Chapter X

Cross-Border Contract Litigation in the EU

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I. Introduction

European Union conflicts rules are well established in cross-border contracts compared to many other areas. The harmonised conflicts system in contract at the Community level was established by 1980 through the Brussels Convention on jurisdiction and recognition and enforcement of judgments and the Rome Convention on applicable law.[1] The system was later updated and modernised on a number of occasions. The Brussels Convention had been replaced by the Brussels I Regulation in 2001,[2] which was then revised by the Recast Regulation in 2012.[3] The Rome Convention was replaced by the Rome I Regulation in 2008.[4] Regardless of the recent modernisation of the European Union ('EU') contractual conflicts system, the Court of Justice of the EU ('CJEU') interpretation of relevant rules in the predecessors often continues to be applicable to the current law.[5] There is rich case law concerning interpretation and application of the contractual conflicts system in court practice.

Considering both jurisdiction and choice of law rules, EU conflicts system in contract demonstrates two main objectives: certainty and fairness. Certainty is the major principle for commercial contracts. In such contracts, where the parties are sophisticated commercial players with equal bargaining power, the law is not playing a role to create unnecessary compliance costs to the parties, but to protect the parties' reasonable expectations. It is trusted that the parties should be entitled to handle their own affairs rationally and any unreasonable legal intervention is undesirable. The law, therefore, should promote efficiency by encouraging the parties to comply with their agreement, or by directing the parties to the country which is naturally predictable by both parties at the time of contracting. The objective of certainty is expressly stated in the recital of both the Recast Regulation and Rome I.[6]

Fairness is the main principle for special contracts with the inequality of bargaining and litigation power, including consumer, employment and insurance contracts. It is believed that in those contracts the stronger party may abuse its power to the disadvantage of the weaker party and the conflicts rules should be tilted in favour of the weaker party to balance the unequal power. The objective of fairness, in terms of

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[1] The Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ('Brussels Convention) was first adopted in 1968 and amended in 1978 on the accession of Denmark, Ireland and the United Kingdom ('UK'). The Brussels Convention provides Community jurisdiction rules for civil and commercial matters, including contract. In 1980, the Convention on the law applicable to contractual obligations ('Rome Convention') was adopted, which provides the Community choice of law rules for contract. The adoption of the Rome Convention marked the establishment of the Community conflicts system for contractual litigation.

[2] Regulation No 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12/1.

[3] Regulation (EU) No 1215/2012 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L351/1.

[4] Regulation (EC) No 593/2008 on the law applicable to contractual obligation (Rome I), [2008] OJ L177/6.

[5] Case C‑167/00 *Henkel* [2002] ECR I‑8111, para 49; Case C‑111/01 *Gantner Electronic* [2003] ECR I-4207, para 28; Case C‑533/07 *Falco Privatstiftung and Rabitsch* [2009] ECR I‑3327, paras 50-51.

[6] Recitals 15 and 16 to the Recast Regulation; Recitals 6 and 16 to Rome I.

weaker party protection, is also demonstrated in the recitals.[7] However, certainty continues to be one of the major concerns. The protection granted to the weak should be appropriate and not cause unnecessary cost to business. Certainty also helps the weaker party to access to justice.

II. Conflicts rules in commercial contracts

A. Party autonomy

Party autonomy grants the parties the freedom to choose the competent court and the applicable law. Although this principle is now also adopted for non-contractual litigation,[8] it plays a more significant role in contractual litigation. Contract creates a premeditated relationship between the parties, which allows the parties to plan and allocate litigation risk in advance, including negotiating and concluding a jurisdiction and choice of law clause. It could, in principle, provide certainty and predictability.

In practice, however, party autonomy could not prevent all disputes and uncertainty on jurisdiction and applicable law. In particular, the EU conflicts rules provide much flexibility to the parties to designate the chosen forum and law. Furthermore, commercial contracts, in many cases, are entered into very quickly, informally, orally, or they sometimes involve multiple documents of different kinds.[9] The flexible EU law and unconventional means to conclude commercial contracts may generate disputes on party autonomy. It is reasonable to argue that party autonomy could produce certainty in principle, but the specific rules should be carefully thought-through to make certainty really happen.

i. Existence of a choice

Disputes may arise as to the existence of a conflicts clause, for example, whether the conflicts clause contained in a separate document is successfully incorporated in the current contract,[10] whether the parties have a consensus on an alleged jurisdiction clause inserted unilaterally by one party,[11] and whether the parties agree on a jurisdiction clause impliedly by following their common business patterns or having mutual understanding of the common practice in the profession.[12] The Recast Regulation does not provide clear rules on determining the existence of a jurisdiction clause. Instead, it provides relatively broad rules on the formality of a jurisdiction clause. A choice of court agreement may be formally valid if it is in writing or evidenced in writing, in a form that accords with common practice between the parties or in a form that accords with international usage.[13] The formal requirements are exhaustive. Under the national law of some countries, an agreement may be concluded orally or by conduct; however

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[7] Recital 18 to the Recast Regulation; Recital 23 to Rome I.

