
 - (3) Section 4- 102
 - (4) Section 4A- 507
 - (5) Section 5- 116
 - [(6) Section 6- 103]
 - (7) Section 8- 110
 - (8) Sections 9- 301 through 9- 307.”

In Europe, Art. 3(2) of the Rome I Regulation on the law applicable to contracts (hereinafter referred to as: “*Rome I Regulation*” or “*Rome I*”)⁵ grants the parties the right

⁵ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) OJ L 177, 2008.07.04, 6. Cf. Callies, G.-P. (ed.): *Rome Regulations*. Alphen aan den Rijn (The Netherlands), 2011, 17–353; Ferrari, F.–Leible, S. (eds): *Rome I Regulation*. München, 2009; Leible, S.–Lehmann, M.: Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht (“Rom I”). *Recht der Internationalen Wirtschaft*, 54 (2008), 528–543; Mankowski, P.: Die Rom I-Verordnung–Änderungen im europäischen IPR für Schuldverträge. *Internationales Handelsrecht*, 7 (2008), 133–152; Pfeiffer, T.: Neues Internationales

to make such a choice.⁶ The regulation or, to be more precise, Art 6 thereof clearly expresses that the parties may choose the law applicable to a contract.

2. Limitations of choice

In all legal systems, the parties' choice of law for a contract, and especially for a consumer contract has limitations. Firstly, in the US, the law chosen must have a substantial relationship with the contract.⁷ In Europe—in our personal opinion—this is not a requirement.

Secondly, in all jurisdictions including Europe and the US, the application of a law can be rejected if it is in conflict with some important provisions that the forum has to validate. Two types of such rules can be distinguished. Above all other issues, the public policy of the forum may contain such important rules.⁸ Art. 9(2) and (3) of Rome I states that nothing in the regulation shall restrict the application of the overriding mandatory provisions of the law of the forum. According to the legal literature, is a reference to the most essential, imperative laws of a country, for example laws protecting consumers and employees.⁹ Along with these rules, the overriding mandatory provisions of the law of the country may also be give effect where the obligations arising out of the contract have to be or have been performed, when those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to such provisions, regard shall be

Vertragsrecht—Zur Rom I-Verordnung. *Europäisches Zeitschrift für Wirtschaftsrecht*, 19 (2008), 622–629; Plender, R.–Wilderspin, M.: *The European Private International Law of Obligations*. London, 2009. 93–434; Stone, P.: *EU Private International Law*. London, 2010. 287–346; von Armbrüster, Ch.–Ebke, W. F.–Hausmann, R.–Magnus, U.: *Staudinger Kommentar zum Bürgerlichen Gesetzbuch—Einleitung zu Rom I-VO*. Berlin, 2011; von Armbrüster, Ch.–Hausmann, R.–Magnus, U.: *Art. 1–10 Rom I-VO*. Berlin, 2011; Magnus, U.–von Armbrüster, Ch.–Ebke, W. F.–Hausmann, R.: *Artikel 11–29 Rom I-VO; Artikel 46 B, C Egbgb*. Berlin, 2011; Wagner, R.: Der Grundsatz der Rechtswahl und das mangels Rechtswahl anwendbare Recht (Rom I-Verordnung)—Ein Bericht über die Entstehungsgeschichte und den Inhalt der Artikel 3 und 4 Rom I-Verordnung. *IPrax–Praxis des Internationalen Privat- und Verfahrensrechts*, 28 (2008), 377–386.

⁶ Cf. Tang, Z. S.: Parties' Choice of Law in E-Consumer Contracts. *Journal of Private International Law*, 3 (2007) 1, 113–136.

⁷ See the above-mentioned Sections. Cf. Hay, P.–Borchers, P. J.–Symeonides, S. C.: *Conflict of Laws*. 5th ed., St. Paul, 2010. 1090–1098; Weintraub, R. J.: *Commentary on the Conflict of Laws*. New York, 6th ed., 2010. 517. et seq.; Rühl, G.: Party Autonomy in the Private International Law of Contacts. In: Gottschalk, E.–Michaels, R.–Rühl, G.–von Hein, J. (eds): *Conflict of Laws in a Globalized World*. Cambridge–New York, 2007. 160. et seq.

