

FOUNDATIONS

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I. INTERNET REGULATION AND PRIVATE INTERNATIONAL LAW

1. Cyberlaw, transnational law and self-regulation

a. Alternatives and challenges to territorial jurisdictions

The Internet as a worldwide information infrastructure and medium for interaction between computers and other devices connected to it was developed through collaborative processes without centralized control. The adoption and evolution of the technical standards that allow communication between computers regardless of physical location was the result of the cooperation of many private actors and organizations, in which a wide range of

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technologists were involved without direct control from any State or inter-governmental organization.¹ The progress of the technical architecture and protocols that allow the smooth operation of the Internet globally remains also primarily the result of the activities of organizations in which large groups of researchers and other interested parties contribute to develop open standards through collaborative processes.²

1.02 In such a context, at the initial stages of the commercial expansion of the Internet, some authors stressed the view that global computer networks erode the power and legitimacy of national jurisdictions to regulate such phenomena and adjudicate claims regarding online activities having global or multi-national effects.³ According to this approach, Internet transactions and activities should not be bound to a particular territorial sovereign and ‘Cyberspace’ should be conceived as a separate place and regarded as an autonomous jurisdiction. Under this view, the Internet could develop its own effective institutions to establish rules governing online activities and to enforce them and adjudicate claims arising out of such activities. Global self-regulation was presented as an alternative to territorial jurisdictions. The view was advocated that Cyberspace should be regarded as naturally independent space, capable of developing its own rules to govern Internet transactions and relationships.⁴

1.03 However, it soon became obvious that nation-states are the primary jurisdictional entities to regulate Internet activities and content. Online conducts are covered by territorially based legislation.⁵ The legitimacy of the assertion of jurisdiction by nation-states with respect to Internet activities that produce significant effects in their respective territories seems widely accepted.⁶ Internet self-regulation remains dominant with respect to technical specifications, protocols and standards that are essential in the functioning of the technical infrastructure of the Internet and its global interconnectedness, such as those

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- 1 B.M. Leiner, V.G. Cerf, D.D. Clark, R.E. Kahn, L. Kleinrock, D.C. Lynch, J. Postel, L.G. Roberts and S. Wol, *Brief History of the Internet*, Internet Society, 1997, available at www.internetsociety.org.
 - 2 See, e.g., R.H. Weber, *Shaping Internet Governance: Regulatory Challenges*, Heidelberg, Springer, 2010, pp. 42–50.
 - 3 D.R. Johnson and D. Post, ‘Law and Borders – The Rise of Law in Cyberspace’, *Stanford L. Rev.*, vol. 48, 1996, pp. 1367–402; and J.R. Reidenberg, ‘Governing Networks and Rule-Making in Cyberspace’, *Emory Law Journal*, vol. 45, 1996, pp. 911–30.
 - 4 J.P. Barlow, ‘A Declaration of the Independence of Cyberspace’, 1996, www.eff.org/es/cyberspace-independence.
 - 5 J.L. Goldsmith and T. Wu, *Who Controls the Internet? Illusions of a Borderless World*, Oxford, Oxford University Press, 2006, pp. 65–85; P.A. De Miguel Asensio, *Derecho privado de Internet*, 5th ed. Madrid, Civitas Thomson Reuters, 2015, pp. 109–26.
 - 6 P.A. De Miguel Asensio, ‘Internet, Jurisdiction’, in J. Basedow, G. Ruhl, F. Ferrari and P. De Miguel Asensio (eds.), *Encyclopedia of Private International Law*, vol. 2, Cheltenham, Edward Elgar, 2017, pp. 989–98, p. 990.

developed under the auspices of ISOC (Internet Society), IETF (Internet Engineering Task Force), IRTF (Internet Research Task Force) or W3C (World Wide Web Consortium).⁷ However, those organizations do not establish regulations directly concerning private rights, Internet transactions or illegal content online.⁸ A more prominent role is played by ICANN (Internet Corporation for Assigned Names and Numbers). It coordinates functions concerning Internet addresses and numbering resources, and the domain name system.⁹ The processes of the organizations responsible for coordination of the Internet's technical infrastructure and the standards they develop are very significant with regard to the functioning of the neutral logical layer of Internet architecture, but do not reduce the number of potential multijurisdictional legal disputes between private parties with the exception of domain names. Their rules are not aimed at regulating Internet content and online conduct. In sum, those organizations do not produce significant rules with a view to establish a legal framework of private cross-border Internet relations and transactions.¹⁰

Other sources of non-State rules or transnational law have become particularly relevant in the Internet ecosystem. For example, free and open source software and open content communities have been created and expanded around the world on the basis of multiple cross-border licences.¹¹ The drawing up of codes of conduct between professional bodies and associations has been promoted as a means of determining the rules applicable to certain Internet related activities and transactions, such as those involving commercial communications, online contracts and data protection. The development of decentralized and potentially autonomous code based systems, such as blockchains, have prompted the emergence of so-called *lex cryptographica* as a set of autonomous rules governing certain systems and transactions.¹² **1.04**

The increasing power of non-state actors, particularly Internet platforms and social networks, has led to the development of certain Internet spaces which **1.05**

7 W. Kleinwächter, 'Multi-Stakeholder Internet Governance: the Role of Governments', in W. Benedek, V. Bauer and M.C. Kettemann (eds.), *Internet Governance and the Information Society*, Utrecht, Eleven, 2008, pp. 9–29.

8 See, e.g., J. Mathiason, *Internet Governance (The New Frontier of Global Institutions)*, Abingdon, Routledge, 2009, pp. 59–69.

9 M. Mueller, 'Internet Addressing: Global Governance of Shared Resource Spaces', in I. Brown (ed.), *Research Handbook on Governance of the Internet*, Cheltenham, Edward Elgar, 2013, pp. 52–70.

10 J.P. Mifsud Bonnici, *Self-Regulation in Cyberspace*, The Hague, TMC Asser, 2008, pp. 115–49.

11 A. Metzger, 'Transnational Law for Transnational Communities: The Emergence of a Lex Mercatoria (or Lex Informatica) for International Creative Communities', *JIPITEC*, vol. 3, 2012, pp. 361–68.

12 See P. De Filippi and A. Wright, *Blockchain and the Law: The Rule of Code*, Cambridge, Harvard University Press, 2018, pp. 193–204.

are primarily governed by the rules laid down by service providers.¹³ Thus, issues such as the assignment of participants' identifiers, the determination of the contents that can be uploaded and the measures to tackle unacceptable content are governed primarily by the terms of use of the relevant service provider.¹⁴ For instance, platforms implement mechanisms that restrict and manage the uploading by users of content regarded as inadmissible by the service provider. Moreover, many of these regulatory frameworks establish some private enforcement mechanisms intended to cover activities in multiple jurisdictions. Other online dispute resolution mechanisms may provide alternatives to litigation in state courts by which a party can obtain an effective remedy.

1.06 Technological developments, such as the emergence of peer to peer networks, new social sharing and exchange models, the cross-border nature of cloud services or the expansion of blockchain technology, pose continuous challenges to governments regarding their ability to control network activities. In these contexts, the temporary adoption of practices of outright illegality by many Internet users is not rare.¹⁵ Yet, the reaction to those challenges reflects the capacity of States to adapt the national legal systems in order to constrain and control Internet activities even with regard to services based on decentralized systems. For example, the particular challenges posed by blockchain do not imply that blockchain-based systems are immune to national rules regulating end users and other relevant actors of those networks, Internet intermediaries (including blockchain specific intermediaries), blockchain protocols, smart-contract developers or blockchain-based markets. Moreover, code is not necessarily a mechanism to implement transnational rules since public authorities may also have recourse to code in order to incorporate existing laws.¹⁶ Furthermore, public authorities are in a position to impose requirements and restrictions to the provision of telecommunication services that may decisively influence Internet connectivity.

1.07 From the initial phases of the commercial use of the Internet, it was noted that its regulation is to a great extent influenced by code, that is to say, the software and architecture of cyberspace. At the same time, the particular significance of technology to constrain people in this context is compatible with the position

13 D. Friedmann, *Trademarks and Social Media (Towards Algorithmic Justice)*, Cheltenham, Edward Elgar, 2015, pp. 68–71.

14 T. Riis (ed.), *User Generated Law (Re-Constructing Intellectual Property in a Knowledge Society)*, Cheltenham, Edward Elgar, 2016, at p. xi.

15 Y. Benkler, *The Wealth of Networks (How Social Production Transforms Markets and Freedom)*, New Haven, Yale University Press, 2006, at p. 470.

16 See P. De Filippi and A. Wright, *Blockchain ... cit.*, pp. 173–95.

of the State as primary regulator of Internet activities. In that connection, it was acknowledged that governments can regulate Internet activities and transactions by adopting laws imposing limits or setting rules on the legality of such activities, but can also decisively influence social norms and market structure affecting or controlling Internet activities.¹⁷ Moreover, technology may also be a key element in enforcing the law and implementing restrictions, as illustrated by technological protection measures and digital rights management systems in the field of copyright.¹⁸

b. Limitations, coexistence and fragmentation

Hence, so-called transnational law and self-regulatory mechanisms governing Internet activities and online relationships between individuals overlap with national legal systems, including international conventions and instruments adopted by supranational entities, such as the EU. In the first place, the lawful coexistence of non-State or transnational rules concerning the Internet with national legal orders is consistent with the wide scope recognized to party autonomy in most countries. It has been noted that private ordering has gained importance as physical frontiers become more permeable and cross-border relationships increase.¹⁹ Indeed, national legal systems grant ample freedom to parties regarding private transactions and relationships, particularly in the commercial sector. Therefore, online platforms and other Internet services providers, as well as other contract based systems, such as open source software communities or decentralized organizations, enjoy significant freedom under national legal orders to organize the activities in which they are involved and to prevent and settle disputes. This applies to rules such as those established in platforms' terms of use, licence agreements and codes of conduct which have been accepted by the parties involved. A different example of self-regulation is provided by standard setting on essential patents and the development of FRAND commitments or licences by standard-setting organizations. **1.08**

However, party autonomy is not unrestricted. The freedom of the parties is limited to those areas of law where they are free to agree on the applicable rules. Moreover, the parties have to comply with the relevant overriding mandatory provisions or public policy rules relevant to their private relationship or transaction. Hence, in many areas of the law, such as data protection, **1.09**

17 L. Lessig, *Code. Version 2.0*, New York, Basic Books, 2006, pp. 38–82.

18 M. Finck and V. Moscon, 'Copyright Law on Blockchains: Between New Forms of Rights Administration and Digital Rights Management 2.0', *IIC*, vol. 50, 2019, pp. 77–108.

19 J. Basedow, *The Law of Open Societies (Private ordering and Public Regulation in the Conflict of Laws)*, Leiden, Brill Nijhoff, 2015, p. 89.

consumer protection, extent of copyright, competition law, financial regulations, free speech or personality rights, etc., significant restrictions will have to be respected. The content of those restrictions and the scope of application of the relevant provisions vary from one country to another.

- 1.10** Moreover, to the extent that self-regulation is based on party autonomy, transnational rules have limited application and are not able to regulate relationships with third parties which are not bound by the relevant instrument. For instance, the significance of the terms of use of Internet platforms and their ability to establish binding rules on the use of the platform and its consequences is restricted by the reach of contract law and party autonomy. Hence, such rules usually shall not be effective vis-à-vis third parties whose rights have been infringed as a result of activities carried out by users of the online platform. Similarly, codes of conduct between professional bodies and associations regarding online activities are voluntary in nature and hence the relevant actors who have not adhered to a code of conduct are not bound by its rules.
- 1.11** Internet self-regulation regarding the ordering of cross-border relationships between private parties is limited in scope. For instance, transnational law instruments are not in a position to alter the territorial nature of intellectual property rights and hence national laws cannot be disregarded when determining ownership and content of copyright as well as exceptions and limitations. Moreover, the rules adopted by the organizations involved in the technical governance of the Internet are particularly limited in scope. The sets of rules adopted by those organizations do not provide a transnational regime regulating the activities and transactions of Internet users and service providers concerning issues such as illegal content, IP protection, non-contractual obligations arising from Internet activities, data protection, personality rights, protection and balancing of other fundamental rights, contract formation, contract performance, etc.
- 1.12** Technical infrastructure control may help in the implementation of efficient systems for private rights enforcement, as illustrated by ICANN policies concerning the protection of trademarks against abusive domain name registration. The effectiveness of such mechanism is linked to ICANN's ability to ensure automated execution mechanisms having global reach as a result of its control over the domain name system. However, so-called Internet governance by infrastructure may conflict with the neutrality and connectivity of Internet architecture not intended to control the network or its users'

activities²⁰ and raises concerns regarding legitimacy, authority and institutional competence.²¹ Thus, such transnational mechanisms for the enforcement of private rights have been developed basically with regard to disputes in a very specific area, such as abusive domain name registration. The interplay of such mechanisms with the national legal systems poses significant challenges regarding the ordering of cross-border disputes (see Chapter 5, *infra*).

Hence, the rules applicable to cross-border Internet activities and transactions may originate from transnational law and self-regulation instruments, but usually it is necessary to consider that those rules coexist with the laws and regulations adopted by nation-states. In this connection, it is noteworthy that the extent of worldwide harmonization in the framework of intergovernmental international organizations remains very limited or even nonexistent in the areas of the law more relevant for the ordering of online private relationships. **1.13**

2. Significance of conflict of laws

a. Reconciling global Internet with national jurisdictions and laws

The expansion of digital networks and the ubiquitous nature of Internet activities and cloud services have led to a dramatic rise not only in the number of international transactions and situations, but also in their complexity. The increase of cross-border interaction through digital networks facilitates transactions and relationships even between parties that ignore the physical location of other actors involved. The instantaneous and borderless transmission of information via the Internet has increased the provision of services and the exploitation of intangible rights on a global scale. Online services have made it common for consumers to engage in international contracts from their home country. Activities carried out through the Internet may have significant effects simultaneously within a great number of jurisdictions, regardless of national borders. This is of particular importance in areas such as the infringement of IP rights and the violation of personality rights. **1.14**

Nation-states are in a position to regulate Internet activity and content in respect to Internet use by persons in their respective territories, but regulating the online conduct of those who are located in other jurisdictions raises **1.15**

20 J. Zittrain, *The Future of the Internet – And How to Stop It*, New Haven, Yale University Press, 2008, p. 28.

21 D.G. Post, 'Internet Infrastructure and IP Censorship', *IP Justice Journal (Internet Governance and Online Freedom Publication Series)*, 2015, www.ipjustice.org/ip-justice-journal, p. 14. See also M.A. Lemley, 'The Law and Economics of Internet Norms', *Chicago-Kent Law Review*, vol. 73, 1998, pp. 1257–94, at pp. 1267–77.

additional difficulties.²² The ubiquitous nature of the Internet and the potentially global reach of online content in situations in which it can be accessed regardless of physical location make it difficult to control certain online activities and pose significant challenges to traditional law enforcement mechanisms.²³ At the same time, parallel compliance with multiple laws from different jurisdictions becomes a significant burden on Internet service and content providers and may lead to fragmentation of certain services which cannot be provided globally under the same terms. However, the challenges to private law enforcement and the burden posed to service providers should not be overemphasized in the light of the available mechanisms to monitor online activities and to implement territorially limited responses.

1.16 Moreover, compliance with the mandatory laws of multiple jurisdictions by Internet service and content providers seems to be the reasonable consequence of their choice to benefit from having virtual activity in all those jurisdictions or trying to serve all those markets.²⁴ Such a result is also consistent with the particularly relevant public interests that internationally mandatory provisions are intended to safeguard. Moreover, it is not rare for international online service providers to operate different websites primarily aimed at separate (national) markets or to adjust by other means contents and services to the specific location of the Internet user. For example, the theoretically worldwide reach of Internet content contrasts with the widespread use of localized targeted advertising. The benefits of maintaining a global Internet based on the provision of services without territorial constraints as an element that boosts innovation and growth,²⁵ should be balanced against the significant risks that such a model poses to policy goals, moral and political values as well as fundamental rights, which may vary from country to country. Territorial restrictions concerning the availability of online services and content are compatible with preserving the global connectivity of the neutral logical layer of Internet architecture.

22 See D. Harvey, *Collisions in the Digital Paradigm (Law and Rule Making in the Internet Age)*, Oxford, Hart, 2017, pp. 111–12, discussing the significance in this context of the Chinese example and the success of its government in controlling Internet content within its borders.

23 See S. Biegel, *Beyond Our Control? (Confronting the Limits of Our Legal System in the Age of Cyberspace)*, Cambridge, The MIT Press, 2001, pp. 51–95; and P. Sirinelli, 'L'adéquation entre le village virtuel et la création normative – Remise en cause du rôle de l'état', K. Boele-Woelki and C. Kessedjian (eds.), *Internet. Which Court Decides? Which Law Applies? Quel tribunal décide? Quel droit s'applique?*, The Hague, Kluwer, 1998, pp. 1–22, at pp. 5–13.