[8] Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), [2007] OJ L199/40, Art 14.

[9] L.F. Manning, 'Choice of Law for Commercial Contracts', (1961) 2 *Boston College Law Review* 241, 243.

[10] *Chester Hall Precision Engineering Ltd v Service Centres Aero France,* [2014] EWHC 2529 (QB); *Credit Suisse v Societe Generale D'Enterprises* [1997] CLC 168; *Fosby v Ranovito* [2010] 1 Lloyd's Rep 384; *7E Communications Ltd v Vertex Antennentechnick GmBh* [2007] 1 WLR 2175.

[11] Case 24/76 *Estasis Salotti v RUWA* [1976] ECR 1831; Case C-322/14, *Jaouad El Majdoub v CarsOnTheWeb.Deutschland GmbH,* ECLI:EU:C:2015:334.

[12] Case C-106/95 *MSG v Gravieres Rhenanes* [1997] ECR I-911.

[13] Art 25(1).

such an agreement would fall foul of Article 25 if it does not meet one of the conditions therein.[14] Does it mean that Article 25(1) determines not only whether a jurisdiction clause is formally valid but also whether it is actually concluded? It has been suggested by some that if an agreement is concluded in a form in accordance with Article 25, it is deemed enough evidence proving that a choice exists as the purpose of the formal requirement is to ensure the existence of consent.[15] This is particularly true in terms of the latter two conditions in the provision. Common practice and commercial usage are used by some courts to ascertain the existence of consent in the absence of an explicit agreement, and the consent is presumed to exist where the jurisdiction clause is consistent with the common practice between the parties or the international usage.[16] Article 25 thus excludes the application of national law in determining the existence and formal validity of a jurisdiction clause.

However, others disagree.[17] They intend to examine whether a jurisdiction clause is subject to a consensus between the parties first,[18] especially in contracts not concluded in a formal manner, such as the incorporation of a standard form contract in a separate document,[19] subscribing to the company statute by a shareholder,[20] the battle of the form case, and contracts concluded online.[21] Even within courts treating existence and formal validity as separate issues, different approaches are adopted to examine the existence of a clause. The CJEU usually does not apply national law or conflict of laws to the issue of existence, but it treats the existence of consensus as a matter of fact and relies on evidence to prove if the parties have entered into an agreement.[22] The most the CJEU has done is, based on the evidence and facts of the case, take the existence of consensus into consideration to interpret if a jurisdiction clause meets the formal requirements in Article 25(1).[23] National courts, on the other hand, may apply national law instead. For example, *Ryanair v Billigfluege.de GMBH*[24] concerned a 'browse-wrap' contract which contained a jurisdiction clause. Before applying the formal requirements under Article 23(1) of Brussels I which corresponds to Article 25(1) of the Recast, the Irish High Court examined whether the party's screen-scraping activity constituted consent to the jurisdiction clause and it applied national law to decide if the jurisdiction agreement was successfully concluded.[25]

This issue has long existed in the Brussels jurisdiction scheme, and it has not been simplified after the Recast Regulation modernised the previous jurisdiction rules. The Recast Regulation has made an important reform by introducing a uniform choice of

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[14] Case 150/80 *Elefanten Schuh v Pierre Jacqmain* [1981] ECR 1671, para 26. L Merret, 'Article 23 of the Brussels I Regulation' (2009) *International and Comparative Law Quarterly* 545, 546.
[15] L Collins, et al., *Dicey, Morris and Collins: Conflict of Laws* (15th edn, Sweet & Maxwell, 2012) paras 12.122-125. *Chester Hall*, n 21; *Knorr-Bremse v Haldex Brake Products GmbH* [2008] I.L.Pr. 26; *Credit Suisse*, n 10 above; *Fosby*, n 10 above; *7E Communications*, n 10 above.
[16] Case C-159/97 *Trasporti Castelletti Spedizioni Internazionali SpA v Hugo Trumpy SpA* [1999] ECR I-1597.
[17] A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford University Press, 2008) para 7.12.
[18] *Estasis Salotti*, n 11 above, para 7. See also *MSG*, n 23, para 15; *Trasporti Castelletti*, n 16 above, para 19.
[19] *Estasis Salotti*, n 11 above.
[20] Case C-214/89 *Powell Duffryn* [1992] ECR I-1745, paras 16-19; Case C-543/10, *Refcomp SpA v Axa*
[21] *Jaouad El Majdoub*, n 11 above.
[22] Case C-366/13 *Profit Investment Sim SpA v Stefano Ossi*, ECLI:EU:C:2016:282, paras 24-29.
[23] Eg *Estasis Salotti*, n 11 above.
[24] *Ryanair v Billigfluege.de GMBH* [2010] ILPr 22.
[25] See also *Bols Distilleries BV v Superior Yacht Services Ltd* [2007] 1 WLR 12; *Africa Express Line Ltd v Socofi SA* [2009] EWHC 3223 (Comm).