⁸ For the US rules cf. Healy, J. J.: Consumer Protection Choice of Law: European Lessons for the United States. *Duke Journal of Comparative and International Law*, 19 (2009), 537. et seq.

⁹ Bonomi, A.: Mandatory Rules in Private International Law—The Quest for Uniformity of Decisions in a Global Environment. In: Šarčević, P.–Volken, P.—The Swiss Institute of Comparative Law (eds): *Yearbook of Private International Law*, Vol. 1, 1999. 215–248; Wojewoda, M.: Mandatory Rules in Private International Law—With Special Reference to the Mandatory System under the Rome Convention on the Law Applicable to Contractual Obligations. *Maastricht Journal of European and Comparative Law*, 7 (2000) 2, 183–213; Dickinson, A.: Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu? *Journal of Private International Law*, 3 (2007) 1, 53–88; Benzenberg, E.: *Die Behandlung ausländischer Eingriffsnormen im internationalen Privatrecht. Eine studie unter besonderer Berücksichtigung des internationalen Schuldrechts*. Jena, 2008.

had to their nature and purpose and to the consequences of their application or non-application.

Moreover, in certain instances, the law of the consumers' habitual residence also has relevance. In Europe, the rule is expressly stated in Rome I: according to Art. 6(2), the parties may not "lower" the level of consumer protection the consumer would have in the absence of such a choice.¹⁰ There's a similar problem with EU consumer law: its provisions cannot be overridden by the choice of the parties.¹¹ In the US, the situation is more complicated. According to § 187(2)(b) of Restatement (second) of conflict of laws, the law chosen by the parties cannot be applied in case the "[...] application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which [...] would be the state of the applicable law in the absence of an effective choice of law by the parties." We can see that the status of the law which would protect the consumer in the absence of a choice by the parties is governed as a public policy issue. Moreover—surprisingly and strangely for Europeans—the state interest consideration has to be applied to ascertain whether the state has a greater interest in order for the provisions to apply. It is also important to emphasize that in Europe, the only substantive provisions that may be set aside are those that would harm the consumer. In sharp contrast with this, in the US the whole choice becomes invalid. However, since in most cases the results will be the same this is only a theoretical difference.¹²

It can be ascertained that "[...] the American courts have been inconsistent in protecting consumers by enforcing the laws of their home states".¹³ In several cases, fundamental public policy was recognized by the court of a foreign jurisdiction. In most cases, the law of the consumer's habitual residence either precludes any choice of law or prohibits waivers under the substantive rules.¹⁴ In certain cases, however, contrary to the general rule, courts have ruled otherwise.¹⁵

Beyond the above, it is important to mention that an earlier version of the U.C.C. in its § 1–301 also contained provisions for some time the provided protection for consumers in a similar way to how it is done in Europe. In 2001, the U.C.C. was amended, but since the states—except for the Virgin Islands—did not promulgate the amendment, the NCCUSL later (in 2007) reverted to the previous legislation.¹⁶ According to the 2001 revision, in general, parties would have had more freedom to choose a law, even one with no connection to a contract. However, this did not apply to consumer contracts, where the requirement for a

¹⁰ Article 6(2) Rome I Regulation.

"Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable [...]"

cf. Healy: *op. cit.* at 536 *et seq.*

¹¹ Numerous provisions on this issue can be found in consumer law directives. Therefore we only cover their main goal here without deeper analysis.

¹² Rühl: *op. cit.* at 170.

¹³ See Healy: *op. cit.* at 536 *et seq.*

¹⁴ Rühl: *op. cit.* at 169.