24 See, P.S. Berman, 'Legal Jurisdiction and the Deterritorialization of Data', *Vanderbilt Law Review En Banc*, vol. 71, 2018, pp. 11–32, at pp. 25–26.

25 See, e.g., B. De la Chapelle and P. Fehlinger, 'Jurisdiction on the Internet: From Legal Arms Race to Transnational Cooperation', *Internet and Jurisdiction Paper*, 2016, www.internetjurisdiction.net, pp. 9 and 15.

Conflict of laws or private international law is intended to regulate situations and relationships between private parties which involve a foreign element. It is aimed at mitigating the uncertainties raised by the multiplicity of (national) legal systems that coexist in the world and to facilitate their coordination. Such uncertainties concern to what extent disputes over activities and transactions having connections with several countries can be adjudicated by the courts of a given jurisdiction.²⁶ Likewise, confusion may also concern the determination of the scope of application of the relevant laws of the multiple countries having ties with the situation and the choice of the law or laws which are to be applied to the relevant issues. The scope of the measures adopted is particularly significant in the online context in which the application of domestic law to certain activities can affect the availability of content over the Internet and hence have a global impact.²⁷ Furthermore, the conditions under which a foreign judgment can be recognized or enforced are particularly relevant for an effective protection of rights in cross-border situations. **1.17**

The limited reach of self-regulation as well as the lack of uniform rules adopted by intergovernmental international organizations regarding Internet activities influence the role private international law plays in regulating cross-border online relationships. From a global perspective, the practical importance of conflict of laws issues is enhanced by the existence in certain areas of significant differences between national substantive laws. **1.18**

Private international law is founded on the States' amenability to cooperate – or at least to allow coordination – in regard to private law matters. Such a willingness is based on the assumption that certain cross-border situations may have connections significant enough with several countries so that the courts of all of them could be competent to adjudicate claims arising from the situation at issue. Hence, coordination mechanisms, such as those concerning *lis pendens* and related actions, may be implemented with a view to mitigate the challenges posed by parallel proceedings. Coordination in private law matters is also based on the assumption that the substantive law rules concerning private relationships are to a certain extent interchangeable with those of other legal systems. Hence, the possibility exists that courts apply a foreign private law to a cross-border dispute. **1.19**

26 See P.S. Berman, 'The Globalization of Jurisdiction', *U.Pa.L.Rev.*, vol. 151, 2002, pp. 311–545.

27 A.D. Murray, 'Mapping the Rule Law for the Internet', in D. Mangan and L.E. Gillies (eds.), *The Legal Challenges of Social Media*, Cheltenham, Edward Elgar, 2017, pp. 13–33, p. 30. In the recent practice of the CJEU, see Judgments of 24 September 2019, C-507/17, *Google (Portée territoriale du référencement)*, EU:C:2019:772; and 3 October 2019, *Glawischnig-Piesczek*, C-18/18, EU:C:2019:821.

- 1.20** In the Internet context the practical considerations, such as fairness or convenience to the parties, behind the States' willingness to cooperate with each other in private law matters are particularly significant as well as the benefits to be expected from cooperation.²⁸ Those benefits include providing mechanisms to regulate conducts located abroad and moderating jurisdiction and regulatory assertions by States.
- 1.21** Yet, the rationale for this sort of cooperation is limited to private law matters. In the realm of criminal law, tax law and other areas of public enforcement, in which authorities exercise powers of intervention and impose public law sanctions, States have traditionally not implemented similar mechanisms of coordination or cooperation. Even if a certain level of harmonization has been achieved in some areas, as illustrated by the 2001 Council of Europe Cyber-crime Convention, a strict correlation between court or public authority and applicable law prevails. Beyond civil and commercial matters, recognition and enforcement of foreign judgments and other coordination devices, such as special rules on *lis pendens* and related claims, are in principle not available.
- 1.22** The development of increased international cooperation regarding online activities is undoubtedly of great importance beyond civil and commercial matters, as illustrated by issues regarding access to user data and content takedowns in the framework of criminal proceedings, but falls outside the reach of private international law. Notwithstanding this, it is noteworthy that in some particularly relevant areas, such as data protection, private and public enforcement may be closely intertwined. The EU general regime on data protection is particularly illustrative in this regard. The data subject's right to lodge a complaint against a controller or a processor with a supervisory authority is parallel to his or her right to bring a civil law claim before a court. The complaint against the supervisory authority may lead only to the imposition of public law sanctions, particularly administrative fines. A civil law claim before a court is necessary if the data subject aims at receiving compensation from the controller or processor for the damage suffered as a result of an infringement of data protection rules.

b. Some relevant features of private international law

- 1.23** Conflict of laws is a body of law which may be particularly useful as a tool to achieve predictability and interoperability between legal systems in the global Internet context. The scope of party autonomy and the freedom of parties to agree on the competent courts (or the submission of disputes to alternative

²⁸ U. Kohl, *Jurisdiction and the Internet (Regulatory Competence over Online Activity)*, Cambridge, Cambridge University Press, 2007, pp. 211–25.

dispute resolution mechanisms) and applicable rules as a basic principle of modern private international law systems also provides a framework to coordinate national legal systems with self-regulation instruments and transnational law. This feature facilitates the drafting of Internet B2B transactions in ways in which conflict of laws issues between the parties involved may be avoided to a great extent.²⁹ The interplay between national law systems and self-regulatory mechanisms implemented by some service providers, such as online markets and platforms, which include settlement systems regarding cross-border disputes between users are also relevant in this regard.

The distinctive attributes of online interjurisdictional issues have significant implications on previous legal paradigms in the field of private international law.³⁰ Traditional jurisdiction and choice of law rules have been developed for cases involving contacts with several territorial entities based on geographical considerations.³¹ The territorial connecting factors traditionally used in those rules may result in significant uncertainties when applied to Internet conduct.³² Internet activities and transactions do not involve physical interactions but the exchange of information between individuals with the participation of one or more intermediaries.³³ Notwithstanding this, many online transactions can be completed by traditional means, such as physical delivery of tangible goods. 1.24

Special doubts arise as to the location of online activities and the determination and extent of the jurisdiction to adjudicate claims concerning them.³⁴ The ubiquitous nature of online communications affects the application of non-specific conflict rules, which have traditionally been very much related to physical and territorial boundaries.³⁵ The expansion of borderless and decentralized DLT systems and their use in business transactions is illustrative in this regard. Uncertainty arises as to the place of performance of certain 1.25

29 See P.P. Swire, 'Elephants and Mice Revisited: Law and Choice of Law on the Internet', *U.Pa.L. Rev.*, vol. 153, 2005, pp. 1975–2001, p. 1989.

30 For an overview in different areas, see the contributions included in S. Leible (ed.), *Die Bedeutung des Internationalen Privatrechts im Zeitalter der neuen Medien*, Stuttgart, Richard Boorberg, 2003, pp. 11–179.

31 F.F. Wang, *Internet Jurisdiction and Choice of Law (Legal Practices in the EU, US and China)*, Cambridge, Cambridge University Press, 2010, p. 7.

32 S.L. Gössl, *Internetspezifisches Kollisionsrecht? (Anwendbares Rect bei der Veräußerung virtueller Gegenstände)*, Baden-Baden, Nomos, 2014, pp. 28–30; and I. Pretelli, 'Improving Social Cohesion through Connecting Factors in the Conflict of Laws of the Platform Economy', in I. Pretelli (ed.), *Conflict of Laws in the Maze of Digital Platforms*, Zurich, Schulthess, 2018, pp. 17–52, p. 27.

33 J. Lipton, *Rethinking Cyberlaw (A New Vision for Internet Law)*, Cheltenham, Edward Elgar, 2015, p. 2.

34 J. Hörnle, 'The Jurisdictional Challenge of the Internet', in L. Edwards and C. Waelde (eds.), *Law and the Internet*, 3rd ed., Oxford, Hart, 2009, pp. 121–58.

35 T. Lutz, 'Internet Cases in EU Private International Law—Developing a Coherent Approach', *ICLQ*, vol. 66, 2017, pp. 687–721, p. 688.

obligations, the location of assets constituted on a DLT ledger or the place of issuance of securities recorded on a DLT system. In Internet torts the place of action will usually differ from the place of injury. Many online cases concern so called scattered harms, where the place of action and the places of injury may become particularly difficult to locate. Furthermore, the disconnection between the effects of Internet activities and geographical boundaries favours the possibility that multiple states assert jurisdiction to hear disputes arising from a particular activity. Internet conduct may potentially establish contacts with almost every jurisdiction, posing the threat of universal jurisdiction over Internet actors, and creating the risk for website operators of being sued in a multiplicity of jurisdictions. Therefore, a refinement of connecting factors not specific to the Internet is necessary to provide balanced responses with regard to cross-border online activities.³⁶

1.26 Physical location loses meaning in online transactions, yet the development and diffusion of geolocation tools facilitate the enforcement of provisions and measures based on territorial connections. Initial Internet technologies were conceived for global access, but filtering technology based on the significance of IP addresses as reliable indications of physical location has later been developed. In particular, geolocation technologies have become very accurate to establish the location of persons accessing websites. This development greatly influences the ability of Internet site operators to control the location of those who access the contents they provide and to arrange their online activities limiting their territorial reach.³⁷ Although certain uses of geolocation technologies may undermine the openness and global nature of the Internet, such a technology is a valuable instrument for Internet actors not only for marketing purposes, but also to control legal risks arising out of the ubiquitous reach of Internet activities. The availability of geolocation technologies is important when applying jurisdictional and choice of law rules to Internet activities, in particular where it is necessary to establish if certain activities are directed to a territory or produce significant effects within it.

1.27 The role of private international law as an instrument to facilitate interoperability between legal systems has to be balanced against the fact that this field of the law remains to a great extent national law, since worldwide

36 See, eg, F. Jault-Seseke, 'Internet, vecteur d'affinement des règles de compétence juridictionnelle', *Internet et le droit international (Colloque SFDI de Rouen)*, Paris, Pedone, 2014, pp. 167–80.

37 See M. Trimble, 'The Future of Cybertravel: Legal Implications of the Evasion of Geolocation', *Fordham Intell. Prop. Media & Ent. L.J.*, vol. 22, 2012, pp. 567–657; D.J.B. Svantesson, *Private International Law and the Internet*, 3rd ed., The Hague, Kluwer, 2016, chapter 10; and id., *Solving the Internet Jurisdiction Puzzle*, Oxford, Oxford University Press, 2017, chapter 11. See also CJEU Judgment of 24 September 2019, C-507/17, *Google (Portée territoriale du déréférencement)*, EU:C:2019:772, paras. 42–3 and 71.

unification of conflict of laws rules is an exception. There are almost no uniform binding private international rules over Internet activities adopted in the framework of international organizations. The lack of uniformity between states' approaches undermines legal certainty at international level. The foregoing reflects a situation in which jurisdiction issues are a source of uncertainty. The jurisdiction and choice of law rules applicable in each case depend on the place where relief is sought. Uncertainty about cross-border recognition and enforcement of judgments undermines also predictability in litigation regarding online activities.³⁸

By contrast, within the European context the view that conflict of laws is an area of the law which is particularly jurisdiction specific does not hold true. To the contrary, private international law is the body of private law where unification within the EU has been achieved to a greater extent. Since the conferral of competence to the EU in the field of private international law, including international civil procedure, in the Treaty of Amsterdam,³⁹ EU law has witnessed an unprecedented unification in this area. Pursuant to Article 81 TFEU⁴⁰ (as amended by the Treaty of Lisbon),⁴¹ the EU has competence to adopt measures in this field 'particularly when necessary for the proper functioning of the internal market'. The EU has adopted a significant number of Regulations in the field. Unification by means of regulations, as instruments of general application, fully binding and directly applicable in all Member States, has been regarded in the field of private international law as necessary to attain the level of certainty required for the proper functioning of the internal market. Those instruments include common rules on international jurisdiction, choice of law and the mutual recognition and enforcement of judgments in most areas of commercial and civil law relevant for Internet activities, particularly as a result of the Brussels I (recast),⁴² the Rome I⁴³ and Rome II⁴⁴ Regulations. Legislation in specific matters have also paid increasing attention to conflict of laws issues, as illustrated by the General EU Data

38 See M.A. Geist, 'Is There a There There? Toward Greater Certainty for Internet Jurisdiction', *Berkeley Tech. L.J.*, vol. 16, 2001, p. 1345, 1354.

39 Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts (consolidated version), OJ C 340, 10.11.1997, p. 1.

40 Treaty on the Functioning of the European Union, consolidated version OJ C 202, 7.6.2016, p. 1.

41 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, OJ C 306, 17.12.2007, p. 1, consolidated version, [2012] OJ C 326/1.

42 Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, 20.12.2012 p. 1.

43 Regulation (EC) No 593/ 2008 of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, p. 6.

44 Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40.

Protection Regulation and the instruments establishing unitary intellectual property rights.

II. INTERNATIONAL JURISDICTION

1. Introduction

1.29 Jurisdiction to adjudicate refers to the question of under which circumstances the courts of a given country have the power to render a decision over claims or disputes arising out of situations and private relationships with connections to various countries. It has become the area of private international law of greatest practical importance, partly due to the influence of the legal system of the court seised in adjudicating the dispute, even if it is international. A court having jurisdiction over a claim shall apply the forum's procedural rules and choice of law provisions. By virtue of the latter, a foreign substantive law may be applied to the merits, but it is generally accepted that all procedural matters shall be governed by the law of the court seised. Moreover, the law of the forum – or *lex fori* – shall also be determinative as to the choice of law rules applicable and the limits and constraints under which foreign substantive rules may be applied by the court deciding over the merits. For example, the values and principles of the *lex fori* may restrict the application of foreign laws in the framework of the public policy exception.

1.30 Other than state immunity from jurisdiction, it is widely accepted that public international law does not impose significant restrictions on nations when establishing the reach of the jurisdiction of their own courts to adjudicate civil and commercial claims.⁴⁵ This conclusion is to be understood without prejudice to the impact that international conventions, including some instruments on human rights such as the ECHR, may exercise on many national jurisdictional regimes. In the context of Internet related disputes, the ECtHR held that given the obligation of Contracting States to provide an effective access to court under Article 6 ECHR, jurisdiction to adjudicate a defamation claim cannot be denied in certain situations. That is the case, in particular, if the country of the court seised is the only viable option for an effective examination of the claim and instituting proceedings before a foreign court is not a reasonable and practicable alternative for the applicant.⁴⁶ On the other hand,

45 D.E. Childress III, 'Jurisdiction, Limits under International Law', in J. Basedow, G. Rühl, F. Ferrari and P. De Miguel Asensio (eds.), *Encyclopedia ...* cit., vol. 2, 2017, 1051.

46 ECHR case of *Arlewin v. Sweden*, Application no. 22302/10, Judgment of 1 March 2016, para. 73.

under certain circumstances broad assertions of jurisdiction may also undermine fundamental procedural rights of the defendant.

Leaving aside those areas and territories, particularly the EU, where rules on jurisdiction have been significantly harmonized, approaches and rules on jurisdiction to adjudicate differ.⁴⁷ Since jurisdiction to adjudicate remains – outside the EU – primarily an issue of national law, different grounds of jurisdiction may be found in the various countries, even if some common trends can also be identified. The latter include acceptance of party autonomy in commercial matters, the defendant’s habitual residence as general ground of jurisdiction, as well as jurisdiction based on the place of performance of an obligation or on the place where the relevant acts have been committed or produce significant effects. Yet, even these bases of jurisdiction are admitted with varying restrictions. **1.31**

Furthermore, recourse to broad assertions of jurisdiction are possible in many systems as a result of the application of so-called exorbitant bases of jurisdiction, which may confer jurisdiction to courts not having a reasonable connection to the dispute at issue or grant territorially unlimited jurisdiction in situations in which such a scope of jurisdiction can be excessive. The Internet context, given that certain territorially unrestricted measures or injunctions may eventually affect conducts globally, raises particular concerns with regard to such broad affirmations of jurisdiction. Excessive or exorbitant jurisdiction may lead to delivering judgments whose recognition and enforcement abroad may face significant obstacles. When deciding on recognition and enforcement, the courts of the requested State usually review whether the rendering court exercised jurisdiction in a manner deemed appropriate under the law of the recognizing country. In the absence of a sufficient link between the dispute and the rendering State or if the extent of the jurisdiction of such court is deemed excessive recognition and enforcement may be refused.⁴⁸ **1.32**

2. Brussels I Regulation (Recast)

a. Scope and related European instruments

The Brussels I Regulation (Recast) is the general EU instrument establishing uniform rules on jurisdiction and recognition and enforcement of judgments in civil and commercial matters. It has been supplemented by other EU **1.33**

47 See A.T. von Mehren, *Adjudicatory Authority in Private International Law: A Comparative Study*, Leiden, Martinus Nijhoff, 2007.