law rule on the substantive validity of jurisdiction clauses.[26] However, the existence and substantive validity of a contract term are two separate issues[27] and it is not clearly suggested that the same choice of law shall be applicable in deciding whether a jurisdiction clause has been concluded.

ii. Lis pendens and 'Italian Torpedo'

One of the most important improvements of the Recast Regulation is the legislative correction of the *Gasser v MISAT*[28] judgment that unreasonably have hampered the effectiveness of a jurisdiction clause and encouraged an 'Italian Torpedo'.[29] According to *Gasser,* a non-chosen court, if seised first, would have priority over a chosen court in a jurisdiction clause in ruling on the validity of such a clause. The Recast Regulation finally reforms the *lis pendens* rule in Article 31 which provides that:

> "2. Without prejudice to Article 26, where a court of a Member State on which an agreement as referred to in Article 25 confers exclusive jurisdiction is seised, any court of another Member State shall stay the proceedings until such time as the court seised on the basis of the agreement declares that it has no jurisdiction under the agreement.
> 3. Where the court designated in the agreement has established jurisdiction in accordance with the agreement, any court of another Member State shall decline jurisdiction in favour of that court."

Pursuant to the new Article 31, a chosen court now has priority over a non-chosen but first seised court. This revision largely improves effectiveness of a choice of court clause and provides certainty to the parties. However, what if the chosen court is not seised? In such a case, *lis pendens* does not exist. If a non-chosen court is obliged to stay jurisdiction wherever a defendant alleges that a jurisdiction clause exists, it may create an unreasonable barrier to the claimant. It would be particularly unfair if a valid jurisdiction clause indeed does not exist and the claimant is forced to sue in the alleged chosen court. A defendant would have to bring the action in the chosen court before it could apply for a stay under Article 31(2) of the Regulation. If not, the non-chosen court still could take jurisdiction.[30]

This interpretation may encourage a defendant to act quickly in order to prevent being sued in a non-chosen forum. However, what if the defendant brings the action in the chosen court excessively late? Where a defendant believes the non-chosen court has no jurisdiction, it may not submit a defence and it may simply ignore the action. According to the above analysis, the seised court may take jurisdiction and continue the substantive proceedings. The defendant, once being aware of the consequence, may bring the action in the chosen court and challenge jurisdiction at this stage. Would the application for stay be rejected by the reason of delay? The Recast Regulation does not suggest anywhere it could. Rejection is inconsistent with the explicit wording of Article

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[26] Art 25(1).
[27] See, in general, J Beatson, A Burrows, J Cartwright, *Anson's Law of Contract* (13th edn Oxford University Press, 2016) Parts II and IV; M Chen-Wishart, *Contract Law* (5th edn, Oxford University Press, 2015) Parts I and III; E McKendrick, *Contract Law* (11th edn, Palgrave, 2015) Parts I and III.
[28] Case C-116/02 *Erich Gasser GmbH v MISAT Srl* [2003] ECR I-1469.
[29] T Hartley, 'Choice-of-court agreements and the new Brussels I Regulation' (2013) 129 *Law Quarterly Review* 309, 309-11.
[30] Ibid, 312ff.

31(2). However, it is inappropriate to award the defendant the right to challenge jurisdiction of the seised court at any stage of the proceedings, which would cause delay, waste of resources and costs. The EU authority should clarify the procedural requirement for the application for a stay under Article 31(2).

B. Special jurisdiction

Although the EU party autonomy rules are not free from criticism, they still largely reduce uncertainty and litigation risk in commercial contracts. More difficulty exists in contracts in the absence of choice. In such circumstances, the defendant should either be sued in its domicile,[31] or pursuant to one of the special jurisdiction rules based on the close connection principle or as one of multiple defendants in the domicile of any of the defendants where the actions are closely connected.[32] It is necessary to note that although suing under the general jurisdiction is more straightforward and rarely rejected by courts, the claimant usually wishes to sue the defendant in other countries, which may be the claimant's domicile or the natural forum where evidence is more readily accessible. Therefore, special jurisdiction is relied on more frequently than general jurisdiction in practice.