¹⁵ For such cases see Healy: *op. cit.*

¹⁶ For background see Graves, J. M.: Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1–301 and a Proposal for Broader Reform. *Seton Hall Law Review*, 36 (2005), 535; Weintraub, R.: *Commentary On The Conflict Of Laws. op. cit.* 513 *et seq.*

reasonable relation remained.¹⁷ Yet consumers were also expressly protected, since the chosen law was not allowed to vary legislation of the state or country in which the consumer resided.¹⁸ As already mentioned, this legislation was not well received and was revoked in 2007.

3. *Special rule for software*

Beside the Second Restatement and the U.C.C., we must also consider the rules of the Uniform Information Transaction Act (UCITA). The National Conference of Commissioners on Uniform State Laws (NCCUSL) voted to approve the Uniform Information Transaction Act (UCITA)¹⁹ on July 29, 1999. The Act was intended to become a modification, a new Article 2B of the U.C.C. At an early stage, the American Law Institute also supported this work but eventually, the document was adopted solely by NCCUSL. The Act created special rules for software licenses and transactions. By the time of writing, it has only been adopted by two states, Maryland and Virginia.²⁰ In 2003, following harsh criticism,²¹ the NCCUSL withdraw UCITA from consideration for endorsement by the American Bar Association. Please note that the provisions of UCITA were generally made for software licenses but its scope also covers the sale of software. In a mixed transaction, where computer software and physical goods (e.g. a computer) are sold together, UCITA may be only applied to the software part of the transaction unless the primary subject matter is the sale or licensing of software.²² Regarding choice of a law, UCITA § 109 states that “the parties in their agreement may choose the applicable law. However, the choice is not enforceable in a consumer contract to the extent it would vary a rule that may not be varied by agreement under the law of the jurisdiction whose law would apply [...] in the absence of the agreement.”

¹⁷ U.C.C. § 1–301(3)(1) (2003).

¹⁸ U.C.C. § 1–301(3)(2) (2003).

“Application of the law of the State or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement: (A) of the State or country in which the consumer principally resides, unless subparagraph (B) applies; or (B) if the transaction is a sale of goods, of the State or country in which the consumer both makes the contract and takes delivery of those goods, if such State or country is not the State or country in which the consumer principally resides.”

¹⁹ The original text as adopted in 1999 available at <http://www.law.upenn.edu/bll/archives/ulc/ucita/ucita200.htm>. Later, in 2000 and in 2002 it was modified. Cf. Ballon, I. C.: *E-Commerce and Internet Law* (Volume 2, 2001). West, 2009, 20–17. *et seq.*; Delta, G. B.–Matsuura, J. H.: *Law of the Internet*. Aspen, 2011. 13–97 (§ 13. 07) *et seq.*

²⁰ On the other hand, more than a dozen states have introduced versions of UCITA, but they never got adopted. D. Hart, J.: *Internet Law: A Field Guide*. Arlington, 2008. 501.

²¹ “Writing a law which makes it almost impossible to sue software publishers for defects is a poor way to manage the escalating level of software customer dissatisfaction with bad software and bad support.” Kaner, C.–Pels, D. L.: *Ucита: a bad law that protects bad software*. *Network World*, 1999 available at <http://www.badsoftware.com/networld.htm>

²² Delta–Matsuura: *op. cit.*... at 13–99 (§ 13. 07).

III. The law applicable in the absence of a choice

1. Europe

In the EU, in the absence of any choice of law made by the parties, Art. 4(1)(a) Rome I Regulation, in theory dictates that the law of the habitual residence of the seller should be applied.²³ However, this does not hold in our case, since in order to protect²⁴ the consumer, Art. 6(1) Rome I Regulation reverses the rule for consumer contracts: in such cases, the habitual residence of the consumer must be applied.²⁵ Though a condition for this rule is that the professional (the business entity) must conduct activity in the country of the consumer.