48 See, e.g., R.A. Brand, ‘Understanding Judgments Recognition’, *North Carolina Journal of International Law and Commercial Regulation*, vol. 40, 2015, p. 877, at 890–92.

Regulations covering fields which are excluded from its substantive scope of application. However, those other Regulations, on issues such as family relationships, maintenance, succession and insolvency are of very limited significance with regard to Internet activities. All relevant civil and commercial matters typically covered by Internet law fall within the substantive scope of application of the Brussels I Regulation (Recast), as laid down in Article 1. It encompasses contracts, both B2B and B2C, and all sorts of non-contractual obligations, such as those arising from defamation, infringements of intellectual property rights, acts of unfair competition, etc.

1.34 Some instruments of the Union contain provisions on jurisdiction in specific matters covered by the Brussels I Regulation (Recast), such as civil claims arising out of the infringement of data protection law or certain disputes concerning unitary IP rights. As laid down in Article 67, the Brussels I Regulation (Recast) does not prejudice the application of those specific provisions on jurisdiction. Yet, the interplay between those instruments and the Brussels I Regulation (Recast) raises specific issues to be addressed in connection with the relevant matters in Chapters 3 and 5, *infra*.

1.35 Like other regulations, the Brussels I Recast is binding in its entirety and directly applicable in the Member States. It is applicable in Denmark, in accordance with a specific agreement.⁴⁹ The origins of the Regulation are to be found in the 1968 Brussels Convention,⁵⁰ which was replaced by the Brussels I Regulation.⁵¹ The CJEU plays an essential role in the interpretation of these instruments with a view to ensure its uniform application in all Member States. The interpretation provided by the CJEU in respect of the provisions of the Brussels Convention and the Brussels I Regulation is also valid for the provisions of the Recast whenever they may be deemed as equivalent. The Lugano Convention⁵² is a parallel agreement to the Brussels I Regulation, concluded between the EU and EFTA member states, namely Iceland, Norway and Switzerland. By virtue of the Convention, the courts of those countries apply jurisdictional rules which are very similar, if not the same, than those of the Brussels I Regulation. The Lugano Convention does not prejudice the application by the EU Member States of the Brussels I Regulation (Recast).

49 Agreement between the EC and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 79, 21.3.2013, p. 4.

50 Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, consolidated version, OJ C 27, 26.1.1998, p. 1.

51 Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1.

52 Lugano Convention of 30 October 2007 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, p. 3.

The uniform rules of the Brussels Regulation are aimed at eliminating obstacles to the functioning of the internal market which may derive from disparities between national legislations. Notwithstanding that, its provisions on jurisdiction are not intended to apply only to situations involving several Member States or in which there is a sufficient link with the functioning of the internal market.⁵³ Hence, those provisions are to be applied by the courts of the Member States also to situations having connections with third States. **1.36**

Nevertheless, pursuant to Article 6(1) of the Brussels I Regulation (Recast), if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1) – consumer contracts – Article 21(2) – contracts of employment – and Articles 24 – exclusive jurisdiction – and 25 – prorogation of jurisdiction – be determined by the law of that Member State. The Regulation is aimed at strengthening the legal protection of persons established in the EU.⁵⁴ Articles 62 and 63 provide rules on how to establish if the defendant is domiciled in a Member State. Pursuant to Article 62, in order to determine whether a party is domiciled in the Member State whose courts are seised, forum law shall apply. In order to determine whether the party is domiciled in another Member State, the court shall apply the law of that Member State. Article 63 defines autonomously the domicile of a company or other legal person, which is deemed domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business. In case those places are different, for the purposes of Article 6(1), a legal person is not domiciled in a Member State if all those places are located outside the Member State. **1.37**

b. Interplay with the laws of the Member States

The CJEU's position is that the applicability of national laws on jurisdiction referred to in Article 6(1) means that the situations envisaged are resolved under the system implemented by the Regulation by reference to the legislation of the Member State before whose court the matter is brought.⁵⁵ Yet, in practice, Article 6(1) Brussels I Regulation (Recast) means that most of its jurisdiction provisions usually are not applicable to disputes in which the domicile of the defendant is located outside the EU.⁵⁶ Hence, the national laws on jurisdiction of the Member States remain applicable to those situations. If the defendant is not domiciled in the EU (or in a contracting State to the Lugano Convention), the jurisdiction of the courts of each Member State **1.38**

53 CJEU Judgment of 1 March 2005, *Owusu*, C-281/02, EU:C:2005:120, paras. 34–35.

54 CJEU Judgment of 14 July 2016, *Granarolo*, C-196/15, EU:C:2016:559, para. 16.

55 CJEU Opinion 1/03 (New Lugano Convention) of 7 February 2006, EU:C:2006:81, para. 148.

56 See, e.g., A. Dickinson and E. Lein (eds.), *The Brussels I Regulation Recast*, Oxford, Oxford University Press, 2015, paras. 3-17 to 3-31 (H. van Lith).

is to be determined by the law of that Member State, except if exclusive jurisdiction is allocated to the courts of a Member State (Articles 24) or the parties have reached a choice of court agreement in favour of the courts of a Member State (Article 25). Also Article 18(1) on consumer contracts and Article 21(2) on individual contracts of employment apply to situations in which the defendant's domicile is not located in a Member State. Furthermore, Article 71(b) provides rules on the jurisdiction of a common court, such as the Unified Patent Court, where the defendant is not domiciled in a Member State.

1.39 Beyond those areas, the national laws on jurisdiction applicable to those situations in which the defendant is not domiciled in a Member State have not been harmonized within the EU. This poses additional uncertainties. National regimes within the EU show significant differences.⁵⁷ Therefore, claims subject to the jurisdiction rules of the Member States do not lend themselves to a single analysis in contrast with those regulated directly by the Brussels system. At any rate, it is not rare that regarding certain jurisdiction rules the interpretation of the provisions of the Regulation influences solutions under national law. However, in most Member States exorbitant grounds of jurisdiction remain applicable to disputes in which the defendant is not domiciled in a Member State. It is revealing the list of rules of national jurisdiction notified by the Member States to the Commission pursuant to Article 76(1) and that are not applicable as against persons domiciled in a Member State according to Article 5. The preservation of different national rules governing access to justice in the Member States with respect to disputes involving third State defendants in the matters covered by the Brussels I Regulation (Recast) remains a significant failure in the evolution of the Regulation. Moreover, the lack of common rules of jurisdiction concerning third State defendants creates important distortions between the jurisdiction rules and the provisions on recognition and enforcement of judgments of the Regulation.

1.40 In Internet related disputes it is not rare that the precise physical location of the party against whom an action is to be brought is uncertain. In those situations doubts may arise as to the applicable rules of jurisdiction regarding the interpretation of the criterion 'is not domiciled in a Member State' – Article 6(1) – which would require the application of national rules of jurisdiction rather than the uniform rules of the Brussels I Regulation (Recast). The CJEU addressed the applicability of the Brussels I Regulation to

⁵⁷ See A. Nuyts, 'Study on Residual Jurisdiction (Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations. General Report. Final Version)', 2007, http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

such situations particularly in its judgment of 15 March 2012, *G*.⁵⁸ The case concerned a claim against the owner of a domain name and Internet site which included various photographs of the claimant without her consent. The whereabouts of the defendant and the location of the server hosting the Internet site were unknown and the legal information of the Internet site in question and the domain registry were not conclusive. Only some factors indicated that the defendant was in the territory of the EU. The CJEU found that Article 6(1) of the Brussels I Regulation (Recast) does not preclude the application of the special rule on jurisdiction over non-contractual claims of the Regulation – Article 7(2) – ‘to an action for liability arising from the operation of an internet site against a defendant who is probably a European Union citizen but whose whereabouts are unknown if the court seised of the case does not have firm evidence to support the conclusion that the defendant is in fact domiciled outside the European Union’ (para. 42). In line with the previous case-law of the Court, the application of the national rules rather than the rules of jurisdiction of the Brussels I Regulation (Recast) is possible only if there is firm evidence to support that such a defendant is in fact domiciled outside the European Union.⁵⁹

Regarding claims against web site operators whose whereabouts are uncertain, 1.41
it is also relevant that the CJEU concluded that EU law

does not preclude the issue of judgment by default against a defendant on whom, given that it is impossible to locate him, the document instituting proceedings has been served by public notice under national law, provided that the court seised of the matter has first satisfied itself that all investigations required by the principles of diligence and good faith have been undertaken to trace the defendant.⁶⁰

c. *Grounds of jurisdiction: overview*

Chapter II on Jurisdiction of the Brussels I Regulation (Recast) contains 1.42
different types of jurisdiction bases, which are intended to be highly predictable (Recital 15). With a view to enhance legal certainty, the Regulation is intended to facilitate the claimant to identify the court in which he may sue and the defendant to foresee before which court he may be sued.⁶¹ The exclusive jurisdiction rules laid down in Article 24 prevail over the rest. Exclusive jurisdiction is established in matters in which it is of particular interest to Member States that their own courts decide certain

58 CJEU Judgment of 15 March 2012, *G*, C-292/10, EU:C:2012:142.

59 See also CJEU Judgment of 17 November 2011, *Hypotéční banka*, C-327/10, EU:C:2011:745, para. 42.

60 CJEU Judgment of 15 March 2012, *G*, C-292/10, EU:C:2012:142, para. 59.

61 See, e.g., CJEU Judgment of 23 April 2009, *Falco Privatstiftung and Rabitsch*, C-533/07, EU:C:2009:257, paras. 21 and 22.

disputes having significant connections to the forum. Such grounds of jurisdiction apply regardless of the domicile of the parties as long as exclusive jurisdiction is conferred to the courts of a Member State. They cannot be excluded by a prorogation agreement between the parties (Articles 25 and 26). A court seised of a claim must declare of its own motion that it has no jurisdiction if the courts of another Member State have exclusive jurisdiction over it (Article 27).

1.43 Exclusive jurisdiction is granted in proceedings which have as their object: (1) rights *in rem* in immovable property or tenancies of immovable property; (2) the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations or the validity of the decisions of their organs; (3) the validity of entries in public registers; (4) the registration or validity of patents, trademarks, designs, or other similar rights required to be deposited or registered; and (5) the enforcement of judgments. The reach of the exclusive jurisdiction rules is subject to restrictive interpretation since they are an exception to the general principle of the Regulation that jurisdiction is generally based on the defendant's domicile (Article 4). The CJEU has stressed that the exclusive jurisdiction rules deprive the parties of the choice of forum which would otherwise be theirs and may result in a situation whereby the parties are brought before a court which is not that of any of them.⁶² Article 22 of the Lugano Convention is the parallel provision to Article 24 of the Brussels I Regulation (Recast).

1.44 Subject to the exclusive grounds of jurisdiction and certain restrictions to protect the weaker party, a choice of jurisdiction by the parties designating the courts of a Member State must be respected (Article 25). This provision applies regardless of the domicile of the parties. Unless the parties have agreed otherwise, jurisdiction based on a prorogation agreement shall be deemed exclusive and hence the courts of the rest of the Member States lack jurisdiction, without prejudice to the possibility of implied submission to the courts of another Member State in accordance with Article 26. Article 26 establishes jurisdiction based on the entering of an appearance by the defendant. The rule on the tacit prorogation of jurisdiction of the court seised applies except where the defendant contests the jurisdiction or where the dispute is one in respect of which Article 24 provides for rules on exclusive jurisdiction. Therefore, Article 26 applies to situations where the parties had concluded an agreement conferring jurisdiction on the courts of a Member State or in

⁶² See CJEU Judgments of 10 January 1990, *Reichert and Kockler*, C-115/88, EU:C:1990:3, para. 9; of 12 May 2011, *BVG*, C-144/10, EU:C:2011:300, para. 30; and of 5 October 2017, *Hanssen Beleggingen*, C-341/16, EU:C:2017:738, para. 32.

favour of the courts of a third country.⁶³ The consensus between the parties and the principle of party autonomy justify the primacy granted to the choice of a court other than that which may have had jurisdiction under the other jurisdiction rules of the Regulation.⁶⁴ Restrictions protecting the weaker party are established in insurance, consumer and employment contracts, where only very limited autonomy is allowed.

Regarding the formal requirements of choice of court agreements, Article 25 **1.45** lays down a uniform regime intended to ensure that the agreement conferring jurisdiction was in fact the subject of consensus between the parties, which must be clearly and precisely demonstrated.⁶⁵ Article 25(1) envisages three alternative forms for prorogation of jurisdiction agreements: (a) in writing or evidenced in writing; (b) in a form which accords with the parties' practices; or (c) in a form which accords with the usages of international trade or commerce. In order to take account of the development of new methods of communication, such as online acceptance of general terms and conditions, Article 25(2) establishes that any communication by electronic means which provides a durable record of the agreement shall be equivalent to 'writing'.⁶⁶ Articles 23 and 24 of the Lugano Convention are the parallel provisions to Articles 25 and 26 of the Brussels I Regulation (Recast).

In those situations not covered by the exclusive jurisdiction grounds and in which no choice of court agreement has been reached, several alternative jurisdiction rules may apply, without prejudice to the restrictions protecting a weaker party in insurance, consumer and employment contracts laid down in Articles 10 to 23. As noted in Recital 15, the rules on jurisdiction of the Brussels I Regulation (Recast) are founded on the principle that jurisdiction is generally based on the defendant's domicile. Article 4 provides for general jurisdiction at the defendant's domicile, a ground of jurisdiction which is available regardless of the connection between the dispute and the forum and is not limited to certain subject matters. This provision is in line with the traditionally accepted maxim 'actor sequitur forum rei'.⁶⁷ **1.46**

Also for the purposes of Article 4, the defendant's domicile is to be established **1.47** in accordance with the general rules in Articles 62 and 63. Under Article 62,

63 CJEU Judgment of 17 March 2016, *Taser International*, C-175/15, EU:C:2016:176, paras. 21–4.

64 CJEU Judgment of 7 February 2013, *Refcomp*, C-543/10, EU:C:2013:62, para. 26.

65 CJEU Judgments of 20 February 1997, *MSG / Les Gravières Rhénanes*, C-106/95, EU:C:1997:70, para. 15; of 28 June 2017, *Leventis and Vafeias*, C-436/16, EU:C:2017:497, para. 34; and of 8 March 2018, *Sacy Home & Garden*, C-64/17, EU:C:2018:173, para. 25.

66 CJEU Judgment of 21 May 2015, *El Majdoub*, C-322/14, EU:C:2015:334, para. 32.

67 P. Jenard, 'Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (Signed at Brussels, 27 September 1968)', OJ C 59, 5.3.1979, p. 1, at p. 19.

the internal law of the court seised applies to determine whether the individual defendant is domiciled in the forum. As to the autonomous definition of the domicile of a company or other legal person provided for by Article 63, it is to be noted that if the statutory seat, central administration or principal place of business of the defendant are located in different Member States, Article 4 allows the plaintiff to bring the claim in the court of any of those Member States.

- 1.48** As an alternative to the general defendant's domicile forum, Articles 7 to 9 provide certain grounds of special jurisdiction. As noted in Recital 16, such rules of jurisdiction are based on a close connection between the court and the action or in order to facilitate the sound administration of justice. Special jurisdictional rules must be interpreted restrictively and cover only the cases expressly envisaged by the Regulation.⁶⁸ First, Article 7 includes seven grounds of jurisdiction, which are relevant in situations in which they allow the plaintiff to sue at a Member State where the defendant's domicile is not located. If the claimant prefers, such grounds of jurisdiction may allow the claimant to bring his claim before the courts of an alternative Member State. As exceptions to the general forum of the defendant's domicile, special grounds of jurisdiction have to be interpreted restrictively. Legal certainty and predictability are basic elements in the interpretation of Article 7. The CJEU has held that the principle of legal certainty requires, that the jurisdictional rules which derogate from the general rule laid down in Article 4 should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued.⁶⁹ Provisions in Article 7 determine directly territorial jurisdiction within the relevant Member State.
- 1.49** Article 7(1) contains the special jurisdiction rules in matters relating to a contract and provides plaintiffs the option to bring the claim in the courts for the place of performance of the obligation in question. The practical significance of this provision, which raises complex interpretation issues, is to a certain extent eroded as a result of the widespread use of choice of forum clauses in online contracts and the impact of the protective rules on consumer, employment and insurance contracts.
- 1.50** Article 7(2) grants jurisdiction in matters relating to tort to 'the courts of the place where the harmful event occurred or may occur'. Its wording favours

⁶⁸ CJEU Judgment of 18 July 2013, *ÖFAB*, C-147/12, EU:C:2013:490, para. 31.