Special jurisdiction rules in contracts are contained in Article 7(1) of the Recast Regulation which states that:

> "A person domiciled in a Member State may be sued in another Member State:
> (1) (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
> (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
> — in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
> — in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;
> (c) if point (b) does not apply then point (a) applies."

Article 7(1) clearly demonstrates the legislative purpose to improve certainty. Its precedent, Article 5(1) of the Brussels Convention, only contains point (a) of the provision that leaves much doubt on which country is the place of performance of the obligation in question.[33] Article 7(1) simplifies this issue by providing a straightforward rule for the sales and services contracts. However, Article 7(1) (Article 5(1) of the Brussels I Regulation) is not free from criticism. A number of questions continue to present in practice which need further clarification.

i. Place of performance by agreement

Firstly, the place of performance could be agreed by the parties. If such an agreement exists, the agreed place would have special jurisdiction under Article 7(1). However, must the agreement be express or could it also be implied? The CJEU might have

[31] Art 4(1) of the Recast Regulation.
[32] Arts 7 and 8 of the Recast Regulation.
[33] European Commission, 'Proposal for the Brussels I Regulation' COM(1999) 348 final, 14; Case 14/76 *De Bloos* [1976] ECR 1497; Case 12/76 *Tessili v Dunlop AG* [1976] ECR 1473.

suggested an affirmative answer. Article 7(1)(b) is clearly worded in a way suggesting the place of delivery and the place where services are provided should be determined 'under the contract'. In other words, all contract terms should be considered to figure out the parties' intention.[34] In *Electrosteel Europe SA v Edil Centro Spa*,[35] the sale of goods contract between the Italian seller and the French buyer contained an 'ex works' clause. Pursuant to Incoterm, this clause means that the carrier took charge of the goods at the seller's premises and delivered them to the buyer's place of business. Referring to then Article 23(1) of the Brussels I Regulation, which accepts implied choice of court through international commercial usages, the CJEU believed that there is no reason to preclude international usage from being used in interpreting other provisions of the Regulation.[36] In deciding the place of delivery 'under the contract', the court must take account of all contract terms and international usage, including Incoterms.[37]

ii. Sales involving carriage of goods

It is presumed that the place of delivery and the place where services are provided are easy to determine, which, however, is not true. Taking international sale of goods as an example, the contract usually includes the carriage of goods. The seller would deliver the goods to the carrier, who would transport the goods and deliver them to the buyer. It is questionable whether the place of delivery is the final destination of the goods, which usually is the domicile of the buyer; the place where the seller delivers the goods to the carrier, which usually is the domicile of the seller; or the place where the seller legally discharges its obligation to deliver. Where the parties have expressly agreed on the place of delivery, the chosen place should have jurisdiction under Article 7(1)(b).[38] If the parties do not choose the place of delivery, the CJEU stated, in *Car Trim*, that the place of delivery in an international sale of goods involving international carriage, for the purpose of Article 7(1)(b) should be the place 'where physical transfer of the goods took place, as a result of which the purchaser obtained, or should have obtained, actual power of disposal over those goods at the final destination of the sales transaction'.[39] This interpretation distinguishes physical transfer of goods, from transfer of risk and transfer of ownership. It is possible that the risk and ownership are transferred to the buyer before actual physical delivery. Although the buyer may legally acquire the ownership and power of disposal at a different time and place, only the actual/physical delivery should be considered to determine jurisdiction. This interpretation reflects the objective of certainty and uniformity. The adoption of the factual delivery criterion aims to avoid the application of substantive law or private international law of a Member State. It was stated in the Commission Proposal for the original Brussels I Regulation that one of the purposes for reform of the special jurisdiction rules was to 'remedy the shortcomings of applying the rules of private international law' and to adopt a pragmatic approach based on a purely factual criterion.[40]

However, there are two types of factual delivery taking place, ie delivering the goods to the first carrier and delivering the goods to the buyer. The CJEU accepts the

[34] Case C-381/08 *Car Trim* [2010] ECR I-1255, para 56.
[35] Case C-87/10 *Electrosteel Europe SA v Edil Centro Spa* [2011] ECR I-4987.
[36] Ibid para 21.
[37] Ibid paras 22-26.
[38] See section II, B, i above.
[39] *Car Trim*, n 34 above.
[40] The Commission Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (COM(1999) 348 final), 14; cited in *Car Trim*, n 34 above, para 52.

second place, stating it is 'the most consistent with the origins, objectives and scheme' of the Regulation. The final destination is highly predictable and has a close proximity with the contract.[41] The goods usually remain in this place after delivery and the operation of the performance of delivery is completed in the final destination.[42] This interpretation is pro-buyer.

iii. Performance in more than one country

The CJEU has interpreted Article 7(1)(b) in a number of cases where the goods are delivered or services provided in more than one Member State. Instead of limiting the court's jurisdiction to performance within its territory, the principle is adopted to centralise all the claims arising out of the contract in the principal place of performance.[43] It helps preventing concurrent proceedings on related claims and reducing the litigation cost for the claimant.