The law applicable to contracts for downloading software, music and films over the Internet is generally the law of the country where the consumer has his or her habitual residence, provided that is the location of the download process and that the site presents a request to conclude a contract.²⁶ A passive website through which concluding a contract is not possible, cannot be considered to be activity in that country.²⁷ The situation is similar with respect to third states (non-MSs). If a company from a third state maintains a website and contracts can be concluded through the website, the habitual residence of the consumer will likely have relevance. If someone concludes a consumer contract with a New York based company and buys goods from New York via the Internet, the contract may be a consumer contract according to Art. 6 of Rome I, and the general rules of the Regulation²⁸—which would lead us to the law of the seat of the company, i.e. to New York law—cannot be applied. Of course, in order to reach this conclusion, the term “directed activity” has to be interpreted, taking into consideration all circumstances of the case (the targeted activity test).²⁹ In the test, anything may have relevance: the offer on the website, shipping conditions, the e-mails the parties sent each other, etc. A good question is what should happen if the website is passive, but the consumer writes an email to the company in order to purchase something. In this case too, all circumstances of the sale may have relevance: the advertisements on the company’s website offering worldwide delivery, where the contract was concluded, where the parties were based, where the computer was, where the goods were to be delivered, where payment took place, the place of breach, etc.³⁰ The application of this test merits some criticism, since some vagueness remains in most of the cases after reviewing the circumstances.³¹

²³ “[...] a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence”.

²⁴ For the scope of protection see Tang: *op. cit.* 213–229.

²⁵ Dicey, A. V.–Humphrey, J.–Morris, C.–Collins, L.: *The Conflict of Laws—Fourth Cumulative Supplement to the Fourteenth Edition*. Oxford, 2011. 393–394; Leible–Lehmann: *Die Verordnung...* *op. cit.* at 537.

²⁶ Gillies, L. E.: *Electronic Commerce and International Private Law*. Hampshire–Burlington, 2008. 141.

²⁷ Ragno, F.: *The Law Applicable to Consumer Contracts under the Rome I Regulation*. In: Ferrari, F.–Leible, S. (eds): *Rome I Regulation*. *op. cit.* 147.

²⁸ *Esp.* Art. 4(1)(a) Rome I Regulation.

²⁹ Callies: *op. cit.* at 124–155.

³⁰ Fawcett, J.–Harris, J. M.–Bridge, M.: *International Sale of Goods In The Conflict of Laws*. Oxford, 2005. 1221 *et seq.*

³¹ Gillies: *Electronic Commerce*, *op. cit.* 141.

2. USA

Contrary to the European solution, where there are unified rules, the situation in the US is by far more challenging. Even though the parties' right to the choice of law is granted by all states, the other rules of the Restatement (second) of conflict-of-laws is respected only by approximately half of them (23 jurisdictions).³² The other states employ different approaches: this is one of the reasons why American choice-of-law rules seem quite chaotic for Europeans. Among these approaches we may find the following main principles as well as combinations thereof:

- The classic “place of contracting” principle (12 states take this approach)³³
- Centre of gravity test (significant contact approach, used by four states and Puerto Rico)³⁴
- Better law approach
- Governmental interest approach (applied, e.g. in California)³⁵
- Law of the forum
- Place of performance
- Purpose of the agreement³⁶

§ 188 of the Second Restatement uses the following choice-of-law principles:³⁷

- The law of the state/country that has the most significant relationship to the transaction and the parties. Under this principle, factors considered are the place of contracting, negotiations and performance, the location of the subject matter of the

³² Symeonides, S. C.: *The American Choice-of-Law Revolution: Past, Present, Future*. Leiden, 2006. 88; Symeonides, S. C.: Choice of Law in the American Courts in 2002: Sixteenth Annual Survey. *American Journal of Comparative Law*, 51 (2003) 1.

³³ Hay–Borchers–Symeonides: *Conflict of Laws*, *op. cit.* at 1159 *et seq.*

³⁴ *Ibid.* at 1175 *et seq.*

³⁵ The court “must search to find the proper law to apply based upon the interests of the litigants and the involved states”. Reich and Purcell, 67 Cal. 2d 551, 553, 63 Cal. Rptr. 31. 33 (1967)

³⁶ Hay–Borchers–Symeonides: *Conflict of Laws*, *op. cit.* at 1164 *et seq.*

³⁷ Restatement (Second) of Conflict of Laws § 188 (1971)

“(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

(2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

- (a) The place of contracting,
- (b) The place of negotiation of the contract,
- (c) The place of performance,
- (d) The location of the subject matter of the contract, and
- (e) The domicile, residence, nationality, place of incorporation and place of business of the parties.