⁶⁹ CJEU Judgments of 28 September 1999, *GIE Groupe Concorde and others*, C-440/97, EU:C:1999:456, para. 24; 19 February 2002, *Besix*, C-256/00, EU:C:2002:99, para. 24; and 1 March 2005, *Owusu*, C-281/02, EU:C:2005:120, paras. 38 to 40.

the view that it grants also jurisdiction for preventive actions. Delimitation between Article 7(1) and (2) is based on autonomous characterization and hence the fact that under national law the claim is deemed non-contractual is not determinative in this regard. A contractual characterization prevails and a claim is considered as relating to a contract in situations where the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or unlawful nature of the conduct complained of against the defendant.⁷⁰ Since Article 7(2) is intended to comprise all actions which seek to establish the liability of the defendant and which are not related to a contract in the sense of Article 7(1),⁷¹ it covers some of the main fields of litigation arising out of Internet activities.⁷² As established by the case-law of the CJEU, Article 7(2) grants jurisdiction to the courts of both the place where the event which may give rise to liability in tort occurs and the place where that event results in damage.⁷³ The claimant may choose to sue the defendant in the courts of either of those places. However, the jurisdiction of the courts of the place where the damage occurred is in principle limited solely to the injury caused in the forum,⁷⁴ without prejudice to the particular approach developed by the CJEU with regard to disputes arising out of online violations of rights relating to personality.⁷⁵ Since the courts of a multiplicity of Member States may have limited jurisdiction, this criterion is called the ‘mosaic approach’.

As regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, Article 7(3) confers jurisdiction to the court seised of those criminal proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings. The rules of the Brussels I Regulation (Recast) apply to establish jurisdiction in civil and commercial matters whatever the nature of the court or tribunal (Article 1). **1.51**

Article 7(5) may also be of interest in the context of Internet related claims. This provision deals with disputes arising out of the operations of a branch, agency or other establishment and grants jurisdiction over the parent to the **1.52**

70 CJEU Judgment of 13 March 2014, *Brogstetter*, C-548/12, EU:C:2014:148, para. 25.

71 CJEU Judgment of 27 September 1988, *Kalfelis*, 189/87, EU:C:1988:459, para. 17; and CJEU Judgment of 28 January 2015, *Kolassa*, C-375/13, EU:C:2015:37, para. 44.

72 See S. Brachotte and A. Nuyts, ‘Jurisdiction over Cyber Torts under the Brussels I Regulation’, in A. Savin and J. Trzaskowski (eds.), *Research Handbook on EU Internet Law*, Cheltenham, Edward Elgar, 2014, pp. 231–53; and P. De Miguel Asensio, ‘Internet, Jurisdiction’, in J. Basedow, G. Rühl, F. Ferrari and P. De Miguel Asensio (eds.), *Encyclopedia ... cit.*, vol. 2, 2017, 989, 992.

73 See, e.g., CJEU Judgment of 5 June 2014, *Coty Germany*, EU:C:2014:1318, para. 46.

74 CJEU Judgment of 7 March 1995, *Shevill and others*, C-68/93, EU:C:1995:61.

75 CJEU Judgments of 25 October 2011, *eDate Advertising and others*, C-509/09 and C-161/10, EU:C:2011:685, para. 48 and of 17 October 2017, *Bolagsupplysningen and Ilsjan*, C-194/16, EU:C:2017:766, para. 32.

courts for the place where the branch, agency or other establishment is situated. This ground of jurisdiction, which supplements the general forum of the defendant's domicile – in these situations, the Member State where the parent is domiciled – is not restricted by the nature of the claim. Hence, claimants benefit from this ground of jurisdiction with regard to contractual and non-contractual claims, as long as the dispute concerns the operations of the establishment. Article 5 of the Lugano Convention is the parallel provision to Article 7 of the Brussels I Regulation (Recast). As regards online contracts, the CJEU has concluded that a court cannot have jurisdiction pursuant to Article 7(5) to hear a claim concerning a dispute in a situation in which the branch at issue was not involved in the legal relationship between the defendant and the claimant.⁷⁶ On the contrary, Article 7(5) is relevant to grant jurisdiction in situations in which the contract was concluded through that branch.

- 1.53** Among the derived special jurisdiction rules laid down in Article 8 of the Brussels I Regulation (Recast), the multiple defendant forum is of particular significance in some disputes concerning Internet activities. According to Article 8(1), a person domiciled in a Member State may also be sued where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided that certain conditions are met. This provision does not apply to defendants who are not domiciled in another Member State, even in the case where they are sued in proceedings brought also against other defendants domiciled in the EU.⁷⁷ Jurisdiction concerning co-defendants domiciled outside the EU is to be determined by the law of the Member State whose courts have been seised.
- 1.54** In particular, Article 8(1) requires that the claims brought against the co-defendants are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings. Such requirement was already imposed by the CJEU in its *Kalfelis* judgment,⁷⁸ in line with the view that article 8(1) is an exception to the general rule of Article 4 and must be interpreted restrictively.⁷⁹ The CJEU has held that the risk of irreconcilable judgments from the claims against the co-defendants must arise ‘in the same situation of law and

76 CJEU Judgment of 11 April 2019, *Ryanair*, C-464/18, EU:C:2019:311, para. 35.

77 CJEU Judgment of 11 April 2013, *Sapir and others*, C-645/11, EU:C:2013:228, para. 56.

78 CJEU Judgments of 27 September 1988, *Kalfelis*, 189/87, para. 12; and 6 December 1994, *Tatry/Maciej Rataj*, C-406/92, EU:C:1994:400, para. 53.

79 CJEU Judgment of 11 October 2007, *Freeport*, C-98/06, EU:C:2007:595, para. 35.

fact'.⁸⁰ The interpretation of this condition poses significant challenges as illustrated by the case-law of the CJEU, particularly in claims concerning the infringement of IP rights. Article 6(1) of the Lugano Convention is the parallel provision to Article 8(1) of the Brussels I Regulation (Recast).

To conclude, it can be noted that the Brussels I Regulation (Recast) does not contain uniform jurisdiction rules for the adoption of provisional measures. On the contrary, Article 35 refers to the national rules on jurisdiction of the Member States. A claimant may file his petition for provisional measures either with a court having jurisdiction as to the substance of the matter under the Regulation or based on the national rules on jurisdiction of the court seised. The case-law of the CJEU provides some directions for the interpretation of the concept of provisional measures and the conditions under which such measures may be ordered. The CJEU has stated that the aim of Article 35 is to avoid losses to the parties as a result of the long delays inherent in any international proceedings. In accordance with that aim, the term 'provisional, including protective, measures' in Article 35 is to be understood as referring to 'measures which are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case'.⁸¹ **1.55**

Moreover, the granting of provisional measures on the basis of Article 35 is conditional on, inter alia, the existence of a real connecting link between the subject-matter of the measures sought and the territorial jurisdiction of the court before which those measures are sought.⁸² The required link is present if the measure is to be enforced within the territory of the State to which application is made. In fact, according to Article 2(a) only provisional measures ordered by a court which by virtue of the Brussels I Regulation (Recast) has jurisdiction as to the substance of the matter are subject to recognition and enforcement in accordance with the Regulation. **1.56**

80 CJEU Judgments of 13 July 2006, *Roche Nederland and others*, C-539/03, EU:C:2006:458, para. 26; 11 October 2007, *Freeport*, C-98/06, EU:C:2007:595, para. 40; 1 December 2011, *Painer*, C-145/10, EU:C:2011:798, para. 79; 11 April 2013, *Sapir and others*, C-645/11, EU:C:2013:228, para. 43; 21 May 2015, *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335, para. 20; and 27 September 2017, *Nintendo*, C-24/16 and C-25/16, EU:C:2017:724, para. 45.

81 CJEU Judgments of 26 March 1992, *Reichert and Kockler/Dresdner Bank*, C-261/90, para. 34; 17 November 1998, *Van Uden Maritime/Kommanditgesellschaft in Firma Deco-Line and others*, C-391/95, EU:C:1998:54317, para. 37; and 28 April 2005, *St. Paul Dairy*, C-104/03, EU:C:2005:255, paras. 12–13.

82 See CJEU Judgment of 17 November 1998, *Van Uden Maritime/Kommanditgesellschaft in Firma Deco-Line and others*, C-391/95, EU:C:1998:54317, para. 40.

d. Coordination of proceedings

- 1.57** The Brussels I Regulation (Recast) contains uniform rules on *lis pendens* and related actions in cases where proceedings are brought in the courts of different Member States (Articles 29 to 32) and in situations in which proceedings are pending before a court of a third State at the time when a court in a Member State is seised (Articles 33 and 34). Provisions on parallel proceedings play an important role to prevent the potential negative impact of parallel litigation where courts of different countries have jurisdiction to hear similar claims or claims having a significant relationship. Given the typical cross-border reach of the Internet, it is not rare that claims concerning online conduct are brought in different States in situations in which the rules on coordination of proceedings become significant to prevent procedural inefficiencies.
- 1.58** *Lis pendens* under the Regulation refers to those situations where proceedings involving the same cause of action and between the same parties are brought in the courts of different States. In order to minimize the possibility of concurrent proceedings and irreconcilable judgments between Member States, Article 29 gives strict precedence to the proceedings brought before the court of the Member State first seised if that court establishes its jurisdiction. Any other court of a Member State shall decline jurisdiction in favour of the court first seised once the latter establishes its jurisdiction. Uniform rules concerning the time at which a court is deemed to be seised are provided for in Article 32. The priority given to the court first seised has an exception intended to enhance the effectiveness of exclusive choice of court agreements and to avoid abusive litigation tactics which were developed under the previous version of the Regulation.⁸³ Pursuant to Article 31(2), precedence is given to the court of a Member State on which a prorogation agreement under Article 25 confers exclusive jurisdiction even if a court not designated in such an agreement is first seised.
- 1.59** Related actions pending in the courts of different Member States are governed by Article 30. Two actions are deemed to be related ‘where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings’. In situations involving related actions in another Member State, significant discretion is granted to the court second seised to stay its proceedings and decline jurisdiction if the court first seised has jurisdiction over the actions in question. This mechanism is intended to ease coordination and enable the

⁸³ CJEU Judgment of 9 December 2003, *Gasser*, C-116/02, EU:C:2003:657, paras. 71–73.

consolidation of the actions brought in different Member States in situations in which the action in the court first seised is pending at first instance.

Unlike the previous versions, the Brussels I Recast provides rules on *lis pendens* and related actions with regard to third States. These situations arise where proceedings are pending before a court of a third State at the time when a court in a Member State is seised. It is no surprise that the approach to situations in which parallel proceedings involve the courts of a third State is different from the solutions established in Articles 29 to 32. Articles 33 and 34 refer to situations in which proceedings are not pending in States which are bound by a comprehensive framework facilitating the reciprocal recognition and enforcement of judgments, as the one laid down in the Regulation which applies only between the Member States. **1.60**

As regards *lis pendens* situations, Article 33 allows a court of a Member State to stay the proceedings if a number of conditions are met. First, the stay is only possible if jurisdiction is based on the defendant's domicile, or the special jurisdiction rules provided in Articles 7 to 9. Hence, such possibility is excluded if the jurisdiction of the Member State court results from a different ground, such as an exclusive jurisdiction rule, a choice of court agreement or the protective jurisdiction rules, including those concerning consumer and employment contracts. Moreover, the court of the Member State has to consider that a stay is necessary for the proper administration of justice. Additionally, a stay is only possible if the judgment to be rendered by the court of the third State is expected to be capable of recognition in that Member State. The lack of common rules at EU level on recognition and enforcement of judgments given in third States may undermine uniformity in this respect. As regards related actions, the possibility to stay the proceedings in the court of the Member State is subject to the additional condition that it is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments. **1.61**

3. Comparative perspectives: United States

a. Main features

From a global perspective it can be noted that rules regarding international jurisdiction may vary significantly from country to country.⁸⁴ The lack of instruments establishing binding international standards in this regard influences such diversity, even if some common trends may be identified. Apart **1.62**

⁸⁴ R. Michaels, 'Jurisdiction, Foundations', in J. Basedow, G. Rühl, F. Ferrari and P. De Miguel Asensio (eds.), *Encyclopedia ... cit.*, vol. 2, 2017, 1042.

from a few exceptions, no specific rules regarding jurisdiction over Internet related civil and commercial claims have been established in national legislations or international instruments. Thus, the general framework on jurisdiction usually applies to determine whether a court has the power to adjudicate such claims.

- 1.63** Along with the European Union, developments regarding jurisdiction over Internet conduct in the United States have become particularly influential. The comparison between both systems is challenging, since they are based on different approaches. The EU model rests on the adoption of a set of uniform rules aimed at providing legal certainty and predictability. The Brussels I Regulation (Recast) and the interpretation of its detailed rules by the CJEU provide a common comprehensive regulatory framework, without prejudice to the application of national rules of jurisdiction to certain situations in which the defendant is not domiciled in a Member State. By contrast, the landscape in the United States is much more complex and potentially uncertain.⁸⁵
- 1.64** Notwithstanding some specific federal rules of jurisdiction for federal courts, in most situations the personal jurisdiction of a court in the US is governed by common law principles or state statutes, which apply both to truly international disputes and to domestic disputes having connections with several US states.⁸⁶ These include assertions on jurisdiction in certain situations which can be regarded as excessive in comparison to EU uniform rules (but not if compared to the national regimes of some EU Member States which remain applicable to third country defendants). This can be the case of general jurisdiction based on the mere presence of the defendant in the forum state and so-called ‘doing business’ general jurisdiction, which may confer jurisdiction based on the carrying on of activities in the forum state even with regard to claims unrelated to such activities. Yet, such risks of exorbitant jurisdiction have to be balanced with the availability of discretionary grounds for declining jurisdiction, in particular the *forum non conveniens* doctrine.
- 1.65** The practical importance of common law principles and state long arm statutes is undermined by the prominent role of constitutional limitations over personal jurisdiction in the US legal system. Any assertion of adjudicatory

85 See P.J. Borchers, ‘Comparing Personal Jurisdiction in the United States and the European Communities: Lessons for American Reform’, *AJCL*, vol. 40, 1992, pp. 121–57; and N. Hatzimihail and A. Nuyts, ‘Judicial Cooperation between the United States and Europe in Civil and Commercial Matters: An Overview of Issues’, in A. Nuyts and N. Watté (eds.), *International Civil Litigation in Europe and Relations with Third States*, Brussels, Bruylant, 2005, pp. 1–25.

86 See W.M. Richman, W.L. Reynolds and C.A. Whytock, *Understanding Conflict of Laws*, 4th ed., New Providence, Lexis Nexis, 2013, pp. 70–125.

jurisdiction is subject to the constitutional limitations resulting from the due process clauses of the fifth and fourteenth amendments to the US Constitution. The constitutional dimension of personal jurisdiction makes possible a discussion of how this area of the law has developed in the US as a whole and also how it is applied to Internet related private disputes. However, the nature of constitutional analysis and the importance of case-by-case analysis in US practice remain important sources of unpredictability.⁸⁷

b. General and specific jurisdiction

The distinction between general and specific jurisdiction is also a feature of US law. In line with the account given of the EU legal framework, general jurisdiction in the US is not claim specific and allows suit against the defendant regardless of the nature of the claim and the location of the underlying conduct.⁸⁸ By contrast, specific jurisdiction is restricted to particular conduct of the defendant connected to the forum. **1.66**

General jurisdiction over a defendant can be asserted in the state that can be regarded as ‘home’ for the defendant⁸⁹ and hence carrying on systematic and continuous business in the forum state⁹⁰ may not suffice to subject the defendant to such jurisdiction.⁹¹ General jurisdiction over natural persons is usually granted at the domicile or residence of the defendant or on the basis of his physical presence if served with process while there.⁹² An incorporated business entity is deemed domiciled at its state of incorporation and principal place of business. In *Bristol-Myers Squibb Co. v. Superior Court of California*⁹³ the US Supreme Court reiterated that general jurisdiction only allows suit against a corporation when its contacts with the forum state are so significant that it may be deemed to be ‘at home’ there. This is usually the case only of corporations headquartered in the forum state. **1.67**

Specific jurisdiction is founded on the defendant’s contacts with the forum state in relation to the claim under consideration. Some state statutes grant specific jurisdiction over disputes regarding particular subject matters, such as contracts or torts. Relevant territorial grounds of jurisdiction include the place of performance of a contract and the place of commission of a tortious act or **1.68**

87 G.B. Born and P.B. Rutledge, *International Civil Litigation in United States Courts*, 6th ed., New York, Wolters Kluwer Aspen, 2018, pp. 81–89.