The centralisation approach improves certainty and efficiency and, in particular, benefits the claimant. The question is whether it protects the claimant by increasing the litigation risk of the defendant. The CJEU suggests that any place of performance should be predictable by the defendant. Furthermore, the defendant is also free from the risk of being sued in multiple states, and the efficiency resulting by eliminating concurrent proceedings benefits not only the claimant but also the defendant.[44] These arguments are correct assuming that the claimant is willing to bring actions for all the claims even if it is required to sue in multiple courts. This may not be true in reality. Without the centralisation approach, the claimant would be reluctant to bring multiple actions, especially where the loss in some country is small. It may prefer to bring one action in the principal place of business only for claims arising out of this country. The court, therefore, does not need to examine the performance in other Member States, which would reduce litigation costs and increase efficiency. This argument, however, is unjustifiable. The localisation approach may force the claimant to give up part of its rights to sue and may lead to efficient breach of contracts by the defendant. Efficiency should not be achieved at the cost of justice.

Jurisdiction should be centralised in the country with the closest link with the contract. According to the CJEU, this country should be the principal place of performance.[45] The principal place of performance is determined by considering contract terms and, in the absence of contract terms, the actual performance.[46] In the sales contract, the principal place of delivery is determined pursuant to economic criteria;[47] in the services contract, where economic criteria cannot be relied on, it depends on the time spent and importance of activities carried out in various Member States.[48] Where the principal place of performance cannot be determined pursuant to the above criteria, inconsistent interpretations exist. According to the CJEU in *Color Drack*, the claimant is free to bring the action in the court of any place of delivery for all the claims where the principal place of delivery cannot be identified.[49] It is also

[41] *Car Trim,* n 34 above, para 61.
[42] Ibid.
[43] Case C-386/05 *Color Drack GmbH v Lexx International* [2007] ECR I-3699, paras 37-38; Case C-19/09 *Wood Floor v Silva Trade* [2010] ECR 2121.
[44] *Color Drack,* ibid, para 44.
[45] Ibid para 40.
[46] *Wood Floor,* n 43 above, para 40.
[47] *Color Drack,* n 43 above, para 40.
[48] *Wood Floor,* n 43 above, paras 41-42.
[49] *Color Drack,* n 43 above, para 42.

accepted in *Rehder v Air Baltic* that where the services provided in more than one country are indispensible, the claimant could sue in either place of service.[50] However, in *Wood Floor,* which concerns the provision of services by commercial agents in multiple Member States, the CJEU stated that if the place of the main provision of services cannot be determined on the basis of the contract or actual performance, it should be identified by taking account of 'the objectives of predictability and proximity'.[51] In this particular case, the CJEU held the main place of services lies in the agent's domicile, because it is likely the agent will provide substantial services there.[52] It raises a question: if the principal place of performance cannot be determined by economic criteria, must it be identified by considering the objectives of predictability and proximity, or could the claimant directly bring the action in any court of performance? It is necessary to note that *Rehder v Air Baltic* is a dispute between a passenger claimant and an airline defendant, which is excluded from the protective jurisdiction scheme because it is a transport contract. The CJEU's decision that permits the consumer to sue in either place of performance nevertheless brings the same level of protection to the passenger. In *Wood Floor,* on the other hand, the defendant is a commercial agent, which also receives special protection under EU law. The CJEU's decision that limits the claimant's choice of jurisdiction is consistent with the general idea of protection of commercial agents. The two decisions generate a suspicion: given that the CJEU gave different decisions in *Rehder* and *Wood Floor,* does it intend to set up a general principle applicable to all subsequent cases, or is it taking into consideration the nature of the disputes and the power balance between the parties? It is likely that, although without explicitly saying so, the CJEU has taken the weaker party protection into account. This implied intention, however, might bring uncertainty to commercial practitioners in practice.