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189–199 and 203.”

contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties.

- The place of negotiations and the place of performance, if they fall in the same state. Clearly, for international e-commerce transactions this principle is not applicable.

By comparison, the U.C.C. states in its § 1–301(b) that “in the absence of an agreement [...] the Uniform Commercial Code applies to transactions bearing an appropriate relation to this state”. The term ‘appropriate relation’ is not defined in the U.C.C. However, it “should be interpreted to mean the ‘most significant relationship’; the term should not be regarded as merely inviting the courts to apply their non-UCC rules”.³⁸ In this sense, it is similar to Restatement the second.

Surprisingly for European scholars, we do not find specific rules for consumer or e-consumer contracts. In this regard two circumstances may have significance. In certain cases, American courts employ the “public policy trick” to apply the laws of the consumer’s habitual residence.³⁹ There is also relevant new case law: the court in *Boudreau v. Scitex Corp.*⁴⁰ held that because the e-mails and other communications concerning the contract were received in Massachusetts, the law of that state should be applied. Such case law can be rooted in the legal thinking of an old landmark case, the Chinese hair case, in which a New York based buyer and a Chinese seller concluded a sales contract. The exact location where the parties concluded the contract could not be identified. In that case, because the place of performance was New York, the court applied NY law.⁴¹ However, in other cases it was emphasized that the place of performance (i.e. of delivery) cannot alone constitute a connection to apply the law of the state in which it took place.

Summarizing the above, we may ascertain that if the place of performance and the consumer’s residence are in the same state as in most e-commerce transactions, we may assume that the law of the consumer’s habitual residence will be applied, just like in Europe. However, as in Europe, in an e-contract all circumstances may have relevance. In the US, protection is granted with reference to public policy.

IV. Some other relevant provisions—territorial limits in the US and the country of origin principle in the EU law

1. Territorial limitations in the US

Besides choice-of-law rules, there are some very important provisions that may also have an effect on the law to be applied. A good example can be found in New York State law.⁴² Here, the courts held in several instances that the New York General Business Law (G.B.L.),

³⁸ *Anderson on The Uniform Commercial Code*. West, 1981. § 1–105:24 363.

³⁹ Rühl: *Party autonomy...*, *op. cit.* at 169.

⁴⁰ For the US interpretation of the term “place of contract” in e-commerce transactions see Street, F. L.–Grant, M. P.: *Law of the Internet*. Charlottesville, 2004. 3–83 § 3.04 *et seq.*

⁴¹ *Xuchang Rihetai Human Hair Goods Co. v. Hanyu Intern. USA Inc.*, 2001 WL 883646, 45 U.C.C. Rep. Serv. 2d 1077 (S.D.N.Y. 2001).

⁴² A well-structured compendium of New York consumer law cases collected by Justice Thomas A. Dickerson (Associate Justice of the Appellate Division, Second Department of the New York State Supreme Court) available on the internet year to year. For the last year (2011) see <http://www.nysba.org/Content/NavigationMenu21/CommitteePages/ClassAction/CONSUMERLAW2011.pdf> (February 1, 2012)

which contains some important provisions for consumers, prescribes in §349 that the transaction in which the consumer is deceived must occur in New York. “Following this latest interpretation of ‘territorial reach’ by G.B.L. § 349, the court in *Truschel v. Juno Online Services, Inc.*, a consumer class action suit alleging misrepresentations by a New York based internet service provider, dismissed the G.B.L. § 349 claim because the named representative entered into the internet contract in Arizona. Notwithstanding the [...] territorial limitation, the Court in *Peck v. AT&T Corp.*, consumer class action involving cell phone service which improperly credited calls causing (the class) to lose the benefit of weekday minutes included in their calling plans, approved a proposed settlement on behalf of residents in New York, New Jersey and Connecticut.”⁴³ It was emphasized that “it would be a waste of judicial resources to require a different class action in each state [...] where the defendants have marketed their plans on a regional [basis]”.