88 *Helicopteros Nacionales de Colombia SA v. Hall*, 466 US 408, 415 (1984).

89 *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US 915 (2011).

90 *International Shoe Co. v. Washington*, 326 US 310 (1945).

91 *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

92 *Burnham v. Superior Court of California*, 495 US 604 (1990).

93 582 US —, 137 S. Ct. 1773 (2017).

injury.⁹⁴ All assertions of jurisdiction have to meet the minimum contact tests that the due process clause demands.⁹⁵ An act is required by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state.⁹⁶ The relationship between the defendant and the forum must be reasonable, in order to protect the defendant against the burdens of litigating in an inconvenient forum and to prevent states from reaching out beyond the limits imposed by the federal system.⁹⁷ It is necessary that the defendant's activities constitute a purposeful and substantial connection to the forum state. It does not suffice that a product manufactured by the defendant and put in the stream of commerce abroad causes damage in the forum state.⁹⁸ It is required that the defendant has purposefully availed itself of doing business in the jurisdiction or placed goods in the stream of commerce in the expectation they would be marketed there.⁹⁹ For specific jurisdiction to exist it is not enough that the defendant generally conducts business in the forum state if such business is unrelated to the claim at issue.¹⁰⁰

1.69 Regarding Internet activities, after the concerns raised by certain initial cases that supported the view that the mere accessibility of the contents within a state might be sufficient to justify jurisdiction,¹⁰¹ an Internet specific test was developed on the basis of the distinction between interactive and passive websites in the landmark case *Zippo Mfg. Co. v. Zippo Dot Coin, Inc.*¹⁰² It established the so-called 'sliding scale' test to Internet contacts: mere passive websites without additional contacts with the forum would not be subject to jurisdiction in that state while the characterization of a website as active was regarded as sufficient to grant jurisdiction anywhere the site is accessed. In between, jurisdiction is to be determined by considering the level of interactivity of the webpage. But the sliding scale test proved unpredictable and difficult to apply.

1.70 The adaptation of the traditional due process standards or minimum contacts test for determining personal jurisdiction has led to the acceptance that also

94 L. Silberman, 'USA', in J. Basedow, G. Ruhl, F. Ferrari and P. De Miguel Asensio, *Encyclopedia ... cit*, vol. 3, p. 2637, p. 2641.

95 *Shaffer v. Heitner*, 433 U.S. 186 (1977).

96 *Hanson v. Denckla*, 357 US 235, 253 (1958).

97 *World-Wide-Volkswagen Corporation v. Woodson*, 444 US 286, 295 (1980).

98 *Asahi Metal Industries Co. v. Superior Court*, 480 US 102 (1987).

99 *J. McIntyre Machinery Ltd. v. Nicasio*, 564 US 873 (2011).

100 *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 US —, 137 S. Ct. 1773 (2017).

101 *Inset Systems, Inc. v. Instruction Set, Inc.*, (937 F.Supp. 161 (D.Conn.1996).

102 952 F. Supp. 1119, 1124–25 (W.D. Pa. 1997).

under the traditional framework, having an active web page cannot always be regarded as a purposeful availment of the benefits of doing business in every forum for the purposes of granting jurisdiction.¹⁰³ A standard based on the effect of the Internet activity within a jurisdiction, in line with the US Supreme Court decision in *Calder v. Jones*¹⁰⁴ articulating the ‘effects test’ for establishing personal jurisdiction, has received significant acceptance, as well as the view that judicial application of the traditional jurisdiction rules allows the standards to evolve gradually and to adapt to the challenges posed by Internet technology. A targeting criterion which focuses on whether the defendant’s conduct is purposefully directed at residents of the forum state has also been applied.¹⁰⁵ These developments confirm the view that the lack of interactivity of a website is not determinative to exclude that the conduct may be purposefully directed to a state in terms that justify the assertion of jurisdiction by its courts under traditional principles. However, the US due process analysis remains particularly flexible and may yield unpredictable results.

Moreover, some concerns about an excessive reach of US jurisdiction based on special legislation have been raised, in connection with the trend by US authorities to seize domain names under the control of US registrars and registry operators – including the entire dot-com registry system – that relate to activities that may violate US law, even if the domain name is owned by foreigners, has been registered using the services of a foreign domain name registrar and is active basically in foreign markets. The ACPA grants broad *in rem* jurisdiction to the US courts where the domain name registrar, domain name registry, or other domain name authority that registered or assigned the domain name is located.¹⁰⁶ This is to be discussed in particular in the context of trademark and domain name disputes (Chapter 5). 1.71

A significant difference between the US and EU approaches concerns the *forum non conveniens* doctrine. In opposition to the situation in the US, such doctrine cannot be used by a competent court under the Brussels I Regulation (Recast) to decline jurisdiction in favour of another court, on the ground that a court of another State would be a more appropriate forum for the case, for instance in disputes concerning the infringement of foreign IP rights by a defendant domiciled in the forum. The CJEU has held that the wide discretion allowed to the court seised by the *forum non conveniens* doctrine 1.72

103 *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.*, 293 F.3d 707 (4th Cir. 2002).

104 465 US 783 (1984).

105 *Millennium Enterprises, Inc. v. Millennium Music, LP*, 33 F.Supp. 2d 907, 921 (D. Or. 1999).

106 Anticybersquatting Consumer Protection Act, 15 U.S.C. § 1125(d).

would undermine the principle of legal certainty that is the basis of the Brussels system and the legal protection of persons established in the EU.¹⁰⁷

- 1.73 Finally, it is worth noting that some basic policies underlying the Brussels system are not present in similar terms in the US and this favours diverging responses with regard to jurisdiction over online activities.¹⁰⁸ That is the case with the importance given to the protection of the weaker party in the Brussels system and its impact on B2C e-commerce transactions. Choice of forum agreements in B2C transactions are subject to severe restrictions, pursuant to Article 19 Brussels I Regulation (Recast). The trend is to have recourse to the so-called country of destination criterion and confer jurisdiction based on the consumer habitual residence and the targeting approach. In the US framework, uneven bargaining power between the parties is not determinative when assessing the fairness and reasonableness of jurisdiction based on consent.¹⁰⁹ This facilitates the enforceability in the US of forum selection clauses in B2C e-commerce contracts,¹¹⁰ without prejudice to certain limitations to protect consumers implemented at state level.¹¹¹

4. International developments

- 1.74 No uniform rules on jurisdiction over private disputes arising from Internet activities have been adopted in the framework of international organizations of global reach. The lack of uniformity between states' approaches undermines legal certainty and the prospects for cooperation. The experience at the Hague Conference of Private International Law is illustrative of the difficulties that the drafting of uniform rules on jurisdiction over Internet activities faces. The impact of the Internet was singled out as one of the areas where progress in the Hague Judgments Project became more difficult at the beginning of the twenty-first century.¹¹² The uncertain legal implications of the use of the Internet and the development of electronic commerce on the traditional approach based on the territorial localization of connecting factors was one of the main reasons behind the failure of the Hague negotiations at that time.

107 CJEU Judgment of 1 March 2005, *Owusu*, C-281/02, EU:C:2005:120, paras. 41 to 46.

108 T. Puurunen, 'The Judicial Jurisdiction of States Over International Business-to-Consumer Electronic Commerce from the Perspective of Legal Certainty', *U.C. Davis J. Int'l L. & Pol'y*, vol. 8, 2002, 133, at 225–31.

109 *Carnival Cruise Lines, Inc. v. Shute*, 499 US 585 (1991).

110 *Koch v. America Online, Inc.*, 139 F.Supp.2d 690 (D.Md., 2000).

111 R.J. Mann and J.K. Winn, *Electronic Commerce*, 2nd ed., New York, Aspen, 2004, p. 31.

112 'Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report by Peter Nygh & Fausto Pocar', Prel. Doc. No 11 of August 2000 drawn up for the attention of the Nineteenth Session of June 2001, available at www.hcch.net.

Such disagreement was the result of the conflicting policy views between business and consumers, but also of the states' public policy concerns related to information and the protection of certain human rights, in particular with regard to the balance between freedom of expression and protection of personality rights. Concerns were raised about the negative consequences of the envisaged convention over the electronic commerce industry in the framework of the debate between a 'country of origin' or a 'country of destination' approach. Under the first approach, jurisdiction is granted to the courts of the country in which the source of the transmission is located. By contrast, the second approach favours granting jurisdiction to the country where the contents are received. Due to the lack of sufficient consensus, the initial far-reaching double convention was limited to cases involving choice of court agreements. **1.75**

The 2005 Hague Convention on Exclusive Choice of Court Agreements is of very limited significance for Internet activities beyond contracts. Moreover, it is remarkable that consumer contracts are excluded from that Convention. The Judgments Project was resumed in 2010, however it was scaled down to cover only the recognition and enforcement of judgments. The idea of drafting a double convention, as initially envisaged, dealing both with jurisdiction and recognition and enforcement of judgments,¹¹³ was abandoned. Hence, only so-called indirect jurisdiction rules, which are relevant not to confer jurisdiction but only to assess the jurisdiction of the rendering court in the framework of recognition and enforcement of judgments, have been the focus of the Hague Judgments Project leading to the adoption of the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.¹¹⁴ **1.76**

Other international organizations active in establishing uniform rules in certain areas related to Internet activities, such as UNCITRAL, WIPO, ITU or UNIDROIT, have not focused their attention on jurisdiction issues in this field. This also applies to non-governmental organizations active in the field of Internet governance. ICANN has been successful in establishing alternative dispute resolution mechanisms concerning conflicts between trademark owners and domain name registrants. However, such mechanisms are not binding on national courts and do not prevent the parties from submitting the dispute to a national court which will decide over its jurisdiction pursuant to its system of Private International Law. **1.77**

113 R.A. Brand, 'Jurisdictional Developments and the New Hague Judgments Project', Permanent Bureau of the Hcch (ed.), *A Commitment to Private International Law (Essays in Honour of Hans Van Loon)*, Cambridge, Intersentia, 2013, pp. 89–99.

114 Available at www.hcch.net.

III. APPLICABLE LAW

1. General overview

- 1.78** The multijurisdictional reach of Internet conduct poses also significant uncertainties with regard to the determination of the law governing online activities. In the absence of common uniform substantive rules directly applicable to a cross-border relationship, private international law primarily rests on so-called conflict rules. Uniform substantive rules regulating cross-border transactions or activities and having significant worldwide acceptance are not common. A rare example of international convention providing uniform substantive rules for cross-border transactions which may be relevant in the online context and has achieved ample acceptance from a global perspective is the 1980 Convention on the International Sale of Goods or CISG.¹¹⁵ Unlike substantive rules, conflict rules are intended to determine the jurisdiction whose law is applicable to the cross-border relationship at issue.
- 1.79** With a view to make possible such a determination, conflict rules have recourse to connecting factors which are instrumental in locating the relationship in the jurisdiction whose law is regarded as applicable. Particularly in the field of contracts, party autonomy plays a prominent role in establishing the law applicable to B2B transactions. Moreover, party autonomy favours the application of so-called transnational rules as long as the parties have incorporated them into their contract. Connecting factors used by conflict rules are usually territorial, such as the place of performance of an obligation, the place of damage or the location of an asset or person. Thus, their determination in the context of Internet activities and digital assets may raise remarkable difficulties.
- 1.80** So-called unilateral conflict rules focus on the scope of application of the law of the forum to cross-border situations. Yet, bilateral conflict rules are much more common in practice. The latter may lead to the application of the law of the forum or the substantive law of another country depending on the circumstances of the case. For instance, that is the case of a rule such as Article 4(1) of the Rome II Regulation. Pursuant to this provision, 'the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs'. Such a law may be either the law of the forum or that of a foreign country.

115 United Nations Convention of 11 April 1980 on Contracts for the International Sale of Goods, 1489 UNTS 3.

A court having competence to adjudicate a cross-border dispute applies its own conflict rules. Hence, unless uniform instruments have been adopted at international level, conflict rules vary from jurisdiction to jurisdiction. Moreover, the private international law of the court seised is determinative with regard to the issues that the application of conflict rules may pose. How those issues are addressed play an important role in establishing the substantive law which is effectively applied by a court hearing a cross-border dispute. For instance, as a result of the public policy exception, the application of a foreign law may be refused if it is deemed to be manifestly incompatible with the values and principles of the law of the forum. Moreover, the procedural treatment received by foreign law before national courts varies from country to country and influences the ascertainment of its content. Forum substantive law is usually applied to those cases in which foreign law has not been sufficiently ascertained. **1.81**

From a global perspective, it can be noted that no uniform conflict rules have been developed at international level in those areas of private law which are more significant to online activities and transactions. Therefore, also in connection to Internet conduct choice of law rules are mainly national provisions and hence responses differ depending on the country considered. By contrast, in the last decades the EU has succeeded in establishing uniform conflict rules in most areas of private law. An essential component of judicial cooperation in civil matters within the EU is a set of regulations providing common choice of law rules. The Rome I Regulation on contracts and the Rome II Regulation on non-contractual obligations make possible an EU wide approach to most conflict of laws issues regarding Internet conduct and online transactions. **1.82**

2. The Rome Regulations

a. Commonalities

The importance of the Rome I and Rome II Regulations is related to the broad scope of application of both instruments. As regards the courts of the EU Member States (except Denmark), the two instruments have universal application. This means that any law specified by them shall be applied by the courts of the Member States whether or not it is the law of a Member State (Article 2 Rome I and Article 3 Rome II). In practice, universal application implies that the uniform conflict rules supersede the national provisions of the Member States with regard to all situations falling within the substantive scope of application of the Regulations. These EU conflict rules apply to all cross-border situations regardless of the domicile of the parties and any other connections with third States. Choice of law rules having a universal scope of **1.83**

application cover situations even if not directly connected with the internal market, such as international contracts between parties located in non-Member States.

- 1.84** Just like other EU rules on private international law, the provisions of the Rome I and Rome II Regulations are subject to uniform interpretation and their concepts are autonomous. The nature of both regulations as instruments of European integration, to be applied by the courts of all Member States is connected to the paramount importance of legal certainty and predictability of the applicable law as basic goals of the unified EU rules. The CJEU plays a pivotal role in ensuring uniform application and in establishing the meaning of the autonomous concepts of both Regulations.
- 1.85** These two instruments are closely intertwined. Moreover, they are connected to the Brussels I Regulation (Recast). Uniform choice of law rules are important to prevent opportunistic forum shopping once jurisdiction rules have been unified and recognition and enforcement of judgments streamlined. As noted in Recital 7 of the Rome I and Rome II Regulations, the substantive scope and provisions of both instruments should be consistent with one another and also with the rules of the Brussels I Regulation.¹¹⁶ The concepts used by each Regulation must be interpreted independently, by reference principally to the general scheme and objectives of the Regulation at issue in order to ensure its uniform application in all Member States. Yet, the close relationship between those instruments must be taken into account. In this regard, the CJEU has established that the interpretation of the concepts used by those two regulations which are, in functional terms, identical, should be harmonized.¹¹⁷ That is also significant with regard to the delimitation of the respective scopes of application of the two instruments,¹¹⁸ the meaning of the concepts of ‘contractual obligation’ and ‘non-contractual obligation’ and their interplay with the distinction drawn in Article 7 of the Brussels I Regulation (Recast) between matters relating to contract and matters relating to tort.¹¹⁹
- 1.86** Given that the EU has not adopted a single instrument establishing common general provisions on choice of law, the Rome I and Rome II Regulations

116 See, e.g., CJEU Judgments of 21 January 2016, *ERGO Insurance and Gjensidige Baltic*, C-359/14 and C-475/14, EU:C:2016:40, para. 43; of 15 June 2017, C-249/16, EU:C:2017:472, *Kareda*, para. 32; and 5 July 2018, *AB flyLAL-Lithuanian Airlines*, C-27/17, EU:C:2018:533, para. 41.

117 CJEU Judgment of 31 January 2019, *Da Silva Martins*, C-149/18, EU:C:2019:84, para. 28.

118 See R. Plender and M. Wilderspin, *The European Private International Law of Obligations*, 4th ed., London, Sweet & Maxwell, 2015, paras. 2-001 to 2-075.

119 See CJEU Judgment of 28 July 2016, *Verein für Konsumenteninformation*, C-191/15, EU:C:2016:612, para. 36, concerning the law or laws applicable to an action for an injunction against the use of unlawful contractual terms in electronic commerce transactions with consumers.

contain provisions on general issues, such as overriding mandatory provisions, public policy of the forum, exclusion of *renvoi*, non-unified legal systems and habitual residence. Provisions on these general issues are similar in both instruments. Notwithstanding this, some gaps of current EU private international law undermine effective unification. Having adopted uniform conflict rules does not fully guarantee uniform results throughout the EU in situations in which the actual application of such rules is dominated by national legal traditions.