Furthermore, although the principal place of performance would have the closest link with the contract in most cases, it may not have the closest link with the dispute. If the defendant, for example, breaches the contract only in the Member States, which are not the principal place of delivery, the action against the defendant may have no connections with the principal place at all. It is hard to justify centralising the action for claims relating to performance in other countries than the principal place of business. It is, however, unknown whether the claimant is obliged to either sue in the defendant's domicile, or in the principal place of performance in such circumstances, or whether the claimant could sue the defendant in one of the states of delivery which does have connections with the actual claim.

iv. Classification

Article 7(1) suffers from classification problems. Before applying Article 7(1), it is always necessary to decide, first of all, whether the dispute is 'a matter in relation to a contract', and secondly, whether the contract is a sale of goods or provision of services contract. As a primary principle, concepts in the EU jurisdiction scheme should not be interpreted according to national law or private international law, but a uniform independent EU meaning.[53] In contrast to sale of goods, which is characterised by supplying goods and transferring ownership of goods, it is more difficult to define

[50] Case C-204/08 *Rehder v Air Baltic* [2009] ECR I-6073, para 44.
[51] *Wood Floor*, n 43 above, paras 41-42
[52] Ibid.
[53] Eg Case C-89/91 *Shearson Lehman Hutton v TVB* [1993] ECR I-139; Case 33/78 *Somafer SA v Saar-Ferngas AG* [1978] ECR 2183; Case C 147/12 *ÖFAB* [2013] ECR, para 27.

services. The CJEU defines services as one of the parties carries out the particular activity in return for remuneration.[54] This interpretation is broad enough to cover most contracts whose subject matter is labour or professional skills. However, it does not make classification of services easier. It still depends on courts' discretion and should be decided in individual cases. Not all 'particular activities' amount to services. In *Falco Privatstiftung v Gisela Weller-Lindhorst,*[55] the CJEU held that a licensing contract is not a contract for provision of services, because the licensor is not required to perform any 'positive' activity and its obligation under the contract is not to challenge the licensee's use of the intellectual property right.[56] It means that only 'positive' activities can be regarded 'services'.

What if both parties are required to perform 'positive' activities? For example, in publication contracts, the author should submit the manuscripts to the publisher according to conditions in the contract and grant the publishers the (exclusive) copy right. The publisher carries out the activity to produce and distribute the final products. Both parties would carry out some positive activities. Is this type of contract falling within the scope of services? If so, who is the service provider? It is suggested by the CJEU that in complicated contracts involving multiple obligations, classification depends on the characteristic obligation.[57] Again, it may take some brains to decide which obligation, in a complicated contract, is the characteristic one. In the publication contract, is it the publisher's obligation to publish or the author's obligation to submit manuscripts and transfer copyrights?

Another complicated contract that needs analysis is a franchise contract. Recital 17 of Rome I suggests that both distribution and franchise contracts are classified as services contracts for the purpose of Article 7(1) of the Recast Regulation. This interpretation does not bind the court and it may over-simplify the problem. A franchise contract also involves the transfer of intellectual property rights: the franchisor allows the franchisee to use its trademark/patent to conduct its business in return for monetary consideration. This has been ruled as a 'negative' obligation and excluded from the scope of services. However, the franchisor also has positive obligations to perform, eg by providing training and other assistance to the franchisee. Could these obligations render the contract a services contract? The answer is not straightforward. The franchisor's obligations include licensing and also training and assistance. However, in some franchise contracts, the main obligation is licensing and other obligations are supplementary. If one can only take the characteristic obligation into consideration, the characteristic obligation in a franchise contract is not much different from a licensing contract. In other franchise contracts involving complicated operation skills and procedure, training and assistance may be equally important. Such franchise contracts might be classified as services.

Questions may also arise as to remuneration. As a general rule remuneration refers to money or other monetary benefits. In *Corman-Collins v La Maison du Whisky*,[58] the CJEU rule that remuneration should be interpreted more flexibly to include not only monetary payment but also all types of advantages.[59] Therefore, a distribution agreement is classified as a contract for the provision of services in the Recast Regulation. The distributor's activity to distribute the grantor's product is the

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[54] Case C‑533/07 *Falco Privatstiftung and Rabitsch* [2009] ECR I‑3327, para 29.
[55] *Ibid.*
[56] *Ibid*, para 31.
[57] *Falco Privatstiftung and Rabitsch*, n 54; para 54; *Car Trim*, n 34 above, paras 31-32.
[58] Case C-9/12 *Corman-Collins v La Maison du Whisky*, ECLI:EU:C:2013:860.
[59] Ibid, paras 39-40.

characteristic service. The distributor receives advantages of exclusivity and relevant assistance from the supplier, which represent economic values and can be counted as remuneration. It is noted that in almost all commercial contracts, both parties would receive advantages of certain economic value, which means that the presence of remuneration usually should not be a question.