2. *The country of origin principle in Europe*

In the EU as well, there is a serious problem with electronic contracting, involving the country-of-origin principle⁴⁴ used in the directive on electronic contracting (hereinafter referred to as: “Directive”).⁴⁵ According Art 3 of the Directive,

- “1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.
2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.”

This complicated text in practice means that the service provider “brings” its laws to another state, and may have the same benefits as domestically. Consequently, in a case where a corporate website (*The Sunday Mirror*) caused harm by releasing news about singer Kylie Minogue, the European Court of Justice held that compensation to be paid cannot be higher than in the state where the website is based (in practice, where the

⁴³ *Consumer Law 2005 Update-The Judge’s Guide To Federal And New York State Consumer Protection Statutes* page 17, available at http://www.nysba.org/Content/NavigationMenu21/CommitteePages/ClassAction/Consumer_Law_2005_Update.pdf

⁴⁴ Blasi, M.: *Das Herkunftslandprinzip der Fernseh- und der e-Commerce-Richtlinie*. Köln–Berlin–München, 2004; Fallon, M.–Meeusen, J.: *Le commerce électronique, la directive 2000/31/CE et le droit international privé*. *Revue critique de droit international privé*, 91 (2002) 3, 435–490; Höning: *The European Directive... op. cit.*; Drasch, W.: *Das Herkunftslandprinzip im internationalen Privatrecht*. Baden-Baden, 1997; Mankowski, P.: *Das Herkunftslandprinzip als Internationales Privatrecht der e-commerce-Richtlinie*. *Zeitschrift für vergleichende Rechtswissenschaft*, 100 (2001) 2, 138–139; Thünken, A.: *Das kollisionsrechtliche Herkunftslandprinzip*. Frankfurt, 2003, 23; Höning, N.: *The European Directive on e-Commerce (2000/31/EC) and its Consequences on the Conflict of Laws*. *Global Jurist Topics*, 5 (2005) 2, 17–18; Naskret, S.: *Das Verhältnis zwischen Herkunftslandprinzip und Internationalem Privatrecht in der Richtlinie zum elektronischen Geschäftsverkehr*. Münster–Hamburg–London, 2003.

⁴⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (“Directive on electronic commerce”) OJ L 178, 17.7.2000, 1–16.

website's owner has its seat).⁴⁶ Thus, even if compensation awarded abroad were higher and thus the provider's obligations were greater, laws of the website's "homeland" have to be applied—overwriting classic rules of collision.

However, the Directive has some "hidden" provisions for contracts in its Annex, which state that Arts 3(3), 3(1) and 3(2) do not apply to "the freedom of the parties to choose the law applicable to their contract" and to "contractual obligations concerning consumer contacts". As a result, in our case we do not have to take into consideration the Directive's provisions regarding applicable law. If these provisions were not included, we would have to apply the seller's law to the contract, and not that of the consumer.

IV. Conclusions

The system of remedies is significantly different in Europe than in the US. Consequently, in a legal dispute, the question of which law should be applied follows right after the procedural issues not covered by this article (e.g. in which state to sue, or how to enforce a judgment). It is clear that sometimes it may be beneficial for consumers to force the court to apply the law of their habitual residence in order to achieve a successful suit. As we have seen, this is possible in most cases, irrespective of habitual residence or nationality. In this regard the US jurisdiction appears less stable than the European one, but its basic approach is similar in most instances.

⁴⁶ Joined cases C-509/09 and C-161/10. Judgment of the Court (Grand Chamber) of 25 October 2011. *eDate Advertising GmbH v X* (C-509/09) and *Olivier Martinez and Robert Martinez v MGN Limited* (C-161/10), not published yet in the ECR.