Particularly, the lack of common standards on the treatment of foreign law at EU level may undermine effective uniformity in the context of the Rome I and Rome II Regulations. The position of forum law concerning the mandatory or facultative application and ascertainment of foreign law may influence the rules effectively applied to a given cross-border dispute. Differences among Member States remain as to the respective roles of judges and parties in determining and ascertaining the content of foreign law, and the consequences of the failure to prove foreign law.¹²⁰ **1.87**

b. Rome I

The unified rules established in the Rome I Regulation (and previously in the Rome Convention) apply to all situations involving a conflict of laws in the field of contractual obligations, both in civil and commercial matters (Article 1(1)). According to the case-law of the CJEU the concept of ‘contractual obligation’ within the meaning of Article 1 of the Rome I Regulation ‘designates a legal obligation freely consented to by one person towards another’.¹²¹ Hence, the material scope of application of Rome I, as it was the case with its predecessor, the 1980 Rome Convention, is very broad and supersedes the national conflict rules of EU Member States.¹²² It covers in principle all contractual claims involving Internet related cross-border B2B, B2C and P2P transactions (see Chapter 6, below). **1.88**

Issues excluded from the Rome I Regulation are listed in Article 1(2), which basically refers to matters which cannot be deemed as contractual, such as capacity, obligations arising out of family relationships, obligations arising out **1.89**

¹²⁰ See C. Esplugues, ‘General Report on the Application of Foreign Law by Judicial and Non-Judicial Authorities in Europe’, in C. Esplugues, J.L. Iglesias and G. Palao (eds.), *Application of Foreign Law*, Munich, Sellier, 2011, pp. 3–94; and Y. Nishitani, ‘General Report’, in Y. Nishitani (ed.), *Treatment of Foreign Law: Dynamics Towards Convergence?*, Heidelberg, Springer, 2017, pp. 43–47.

¹²¹ See CJEU Judgment of 28 July 2016, *Verein für Konsumenteninformation*, C-191/15, EU:C:2016:612, para. 44.

¹²² See C. Reithmann and D. Martiny (eds.), *Internationales Vertragsrecht*, 8th ed., Cologne, Otto Schmidt, 2015, paras. 1.66 to 1.120; and M. McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations*, Oxford, Oxford University Press, 2015, paras. 6.01 to 6.66.

of the negotiable character of negotiable instruments, questions governed by the law of companies, the constitution of trusts and the external aspect of agency and representation. Arbitration agreements and agreements on the choice of court are excluded from the scope of the Regulation. Obligations arising out of dealings prior to the conclusion of a contract are also excluded. Yet, pursuant to Article 12(1) of the Rome II Regulation on *culpa in contrahendo*, the law applicable to such obligations, regardless of whether the contract was actually concluded or not, is the law that applies to the contract or that would have been applicable to it had it been entered into.

1.90 The Rome I Regulation is based on a broad acceptance of party autonomy in Article 3. Choice of the governing law by the parties is favoured by the Rome I Regulation as the preferred option to provide legal certainty and foreseeability as to the law applicable to international B2B contracts. In order to balance party autonomy with other relevant interests, the Rome I Regulation imposes certain restrictions on freedom of choice. Significant restrictions to party autonomy apply with regard to contracts for the carriage of passengers (Article 5(2)), consumer contracts (Article 6), insurance contracts (Article 7) and employment contracts (Article 8). The general provisions on the law applicable to contracts in the absence of choice are found in Article 4, which is aimed at achieving a balance between conflicts justice – or proximity – and legal certainty with a view to ensuring a sufficient level of predictability. Protection of the public interests of the forum (including those of the EU) may justify recourse to the exceptions based on public policy (Article 21) and overriding mandatory provisions that prevail over the law of the contract (Article 9).

c. Rome II

1.91 Pursuant to Article 1(1), the Rome II Regulation applies ‘in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters’. The case-law of the CJEU has established that the concept of ‘non contractual obligations’ in Article 1(1) is to be understood as meaning an obligation ensuing from damage which derives from tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*. In principle, the concept covers all actions which seek to establish liability and are not related to a ‘contract’.¹²³ In practice the Rome II Regulation provides the uniform conflict rules that determine in the EU Member States (other than Denmark)

123 CJEU Judgment of 28 July 2016, *Verein für Konsumenteninformation*, C-191/15, EU:C:2016:612, paras. 45 and 46.

the law applicable to non-contractual obligations arising from Internet activities and online conduct except for those non-contractual obligations excluded from its scope under Article 1(2).

Most issues listed in Article 1(2) Rome II as excluded from its scope are of limited significance with regard to online torts. Exclusions refer to non-contractual obligations arising out of: family relationships, the negotiable character of negotiable instruments, the law of companies and trusts, and of nuclear damage. Yet, one exclusion is particularly remarkable regarding Internet liability. Article 1(2)(g) excludes ‘non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation’ from the scope of the Regulation. Hence, in that area national choice of law rules remain determinative in the Member States. Moreover, according to Article 28(1), the Rome II Regulation does not prejudice the application of pre-existing international conventions to which one or more Member States are parties and which lay down conflict of law rules relating to non-contractual obligations. That is the case, in particular of the 1973 Hague Convention on the law applicable to products liability.¹²⁴ **1.92**

Under the Rome II Regulation, parties may agree to submit certain non-contractual obligations to the law of their choice pursuant to Article 14. The general conflict rule, where there has been no choice of law by the parties, is provided for in Article 4 which is based as the rest of the conflict rules of the Regulation in the closest connection principle. Special conflict rules that prevail over the general rule in Article 4 are provided for certain matters, including, where the non-contractual obligation arises out of product liability (Article 5), unfair competition or restrictions of competition (Article 6), environmental damage (Article 7) and infringement of an intellectual property right (Article 8). Moreover, Rome II also provides conflict rules for obligations arising out of unjust enrichment (Article 10), *negotiorum gestio* (Article 11) and *culpa in contrahendo* (Article 12). The rationale behind the inclusion of specialized choice of law rules is primarily that the general rules of the Regulation are not fully compatible with the needs of non-contractual obligations arising in those specific areas. As an exception to the freedom of the parties to submit non-contractual obligations to the law of their choice granted by Article 14 of the Rome II Regulation, Articles 6(4) and 8(3) provide that the law applicable under those articles may not be derogated from by an agreement. Therefore, unlike other conflict rules of the Regulation, Articles 6 and 8 include mandatory provisions determining the law applicable **1.93**

124 1056 UNTS 191.

to non-contractual obligations arising from unfair competition, restrictions of competition and infringements of IP rights that cannot be derogated by the parties.

1.94 Pursuant to Article 15, the law determined by the Rome II Regulation governs in principle all issues relating to tort such as: the basis and extent of liability, the grounds for exemption from liability, any limitation of liability, the damage or the remedy claimed, transfer of a right to claim damages or a remedy, persons entitled to compensation for damage sustained personally, liability for the acts of another person and the extinction and prescription of the obligation. Yet, the overriding mandatory provisions of the law of the forum prevail in situations where they are mandatory under Article 16 (and Article 26 on public policy). Moreover, according to Article 17 account shall be taken of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability in assessing the conduct of the person claimed to be liable. Evidence and procedure are governed by forum law without prejudice to the specific provisions on formal validity and burden of proof (Articles 21 and 22).

3. Comparative perspectives

1.95 Unlike the situation within the EU, at world level choice of law approaches may differ in significant ways from one country to another. Notwithstanding this, in some relevant areas recourse to similar principles is widespread. That is the case of party autonomy and freedom of choice in international B2B contracts. Broad acceptance of party autonomy in this regard is key to facilitate recourse to different forms of self-regulation. The *lex loci protectionis* principle is also generally acknowledged as the basic approach to determine the law applicable to non-contractual obligations arising from IP infringements. Its widespread recognition is directly related to the universal acceptance of the territorial nature of IP rights. Moreover, the so-called market effects rule enjoys extensive comparative approval concerning torts related to unfair competition and antitrust law.

1.96 The very limited reach of harmonization at international level and the jurisdiction specific nature of choice of law rules influence that responses in other areas may differ significantly depending on the country considered. Outside the EU, international and regional efforts to adopt uniform binding choice of law rules on obligations have achieved very limited success. Among the Hague Conference instruments, the absence of relevant conventions on the law applicable to international contracts is illustrated by the failure of the

1986 Convention on International Sales,¹²⁵ which has not even entered into force. At regional level in other areas of the world, conventions intended to adopt common rules on the law applicable to international contracts have suffered a similar fate. Significant in this regard is the 1994 Inter-American Contracts Convention,¹²⁶ which has only two ratifications. Also uniform conflict rules on non-contractual obligations are rare in those areas more relevant to online conduct. Even if some international conventions have been adopted, they cover very specific subject matters and have achieved limited international acceptance. One such example is the Hague Convention on the law applicable to products liability, which is in force only in 11 European countries.¹²⁷

In the absence of binding international provisions, conflict rules on contracts and non-contractual obligations vary from country to country. Although some common trends may also be found in many jurisdictions, different approaches prevail on issues such as the restrictions to party autonomy and the approaches to determine the law applicable to the extent that it has not been chosen by the parties.¹²⁸ **1.97**

Contrary to the unification brought about by the Rome I and Rome II Regulations in the EU, different choice of law approaches prevail in individual states in the US.¹²⁹ The courts of those states that adhere to the Second Restatement of Conflict of Laws (1971) usually apply the law of the place having the most significant relationship to the contract or the non-contractual obligation at issue.¹³⁰ In order to locate such place the Second Restatement provides a number of presumptions for some specific contracts. In addition, guidance is provided as to the factors to be considered in locating the most significant relationship to a contract, such as the place of negotiation and contracting, the place of performance, the domicile of the parties and the policies underlying the relevant substantive laws. The latter factor is the key element to determine the applicable law in those US jurisdictions that follow the so-called interest analysis approach. As far as non-contractual obligations are concerned, the Second Restatement provides specific rules on particular torts and also a list of factors to be weighted with a view to establish the place **1.98**

125 Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods, 24 ILM 1575.

126 Inter-American Convention on the Law Applicable to International Contracts, 33 ILM 732.

127 Hague Convention of 2 October 1973 on the law applicable to products liability, 1056 UNTS 191.

128 S.C. Symeonides, *Codifying Choice of Law Around the World (An International Comparative Analysis)*, New York, Oxford University Press, 2014, pp. 39–170.

129 S.C. Symeonides, *Choice of Law*, New York, Oxford University Press, 2016, pp. 177–272.

130 W.M. Richman, W.L. Reynolds and C.A. Whytock, *Understanding ...* cit., pp. 230–44; and G.B. Born and P.B. Rutledge, *International ...* cit., pp. 724–5 and 772–5.

of the most significant relationship. Such factors include the place of injury, the place of the conduct causing the injury, the domicile and nationality of the parties, as well as the place in which the parties' pre-existing relationship, if any, is centred.

1.99 From a comparative perspective, it is remarkable that in the field of contracts the Rome Convention and Rome I Regulation have proved to be a very influential model, frequently used outside the European Union as a blueprint when drafting national provisions or international texts in this field. EU instruments have become a reference for national and international legislators in Europe and beyond.¹³¹ Their influence is supported by the widespread view that they include a comprehensive set of high quality rules which may provide adequate guidance to less sophisticated PIL systems even on general issues, such as application of mandatory provisions, *renvoi*, public policy, non-unified legal systems and habitual residence. Moreover, the position of the Rome II Regulation, as a milestone in choice of law, and the most comprehensive instrument of its kind in the world¹³² determines its significance as a model for many national legislators and for regional and international efforts in the field. The influence of at least one of these EU instruments is acknowledged with respect to the recent PIL reforms in countries such as Japan,¹³³ China,¹³⁴ Albania, Dominican Republic, Ecuador, Iceland, Israel, Korea, Montenegro or Russia.¹³⁵

1.100 Nevertheless, a cautious approach is to be adopted in this regard. Systems based on similar principles may not always lead to the same result with regard to specific situations. Those instruments remain regional and even if they have significantly influenced developments in many systems some differences in approach or tradition may lead to different results between systems influenced by a same model. For instance, modern Chinese legislation has recourse to some connecting factors previously adopted in EU instruments, such as the domicile of the party who effects the characteristic performance and the

131 See R.A. Brand, 'The European Union's New Role in International Private Litigation', *Loyola U. Chi. Int'l. L. Rev.*, vol. 2, 2004–5, 277, 293; J. Basedow, *The Law ... cit.*, at 510; and S.C. Symeonides, *Codifying ... cit.*, 2014, p. 29.

132 A. Dickinson, *The Rome II Regulation (The Law Applicable to Non-contractual Obligations)*, Oxford, Oxford University Press, 2008, p. IX.

133 See M. Dogauchi, 'Historical Development of Japanese Private International Law', in J. Basedow, H. Baum and Y. Nishitani (eds.), *Japanese and European Private International Law in Comparative Perspective*, Tübingen, Mohr Siebeck, 2008, 27, 53.

134 Qisheng He, 'Recent Developments of New Chinese Private International Law With Regard to Contracts', in J. Basedow and K.B. Pissler (eds.), *Private International Law in Mainland China, Taiwan and Europe*, Tübingen, Mohr Siebeck, 2014, pp. 157–80.

135 See the respective national reports in J. Basedow, G. Rühl, F. Ferrari and P.A. De Miguel Asensio (eds.), *Encyclopedia ... cit.*, vol. III.

closest connection. Yet, compared to the Rome I Regulation, the extreme flexibility of the similar provisions in Chinese law grants a high degree of discretion to courts that may lead in certain situations to differences in result with the Rome I Regulation and its highly predictable conflict rules.¹³⁶

IV. RECOGNITION AND ENFORCEMENT OF JUDGMENTS

1. Main features

a. Purpose and context

Due to the separation of national judicial systems, the effects of a judgment are in principle limited to the territory of the country whose court rendered it. Therefore, a foreign judgment must be recognized or declared enforceable in the local forum in order to produce its typical effects as a judgment, such as *res judicata*, beyond the country where it was rendered. Recognition basically refers to an extension of the legal effects the foreign judgment produces in the country of origin. By contrast, enforcement requires that the courts of the requested State adopt the necessary measures to give one party the relief granted to it by the foreign judgment, having recourse to public coercive force when needed. Provided that certain conditions are met, recognition of foreign judgments by operation of the law and without any special procedure being required is possible under many international conventions, regional instruments and national legislations. However, enforcement is typically subject to a previous specific procedure to obtain a declaration of enforceability in the enforcing country, usually known as *exequatur*. In some countries, such as in England under statute, a foreign judgment may be enforceable by a process of registration.¹³⁷ Once a foreign judgment has been declared enforceable in the country of destination, its enforcement is usually governed by the same rules that apply to the enforcement of domestic judgments. As a result of the significance of mutual trust in the administration of justice in the EU, the Brussels I Regulation (Recast) allows the direct enforcement of a judgment rendered in another Member State without a declaration of enforceability. **1.101**

Recognition of a foreign judgment prevents subsequent litigation of the same dispute in a different forum and ensures the protection of rights acquired abroad. This is especially important in a context of increasing globalization. **1.102**

136 P.A. De Miguel Asensio, 'The Law Applicable to Contractual Obligations: The Rome I Regulation in Comparative Perspective', in J. Basedow and K.B. Pissler (eds.), *Private ... cit.*, pp. 191–219, at 201–7.

137 Lord Collins of Mapesbury (ed.), *Dacey, Morris and Collins on The Conflict of Laws*, 15th ed., London, Sweet & Maxwell, 2012, p. 669.

Reliance on the *res judicata* effect of a judgment is necessary to deter the losing party from bringing new proceedings involving the same cause of action and between the same parties in the courts of another state. Moreover, the possibility to enforce abroad money judgments against defendants without sufficient assets in the country where the judgment was rendered avoids the need to pursue additional litigation in a country where the defendant has assets. Enforcement abroad may be decisive also to ensure the authority of an injunction ordering a party to desist from an infringement in the territory of several countries.

1.103 Because of the lack of significant global agreements on recognition and enforcement of foreign judgments in most Internet related fields, the applicable rules usually depend on regional or bilateral instruments or the domestic law of the requested country.¹³⁸ The applicable rules in a given jurisdiction may be different depending on which is the rendering country of the judgment at issue. International conventions and regional instruments on recognition and enforcement are usually subject to reciprocity and hence only apply to the mutual recognition of judgments between contracting states. Hence, at EU level the Brussels I Regulation (Recast) covers only recognition and enforcement of judgments given in a Member State. In the US recognition and enforcement of foreign judgments is basically governed by state laws, but significant harmonization has been achieved as a result of uniform instruments adopted by many states,¹³⁹ particularly the 1962 Foreign Money Judgments Recognition Act and the 2005 Foreign Country Money Judgments Recognition Act, as well as the guidance of the Third Restatement on Foreign Relations Laws.