C. Default applicable law

Uncertainty also exists in Rome I.[60] Article 4 provides harmonised choice of law rules for contracts without a choice of law agreement. Article 4 of Rome I has departed from Article 4 of the Rome Convention, by adopting fixed connecting factors for eight common types of contracts (the hard and fast rules),[61] by limiting the use of the principle of characteristic performance,[62] and by lifting the threshold of the escape clause (the closest connection principle).[63] The purpose of the reform is to increase certainty and efficiency.

However, it is hard to argue that Rome I could indeed achieve certainty. Applying the hard-and-fast rule usually will be very straightforward, but it suffers from the difficulty of classification. Questions may arise to distinguish sale of goods from provision of services. The scope of services is also uncertain. If a uniform definition of services shall be provided in the conflicts scheme, the case law on the Brussels I Recast (Brussels I Regulation) shall be applicable in Rome I.

The characteristic performance rule applies to contracts falling out of the scope of Article 4(1). This rule traditionally suffers from uncertainty. It is not always easy to identify the characteristic performer of a contract and in some contracts the characteristic performer simply does not exist, eg both parties' performances are equally complicated and important to the operation of the contract. Unfortunately, these complicated contracts, in which the characteristic performer cannot be easily identified, are generally excluded from the scope of Article 4(1). In other words, Article 4(2) cannot offer much help in practice.

Furthermore, the characteristic performance rule also applies to contracts covered by more than one category in Article 4(1).[64] The purpose of this condition is to apply Article 4(2) to any contracts that cannot be clearly classified as any type in Article 4(1). It is, however, necessary to note that although Article 4(1) of Rome I provides different connecting factors for eight types of contracts, these contracts are not mutually exclusive to each other. For example, sale of goods contracts in Article 4(1)(a) and sale of goods by auction in Article 4(1)(g) are overlapping. Recital 17 also suggests that services contracts in Article 4(1)(b) cover franchise contracts in Article 4(1)(e) and distribution contracts in Article 4(1)(f). The wording of Article 4(2) might indicate that all these contracts that fall in one category in general but specific rules are provided for them given their special characteristics fall within the scope of Article 4(2). These two provisions, therefore, are not perfectly compatible.

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[60] This Chapter only deals with Art 4. Art 3 of the Rome I Regulation largely follows Art 3 of the Rome Convention which has been studied thoroughly in earlier researches. See, eg. J Hill, 'Choice of Law in Contract under the Rome Convention' (2004) 53 *International and Comparative Law Quarterly* 325.

[61] Art 4(1).

[62] Art 4(2).

[63] Art 4(3) and (4).

[64] Art 4(2).

Where Article 4(1) and (2) cannot apply, the applicable law is determined by the closest connection principle.[65] This principle may lead to a lot of uncertainty as it completely depends on the discretion of the court by calculating and weighing all the linking factors of a contract. Different courts may put different weight to some factors. In particular, in complicated contracts, multiple connecting factors exist in various countries, leading to greater diversity. In such cases, the uniform choice of law rules may not lead to the uniformity and the applicable law continues to depend on which court hears the case. Furthermore, it is not unusual to find that there is no one single country clearly being the centre of gravity. There is no further guidance to designate the applicable law in such cases.

The final difficulty arises out of the escape clause. Even if the governing law may be determined pursuant to Article 4(1) and (2), the court may decide the law of the other country should apply instead if 'it is clear from all the circumstances of the case that the contract is manifestly more closely connected with' another country.[66] It again depends on the court to exercise its decision in determining if there is another country with a manifestly closer connection. The word 'manifestly' suggests the escape clause should not be applied lightly. A mere closer connection would not justify derogation from Art 4(1) and (2). However, it is always easier to explain the principle than applying it in practice. There is no a clear-cut line between closer connection and manifestly closer connection.

Article 4 of Rome I cannot produce great certainty to the contracting parties. On the other hand, the discretion-oriented principles may open new debatable points and increase litigation costs. Bearing in mind the difficulty of Article 4, sophisticated commercial players may be encouraged to insert choice of law agreements in their contracts to reduce future uncertainty.[67]

III. Contracts with inequality of bargaining power

For contracts with inequality of bargaining power, the EU legislature pays most attention to the need of weak party protection. However, certainty continues to be one of the objectives. Take consumer contracts as an example. Where the business targets a consumer's domicile, the effect of jurisdiction and choice of law clauses is largely limited. The consumer should only be sued in the consumer's domicile but can choose to sue the business either in the business' domicile or in the consumer's domicile and the consumer can be protected by the level not lower than mandatory rules in his habitual residence.[68] The test for 'targeting' is well designed to ensure certainty. The protective conflicts rules balance the purposes of weak party protection and certainty.