1.104 National regimes on recognition and enforcement differ significantly across the world in many respects. For instance, they differ as to the role of reciprocity as a basic tool determining if recognition of judgments from a given country is possible or not.¹⁴⁰ Differences also may be found with regard to the grounds for non-recognition and enforcement of foreign judgments.

138 P.A. De Miguel Asensio, 'Recognition and Enforcement of Judgments: Recent Developments', in P. Torremans (ed.), *Research Handbook on Cross-border Enforcement of Intellectual Property*, Cheltenham, Edward Elgar, 2014, 469, 472–6.

139 G.B. Born and P.B. Rutledge, *International ... cit.*, pp. 1072–4.

140 On the traditional importance of reciprocity in the Chinese system in sharp contrast with the current situation in other national systems, see W. Zhang, 'Recognition and Enforcement of Foreign Judgments in China: A Call for Special Attention to Both the Due Service Requirement and the Principle of Reciprocity', *Chinese Journal of International Law*, vol. 12, 2013, pp. 143–74. Also in Germany, according to § 328 (recognition) of the Code of civil procedure (*Zivilprozessordnung*) a reciprocity requirement is established and has played a relevant role against judgments from jurisdictions with questionable standards regarding the rule of law. See G. Cuniberti, 'Le fondement de l'effet des jugements étrangers', *R.des C.*, vol. 394, 2019, chapter V.

The divergent understanding of some shared controls, such as procedural and substantive public policy, reinforce the disparity in this area, which becomes a source of uncertainty and an obstacle hindering efficient resolution of cross-border disputes.

b. Judgments

Recognition and enforcement is typically limited to foreign judgments in civil and commercial matters. Therefore, orders and sanctions originating from administrative bodies or those imposing criminal sanctions cannot benefit from such regimes. Recognition of foreign judgments in civil and commercial matters concern the interests, rights and duties of the private parties involved and hence should be regarded primarily as a private matter. The interests involved are different from those prevailing in public law matters, such as international cooperation in tax law or criminal prosecution. At any rate, the limits regarding the possibility to enforce certain judgments in civil and commercial matters, such as provisional measures, non-monetary judgments or default judgments, may differ significantly depending on the applicable regime. **1.105**

In the context of litigation relating to Internet activities, both monetary and non-monetary judgments are very common. For instance, money judgments are the result of the authority granted to the courts to order an infringer to pay damages to the rightholder. Due to the different approaches on punitive damages, among the specific issues raised by money judgments are those concerning the cross-border implications of judgments awarding non-compensatory damages, and its significance in the context of substantive public policy. Typical non-money judgments include injunctions prohibiting the production or marketing of goods or the use of protected subject matter, orders to surrender and deliver infringing goods, or other orders for specific performance. Non-money judgments also comprise merely declaratory judgments, including negative declarations. **1.106**

Traditionally, some legal systems have been reluctant to admit the possibility of enforcing foreign non-money judgments. Enforceability of foreign *in personam* judgments under the common law was considered limited to judgments for a fixed or ascertainable sum of money. However, in most jurisdictions it is now widely accepted that the common law should be extended to make possible the enforcement of foreign non-money judgments.¹⁴¹ **1.107**

¹⁴¹ See the decision by the Supreme Court of Canada in *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612, 2006 SCC 52, concluding that the 'time is ripe to change the common law rule against the enforcement of foreign non-monetary judgments' (para. 64).

Compared to judgments for a fixed sum of money, the recognition and enforcement of foreign non-money judgments may raise specific challenges and demand additional involvement by the authorities of the destination country. That is especially the case of judgments granting injunctions under which a party is ordered to abstain from or to tolerate certain acts¹⁴² Judgments imposing such orders tend to establish substitute measures to be enforced in the event that the losing party does not comply with the prohibition order. Judgments specifying measures to be applied in case of non-compliance with injunctions and subsequent orders of the court of origin imposing a penalty on a party for non-compliance are of special significance in this regard. Such measures may involve more direct mechanisms of coercion, such as monetary penalties, *astreinte*, debtor's coercive detention and contempt of court. Some of these foreign coercive measures, such as periodic penalty payments to the right holder, may typically be recognized and enforced in some legal systems.¹⁴³ However, significant uncertainties remain, particularly to the extent that in some systems such penalties are not payable to parties, but to courts or public authorities, and because some penalties may require a further court order fixing the amount to be paid before being effective.

1.108 The applicability of the provisions on the enforcement of foreign judgments in civil matters to certain coercive measures may be controversial, since foreign criminal judgments are excluded from recognition and enforcement. In *De Fontbrune v. Wofsy*¹⁴⁴ the Ninth Circuit Court of Appeal reversed a decision by the Northern District of California which denied the enforcement in the US of an *astreinte* ordered by the Paris Court of Appeal in relation to the breach of an injunction prohibiting the use of certain photographs for copyright infringement. The initial refusal to enforce the *astreinte* in the US was based on the view that it was not compensatory but a penalty. The Ninth Circuit reversed the decision on the basis that the purpose of the *astreinte* was to compensate the rightholder and arose in the context of a civil claim between private parties. Indeed, doubts as to the characterization of certain measures as civil matters may appear in particular to the extent that the measures concerned present some elements of criminal sanction. This is the case with measures such as contempt orders, a debtor's coercive detention or imprisonment and penalty payments to be paid to the benefit of public authorities – to be distinguished from penalty payments payable to the rightholder – which

142 See B. Hess, 'Protecting privacy by cross-border injunction', *Riv.dir.int.pr.proc.*, vol. 55, 2019, pp. 284-301.

143 See regarding the cross-border enforcement within the EU of a periodic penalty payment, ordered by a Community trademark court to ensure compliance with a prohibition against further infringement, CJEU Judgment of 12 April 2011, *DHL Express France*, C-235/09, EU:C:2011:238, para. 55.

144 838 F.3d 992, 1000 (9th Cir. 2016).

some legal systems establish as substitutive measures in case of non-compliance with an injunction.¹⁴⁵ The criminal sanction elements of some of these measures may lead to their being regarded as not falling within the scope of civil matters or to their being refused recognition and enforcement on other grounds. Particularly, the enforcement abroad of measures ordering the detention of the infringer, penalty payments to the benefit of public authorities or similar sanctions may face insurmountable obstacles.¹⁴⁶

In cases in which the kind of relief granted in the foreign judgment is unknown or is not available in the requested country, it may be appropriate to grant a remedy available in the enforcing country that is functionally or substantially equivalent to the one awarded in the foreign judgment because it fulfils the object sought by the foreign order.¹⁴⁷ In the EU framework, in the light of the diversity of enforcement measures existing under national procedural laws, Article 54 Brussels I Regulation (Recast) allows for an adaptation based on a functional equivalence principle. It clarifies that such adaptation shall not result in effects going beyond those provided for in the law of country of origin. **1.109**

In the context of Internet activities, there is an increasing recourse to injunctions against intermediaries. Even in situations in which intermediaries may not be held liable, they may be required by a court to terminate or prevent an infringement. Among the most popular injunctions in this context are those ordering to block access to foreign websites involved in infringement activities.¹⁴⁸ Such orders usually have international implications and are **1.110**

145 The CJEU Judgment of 18 October 2011, *Realchemie Nederland*, C-406/09, EU:C:2011:668 offers an example of the difficulties raised by the cross-border enforcement of administrative fines imposed in civil proceedings. The case related to the enforcement in The Netherlands of a German judgment imposing an order for payment of 'Ordnungsgeld' (a fine payable to the benefit of the public authority) on a patent infringer pursuant to § 890 of the German Civil Procedure Code (Zivilprozessordnung). The CJEU held that the concept of 'civil and commercial matters' in Art. 1 of the Brussels I Regulation encompasses 'a decision of a court or tribunal that contains an order to pay a fine in order to ensure compliance with a judgment given in a civil and commercial matter' even if the fine is punitive and has a penal nature. In reaching this conclusion the CJEU established (paras. 39–42) that the nature of the right to enforcement depends on the relationship between the parties and the nature of the subjective right which the court order protects, and, hence, in a dispute concerning the infringement of a patent right it is determinative that it is a private right covered by the concept of 'civil and commercial matters'.

146 Finding a subsidiary order of imprisonment contrary to Spanish public policy where such order resulted from non-compliance with a German judgment ordering the cessation of certain Internet activities violating the IP rights of the claimant, see the decision (*auto*) of the Audiencia Provincial de Barcelona 15 March 2010, 32/2010, AC\2010\1203, *AEDIPr*, vol. X, 2010, 1126. Notwithstanding this, the decision confirmed the enforceability of the rest of the German judgment in Spain.

147 R.F. Oppong, 'Enforcing Foreign Non-Money Judgments: An Examination of Some Recent Developments in Canada and Beyond', *UBC Law Rev.*, vol. 39, 2006, 258, at 268.

148 See, e.g., M. Husovec, 'Injunctions against Innocent Third Parties: The case of Website Blocking', *JIPITEC*, vol. 4(2), 2012, 116–29.

intended to block access to websites located abroad. However, recognition and enforcement abroad is usually not necessary in these cases, since the orders are typically addressed to intermediaries, such as Internet access providers, located in the jurisdiction of the rendering court.

1.111 In this connection, it is significant that the enforceability of foreign provisional measures is in principle declined in all those systems that restrict such possibility to decisions being final or non-appealable in the country where they were rendered. The basic rationale underlying this approach is that enforceability of such foreign measures may create particular risks, due to the interim nature of such measures, which may later be revoked and which can be based on an alleged infringement that may be found to be non-existent. Therefore, a restrictive approach prevails in many national regimes and international conventions, which do not allow for recognition or enforcement of provisional measures. Notwithstanding this, facilitating cross-border enforcement of such measures is of particular importance due to the practical significance of interim relief in many areas.

1.112 Default judgments may also pose special challenges. However, it is widely accepted that non-appearance by the defendant should not prevent in general a court from adjudicating a dispute and that foreign default judgments may benefit from recognition and enforcement. The focus rests on the verification by the requested court of the respect in the court of origin of the rights of defence of the defendant by proper summons in adequate time.¹⁴⁹ This requirement is intended to guarantee adequate protection of defaulting defendants and is closely connected to the procedural public policy clause. Therefore, the possibility to recognize and enforce foreign default judgments tends to be accepted as long as the defendant was duly serviced of the document instituting the proceedings and had the opportunity to present his case.

c. Basic checks: implications for online activities

1.113 A basic feature of every system of recognition and enforcement is the determination of the grounds for non-recognition.¹⁵⁰ A comparison between national systems shows significant differences in this regard. However, shared approaches have also developed in recent years in the context of international

149 This approach is also common to many national, regional and international instruments, see, e.g., Article 45(2) Brussels I Regulation (Recast), Article 34(2) Lugano Convention, Article 9(c)(i) Hague Convention on Choice of Court Agreements of 2005, and, in the US, Section 4(c)(1) Uniform Foreign-Country Money Judgments Recognition Act (2005).

150 See, e.g., G.B. Born and P.B. Rutledge, *International ... cit.*, pp. 1105–47, discussing the exceptions to the presumptive recognition of foreign judgments in US courts.

efforts to draft common rules in this area and the evolution of national legal systems. For instance, the idea that a substantive review of a foreign judgment is not possible in the framework of recognition and enforcement is common to almost all international, regional and national systems of recognition and enforcement.

The global reach of the Internet creates special risks that litigation in a single country concerning activities carried out through ubiquitous media may produce significant effects in other states where the activities may be acceptable. In those circumstances, the interest in obtaining a declaration on recognition or non-recognition may be of special significance. Some of the most notorious cross-border Internet disputes, such as the High Court of Australia's decision in *Dow Jones & Co. Inc. v. Gutnick*,¹⁵¹ involve global injunctions which may raise special concerns in this regard. A prominent example is provided by the US reaction to the French decisions ordering Yahoo! Inc. to render impossible any access via Yahoo.com to any site or service that may be construed as constituting an apology for Nazism or a contesting of Nazi crimes. In order to safeguard its interests the defendant in the French proceedings sought a judgment declaring unenforceable in the United States the French court order.¹⁵² Similarly, in the case of *Google v. Equustek*, after being ordered by the Canadian Supreme Court to eliminate a number of search results globally,¹⁵³ Google was successful in obtaining a California district court injunction preventing US enforcement of the order.¹⁵⁴

Grounds to refuse recognition and enforcement fall mainly within four categories: verification of the jurisdiction of the rendering court to adjudicate the relevant case; safeguard of the procedural guaranties of the party against whom recognition or enforcement is sought; protection of substantive public law; and irreconcilability with another judgment or prior pending proceedings.¹⁵⁵ In principle, there is no distinction in this regard between recognition and declaration of enforceability of foreign judgments. The same requirements apply to both except for the one concerning the enforceability of the judgment in the country of origin that only applies when enforcement is sought.

151 (2002) 210 C.L.R. 575 (Austl.).

152 See *Yahoo !, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, et al* 145 F. Supp. 2d 1168, Case No. C-00-21275JF (N.D. Ca., September 24, 2001) and 433 F.3d 1199 (9th Cir. 2006).

153 *Google Inc. v. Equustek Solutions Inc.*, 2017 SCC 34.

154 *Google LLC v. Equustek Solutions Inc.*, Case No. 5:17-cv-04207-EJD, 2017 WL 5000834 (N.D.Cal. Nov 2, 2017) (preliminary injunction) and (N.D. Cal. Dec. 14, 2017) (default judgment making the injunction permanent). See J. Daskal, 'Supreme Court of Canada on the Appropriateness and Scope of a Global Website Takedown Order International Decisions', *Am. J. Int'l L.*, vol. 112, 2018, pp. 727–33.

155 See P.A. De Miguel Asensio, 'Recognition ...', cit., pp. 484–93.

- 1.116** Verification of jurisdiction has become particularly significant as a ground for non-recognition. It allows the requested court to review whether the original court exercised jurisdiction in a manner considered appropriate in the recognizing country. It makes possible to assess the existence of a sufficient link between the dispute concerned and the State where the adjudicating court sat that is also of great importance in guaranteeing an adequate protection for the defendant. This control is needed to ensure the respect to the exclusive jurisdiction rules of the requested State and to guarantee that judgments based on exorbitant grounds of jurisdiction in situations in which the country of origin has no relevant connection with the dispute shall not be recognized. Therefore, some grounds of jurisdiction used in certain systems are typically not acceptable when exorbitant. Examples may be jurisdiction founded solely on the document instituting the proceedings having been served on the defendant during his temporary presence in the rendering country, or jurisdiction based only in the presence within the country of origin of property belonging to the defendant not directly related to the dispute.
- 1.117** The principles governing jurisdiction in the law of the requested State influence verification of jurisdiction of the court of origin for the purposes of recognition and enforcement. Hence, the development of uniform instruments may be particularly relevant to favour recognition by providing further predictability as to the application of this ground for non-recognition. In particular, so-called double instruments include provisions on (direct) jurisdiction coupled with rules on recognition and enforcement. The harmonization of jurisdiction provisions among Member States decisively influences the jurisdiction review in the recognition stage. The Brussels I Regulation (Recast), the Lugano Convention and the 2005 Hague Choice of forum Convention fall within this category. Conventions on recognition, such as the 2019 Hague Convention, only provide rules on so-called indirect jurisdiction. They establish connections that are acceptable for recognition purposes in all participating states.
- 1.118** As to the relevant standard of review in the absence of international conventions or regional instruments, approaches differ. For instance, in the United States, a judgment will not be recognized if the court of origin did not have jurisdiction in accordance with the rules applied to determine jurisdiction in US courts at the trial court level. Similarly, other national systems rely on the so-called mirror-image approach. Pursuant to this approach, judgments can only be recognized if they were given by a court that founded its jurisdiction on a ground existing also in the requested State. A flexible understanding of this technique leads to the standard of equivalence approach. It considers eligible for recognition judgments rendered in a country having a connection

with the dispute equivalent to those established in the jurisdiction rules of the requested State, even if not formally identical, provided that a significant connection exists between the rendering country and the dispute. A more restrictive approach prevails in other countries where the list of indirect jurisdictional grounds is much shorter than the list of direct jurisdictional grounds.¹⁵⁶

In the Internet era, recourse to global measures, such as broad injunctions, may create risks of inadequately prohibiting certain activities that can be legal if limited to the territory of a given country. Lack of sufficient connection between the dispute and the court of origin to adopt such broad injunctions having significant effects in the requested country may be a relevant factor in refusing recognition and enforcement of a foreign judgment. The widespread availability of geolocation tools may be useful in fashioning remedies in a way in which they are territorially limited and consistent with the extent of the jurisdiction of the rendering court. **1.119**

Public policy as a ground for non-recognition has a substantive and a procedural dimension. The latter is intended to safeguard that the specific foreign proceedings leading to the judgment were not manifestly incompatible with fundamental principles of procedural fairness of the requested state. In Europe the development of common standards as to the right of fair trial under Article 6 ECHR and the relevant provisions of the CFREU¹⁵⁷ has important consequences in the area of recognition and enforcement of judgments. The ECHR demands a review of whether the proceedings before the foreign court that rendered the judgment which is to be recognized fulfilled the guarantees of Article 6.¹⁵⁸ From an international perspective, fundamental principles of procedural fairness may comprise: basic standards of independence and impartiality of the court; procedural equality of the parties; due notice and the right to be heard;¹⁵⁹ the right of the parties to engage a lawyer; a reasoned explanation of the essential basis of the judgment; and prompt rendition of justice. However, the consequences and restrictions resulting from these principles and their interpretation may vary significantly between different legal systems. **1.120**

Public policy is an exceptional device. Hence, the existence of differences between the procedural law of the country of origin and that of the requested **1.121**

156 R.A. Brand, 'Understanding ...', cit., pp. 890–2.

157 Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391.

158 See ECtHR, *Pellegrini v. Italy*, Judgment of 20 July 2001, Case no 30882/96 para. 40; and *Saccoccia v. Austria*, Judgment of 18 December 2008, Case no 69917/01 para. 62, available at www.echr.coe.int.

159 See, e.g., CJEU Judgment of 2 April 2009, *Gambazzi*, C-394/07, EU:C:2009:219, para. 48.

country is not determinative to refuse enforcement unless such differences decisively affect in the case concerned fundamental procedural fairness or undermine essential principles of the system in which enforcement is sought. In this respect, significant differences may be found between common law systems and civil law systems, but they may not affect fundamental principles of procedural fairness, to the extent that the legal systems involved provide sufficient guarantees for a fair and impartial trial. For example, it seems appropriate to consider that a civil judgment based on a jury verdict should not in principle be regarded as contrary to public policy in countries that do not use civil juries. Also, differences with respect to the availability of discovery devices between the country of origin and the requested country should not be an obstacle to the enforcement of the judgment.

1.122 As construed in most recent international conventions, regional instruments and national legislations, substantive public policy leads to the refusal of recognition and enforcement of a foreign judgment to the extent that it would be manifestly incompatible with the public policy of the requested state. Therefore, the application of public policy as a ground for non-recognition is limited to situations in which the violation can be easily ascertained by the requested court. It is an exceptional device to be applied only in very limited situations, where the extension of the relevant judgment effects to the requested country openly undermines the fundamental principles and basic values of its legal order.¹⁶⁰ Mere differences in substantive law do not give rise to a manifest incompatibility with the essential fundamental principles and values of the requested state.

1.123 Courts in civil law countries and other jurisdictions have traditionally considered that recognition of foreign awards imposing punitive damages may be in contradiction with public policy. However, a tendency can be identified towards a more flexible approach. This trend is also favoured by the restrictions on non-compensatory damages implemented in some countries having such a category of damages. Furthermore, in many countries whose liability system is compensatory, damages may cover non-monetary damage, statutory damages are now being introduced and institutions may be found in which civil liability rules have additional functions beyond compensation. Moreover, in civil law jurisdictions, the costs associated with litigation are commonly awarded to the successful claimant. The trend to restrict recourse to public policy in this context is illustrated by the inclusion of special provisions in Article 11 of the 2005 Hague Convention on Choice of Court Agreements

160 M. Trimble Landova, 'Public Policy Exception and Enforcement of Judgments in Cases of Copyright Infringement', *IIC*, vol. 40, 2009, pp. 642–65.

and Article 10 of the 2019 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters. Under this restrictive approach, recognition of a judgment may be refused if, and only to the extent that, the judgment awards damages, including punitive damages, that do not compensate a party for actual loss or harm suffered and exceed the amount that could have been awarded by the courts of the requested State (including costs and expenses relating to the proceedings).

How fundamental rights are balanced is key in determining the legality of many Internet activities. It plays also a decisive role in relation to intermediary liability and injunctions against intermediaries.¹⁶¹ The scope of fundamental rights, such as freedom of speech and information, data protection and other personality rights, vary significantly among jurisdictions and the balancing of the several fundamental rights involved in Internet related litigation lead to different results. The observation that there is much greater international consensus on certain areas – e.g., what constitutes copyright infringement – than others – e.g., data protection or defamation laws – is relevant in this context.¹⁶² Substantive public policy plays a more prominent role in refusing recognition and enforcement of judgments relating to those areas in which consensus between the countries involved is lacking. In this regard, public policy may play a role even in situations involving jurisdictions which share significant common values. It may be recalled that in order to declare the French order in the Yahoo litigation unenforceable in the US, the District Court noted that the foreign order violated the protections of the United States Constitution by chilling protected speech that occurs simultaneously within the US.¹⁶³ Moreover, in *Google LLC v. Equustek Solutions Inc.*¹⁶⁴ even if the injunction preventing enforcement lacked a proper recognition and enforcement analysis, it concluded that the Canadian order undermined the policy goals of Section 230 of the Communications Decency Act (CDA) and threatened ‘free speech on the global internet’.

161 See, e.g., M. Husovec, ‘Editorial: Intermediary Liability as a Human Rights Issue’, *JIPITEC*, vol. 8, 2017, pp. 181–2.

162 J. Daskal, ‘Borders and Bits’, *Vanderbilt Law Review*, vol. 71, 2018, pp. 179–240, p. 271.

163 *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme, et al* 145 F. Supp. 2d 1168, Case No. C-00-21275JF (N.D. Ca., September 24, 2001). On the later developments in this case see 433 F.3d 1199 (9th Cir. 2006).

164 Case No. 5:17-cv-04207-EJD, 2017 WL 5000834 (N.D.Cal. Nov 2, 2017).

2. European Union

a. Brussels I Regulation (Recast)

- 1.125** The basic EU instrument on recognition and enforcement of judgments is the Brussels I Regulation (Recast). It provides a uniform and coherent system of mutual recognition and enforcement of judgments, initially established in the 1968 Brussels Convention and later amended by Regulation (EC) No 44/2001. The 2007 Lugano Convention maintains a regime on recognition and enforcement similar to that of Regulation (EC) No 44/2001. One of the main achievements of the 2012 Recast was to abolish within the EU the need to bring specific proceedings intended to obtain a declaration of enforceability of a judgment from another Member State. The Recast makes possible to proceed directly to the enforcement in other Member States of a judgment which is enforceable in the Member State of origin without any declaration of enforceability being required. Judgments given by the courts of a Member State are to be treated as if they had been rendered in the Member State addressed. Notwithstanding this, the Regulation gives to the person against whom enforcement is sought the possibility to apply for the refusal of the enforcement to the competent court of the Member State where enforcement is sought. Enforcement will be refused where one of the grounds for refusal of recognition or enforcement set out in Article 45 is found to exist. Those grounds apply in addition to the grounds for refusal or of suspension of enforcement under the law of the Member State addressed for judgments rendered by its own courts.
- 1.126** The grounds to refuse enforcement under the 2012 Recast (Article 45) are the same provided for by Regulation 44/2001 to deny exequatur (Articles 34 and 35). The exhaustive list of checks include public policy, respect of the rights of defence of the defaulting defendant, incompatibility between judgments and very limited verification of the jurisdiction of the rendering court. Therefore, the main progress in the Recast refers to a procedural development. Since the need for a special procedure (exequatur) is abolished, the control now takes place directly in the framework of the enforcement itself by enabling the party against whom enforcement is sought to bring an application for the refusal of the enforcement. Such an application may deeply affect enforcement, since the court in the Member State addressed may: limit the enforcement proceedings to protective measures; make enforcement conditional on the provision of security; or suspend the enforcement proceedings.
- 1.127** Mutual trust in the administration of justice in the Union and the development of judicial cooperation have led in this area to simplify the mutual recognition and enforcement between Member States. In comparison to

conventional and national regimes, the checks under the Brussels I Regulation (Recast) are more limited and the types of judgments that may benefit are broader. This facilitates the free circulation of judgments within the Union. The CJEU has stressed the significance of a broad understanding of the concept of judgment in this regard. It has established that in the framework of the Brussels I Regulation such concept ‘covers “any” judgment given by a court of a Member State, without any distinction being drawn according to the content of the judgment in question’. Hence, that concept also comprises a judgment by which a court of a Member State declines jurisdiction on the basis of a jurisdiction clause.¹⁶⁵ Furthermore, the concept is not limited to decisions which terminate a dispute in whole or in part, but also applies to provisional or interlocutory decisions.¹⁶⁶

Acceptance of a broad concept of judgment as the object of recognition and enforcement results in overcoming the traditional reluctance to give effect to some types of foreign judgments, in particular non-monetary judgments, such as provisional measures. Pursuant to Article 2(a) of the Brussels I Recast, judgments eligible for recognition and enforcement include provisional measures ordered by a court which by virtue of the Regulation has jurisdiction as to the substance of the matter, provided that the defendant was summoned to appear or the judgment containing the measure is served on the defendant prior to enforcement. **1.128**

Concerning the grounds for non-recognition in Article 45, it is noteworthy that they are drafted and construed in restrictive terms to favour mutual recognition and enforcement of judgments.¹⁶⁷ That is the case of the safeguard to ensure effective protection of the rights of defence of the defaulting defendant¹⁶⁸ as well as verification of jurisdiction of the rendering court. Without prejudice to some very limited exceptions, such as those concerning the respect to the exclusive jurisdiction rules and the protective rules on consumers and employees, under the Regulation the jurisdiction of the court of origin may not be reviewed. The very restrictive understanding of this check is closely related to the existence of harmonized jurisdiction rules in the Regulation and the mutual trust in its application by the courts of the Member States. Therefore, the lack of harmonized jurisdiction rules with regard to **1.129**

165 CJEU Judgment of 15 November 2012, C-456/11, *Gothaer*, EU:C:2012:719, para. 23,

166 See CJEU Judgments of 18 October 2011, *Realchemie Nederland*, C-406/09, EU:C:2011:668, para. 38; and 14 October 2004, *Mærsk Olie & Gas*, C-39/02, EU:C:2004:615, para. 46.

167 CJEU Judgment of 16 January 2019, *Liberato*, C-386/17, EU:C:2019:24, para. 55.

168 See CJEU Judgments of 14 December 2006, *ASML*, C-283/05, EU:C:2006:787, para. 20; 17 November 2011, *Hypoteční banka*, C-327/10, EU:C:2011:745, para. 50; and 7 July 2016, *Lebek*, C-70/15, EU:C:2016:524, para. 39.

defendants not domiciled in a Member State may lead to some distortions to the extent that recognition without verification of jurisdiction applies also to judgments concerning third state defendants given by courts of the Member States on the basis of national jurisdiction rules.¹⁶⁹

- 1.130** Under Article 45(1), the possibility to refuse recognition if it is manifestly contrary to public policy remains primarily a national device, since it is to be determined in the light of the content of public policy in the Member State addressed. Notwithstanding this, the case-law of the CJEU is also of interest in establishing the particularly exceptional nature of this device to refuse recognition in the EU context. This check does not allow to refuse recognition if the court of origin incurred in an error affecting the application of EU law unless it amounts to a manifest breach of a rule of law regarded as essential or of a right recognized as being fundamental.¹⁷⁰ Moreover, a manifest breach of public policy in the requested Member State requires that the individuals concerned have availed themselves of all the legal remedies available in the Member State of origin, save where specific circumstances make it too difficult, or impossible to use such legal remedies.¹⁷¹ The Court has also made clear that the mere invocation of serious economic consequences does not constitute an infringement of the public policy of the requested Member State, within the meaning of Article 45(1).¹⁷²

b. Third country judgments

- 1.131** The rules of the Brussels I Regulation (Recast) on recognition and enforcement are only applicable to judgments given by a court of another Member State. Judgments rendered in third States remain outside the Brussels system and subject to the domestic rules on recognition and enforcement of the requested Member State, unless an international convention, such as the Lugano Convention, prevails. Hence, there is no uniform approach to the recognition of judgments rendered in third countries.¹⁷³ The current EU legislation does not ensure equal treatment and effects to third country judgments throughout the EU because such judgments remain outside the scope of application of the Brussels I Regulation and are subject in each EU Member State to its own domestic rules on recognition. Unification at EU

169 See, e.g., S.C. Symeonides, 'The Brussels Convention Fifty Years Later: A View from Across the Atlantic', *Rev. crit. DIP*, vol. 3, 2018, pp. 563–7.

170 CJEU Judgment of 16 July 2015, C-681/13, *Diageo*, EU:C:2015:471, para. 52.

171 *Idem*, at para. 64.

172 CJEU Judgment of 23 October 2014, *flyLAL*, C-302/13, EU:C:2014:2319, para. 58.

173 G. Walter and S.P. Baumgartner, *The Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions*, The Hague, Kluwer, 2000; and C. Thole, 'Die Entwicklung der Annerkennung im autonomen Recht in Europa', in B. Hess (ed.), *Die Anerkennung im Internationalen Zivilprozessrecht – Europäisches Vollstreckungsrecht*, Bielefeld, Gieseking, pp. 25–55.

level of the rules applied to third country judgments would foster legal certainty. It is undisputed that the rules applicable should be to a significant extent different from those of the Brussels system intended to be applied in the specific context of EU integration. However, such additional provisions have not been adopted and the Regulation covers only the reciprocal recognition of judgments within Member States.

Hence, in the absence of international conventions, no common approach exists to the recognition and enforcement of third country judgments in EU Member States. Obviously, a common feature of the domestic legislations of all Member States is that they are more restrictive than the Brussels system, in particular as regards the verification of the jurisdiction of the rendering court. Notwithstanding this, relevant differences remain, as illustrated by the requirement of reciprocity which plays a significant role in some countries, such as Germany, but not in others. Regarding the conclusion of international conventions with third States, an expansive view of the scope of the EU external exclusive competence prevails after the CJEU Opinion concerning the Lugano Convention¹⁷⁴ and in light of Articles 3(2) and 216 TFEU. However, in contrast with the role played by bilateral conventions on recognition and enforcement in the Private International Law systems of some Member States, the EU has so far not been active in concluding bilateral agreements with third States. In this context, developments in this field at the Hague Conference have become particularly relevant from the European perspective as an alternative to the establishment of a common EU regime on the effects of third-state judgments. **1.132**

3. International developments

Progress in the field of international judicial cooperation in civil matters has resulted in the conclusion of a significant number of international conventions dealing with recognition and enforcement of foreign judgments. That is typically the case with regard to bilateral conventions on recognition and enforcement of judgments concerning civil and commercial matters in general. Even though the existence of a network of bilateral conventions may be relevant in some countries, such as China,¹⁷⁵ from a global perspective the practical repercussion of such conventions is limited. International conventions and regional instruments on recognition of judgments are usually subject **1.133**

174 CJEU Opinion 1/03 of 7 February 2006, EU:C:2006:81. See also CJEU Opinion 1/13 of 14 October 2014, EU:C:2014:2303.

175 K.F. Tsang, 'Chinese Bilateral Judgment Enforcement Treaties', *Loyola L.A. Int'l & Comp. L. Rev.*, vol. 40, 2017, pp. 1–49.

to reciprocity, and hence they only apply to decisions adopted by the courts of other contracting states.

1.134 Establishing closer and effective international cooperation concerning recognition and enforcement of judgments in the areas more relevant to Internet activities has proved a challenging task. Noteworthy in this context is the failure of the negotiations at the Hague Conference during the 1990s on a proposed convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.¹⁷⁶ Later the scope of the negotiations was restricted, leading to the conclusion on 30 June 2005 of the Convention on Choice of Court Agreements. Its scope of application covers only choice of court clauses in B2B cases and does not contain rules on jurisdiction for specific subject matters such as infringement of intellectual property rights. Its provisions on recognition and enforcement apply only to judgments given by a court of a contracting state designated in an exclusive choice of court agreement (Article 8.1).

1.135 In 2012 HCCH reopened the discussions on a possible general instrument 'relating to recognition and enforcement of judgments, including jurisdictional filters'.¹⁷⁷ Therefore, direct jurisdiction rules were excluded from the project. Finally, the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters has been adopted on 2 July 2019. The Convention has not yet entered into force and its success remains to be seen. Its potential direct impact with regard to Internet related disputes appears to be limited. Significant in this respect is that the Convention excludes, among others, the following matters: defamation, privacy, intellectual property and most antitrust matters (Article 1).¹⁷⁸

176 Its main result was the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters of 30 October 1999 and the revised Draft of 2001, see www.hcch.net.

177 See Hague Conference on Private International Law, 'Conclusions and Recommendations Adopted by the Council on General Affairs and Policy' (17–20 April 2012), www.hcch.net.

178 Available at www.hcch.net.