A. Targeting test

Is it really easy to decide whether a business has 'targeted' a consumer's domicile or habitual residence? A number of judgments have been rendered by the CJEU interpreting 'targeting' in various circumstances, especially in online contracting. The Recast Regulation and Rome I use broad terms. For example, Article 17(1)(c) of the Recast Regulation provides that a business has targeted consumers' domicile if 'the contract has been concluded with a person who pursues commercial or professional

[65] Art 4(4).
[66] Art 4(3).
[67] For more, see Z Tang, 'Law Applicable in the Absence of Choice' (2008) 71 *Modern Law Review* 785.
[68] Art 18 of the Recast Regulation.

activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State'.[69] The exact meaning of the broad term 'direct…to' generated a lot of debates in the past and commentators have proposed a few approaches, such as accessibility,[70] profitability,[71] country-specific-indicia,[72] activity of the website,[73] and ring-fencing,[74] to interpret this concept in online transactions.

In its recent decisions, the CJEU provides a hybrid approach to interpret the meaning of Article 17(1)(c). In the joint judgments for *Pammer v Reederei* and *Hotel Alpenhof GesmbH v Heller*,[75] the CJEU expressly rejected the accessibility approach, ie the business is deemed to have targeted the consumer's home country if it operates a website that is accessible in that country. If the only connection between the business and the consumer's domicile, besides the concluded contract, is the accessibility of the website, this business does not target that country. The CJEU also ruled that some factors are conclusive that the business has targeted the consumer's home state, for example, the business provides an express statement, either on the website or somewhere in the contract or confirmation, that it intends to trade with consumers from certain countries. Most cases fall between the two scenarios and the court should consider all the relevant factors to decide if the business has 'manifested its intention to establish commercial relations' with consumers domiciled in certain countries. Relevant factors include international nature of the activity at issue, the provision of the international code of the business telephone number, using the top-level domain of a particular foreign country, using the neutral top-level domain, providing itineraries guiding travel from other Member States to the business's home to receive services, mentioning the composition of international customers from various Member States, language and currency.

It is important to note that the CJEU judgment is not completely consistent with the previous joint statement made by the Council and the Commission which suggests that the country specific indicia are irrelevant. Country specific indicia is clearly adopted by the CJEU as one of the factors that may indicate the business's intention. The CJEU's approach is an appropriate one because no rigid guidance can work effectively in a cross-border commercial world marked by the frequent adoption of new commercial models and the frequent updating of communication technology. The flexibility, however, may leave uncertainty to the parties and reduce the business's capacity to manage its commercial risk and set up its marketing strategy.

In order to provide sufficient protection to consumers, the CJEU ruled that the only requirement for the objective connection is the 'targeting' test. As far as the business has targeted the consumer's domicile, all consumers in that country could rely on the

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[69] Art 17(1)(c) of the Recast Regulation. See also Rome I, Art 6(1).

[70] VznGr Den Haag, *NIPR* 2005, 168; OGH 9 Nc 110/02; LG Feldkirch 3 R 259/03; European Commission, 'Proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters' ('Commission Proposal'), COM(99)0348 final, [1999] OJ C 376E/1, Recital 13.

[71] A Thünken, 'Multi-State Advertising Over The Internet And The Private International Law Of Unfair Competition' (2002) 51 *International and Comparative Law Quarterly* 909, 935.

[72] German Appellate Court, the judgment of 12/15/2004—U 1855/04.

[73] Amendment 37 from the Parliament in the 'Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters' (Parliament Proposal'), A5-0253/2000 COM (1999) 348-C5-0169/1999–1999/0154 (CNS), [2001] OJ C146/94, 97–8.

[74] Ibid, Art 37.

[75] Joined cases C-585/08 and C-144/09 *Pammer v Reederei* and *Hotel Alpenhof GesmbH v Heller* [2010] ECR I-12527.

protective jurisdiction and choice of law rules, irrespective of whether the contract that gives rise to the dispute is the direct result of the targeting activity. The protective conflicts rules, thus, apply to both distance contracts and contracts concluded in the business's domicile.[76] In *Emrek v Sabranovic*,[77] a German consumer bought a car in France by placing an order in the French company's premises in person. The French company maintained a website, providing its contact information, including the international code of a telephone number. The CJEU held that the protective conflicts rules must apply and there is no need for a causal link between the targeting activity and the contract. This decision is justifiable in that, firstly, it is hard to prove whether the particular contract is the result of the targeting activity and, secondly, once the business has targeted a particular country, the business should have reasonable expectation that it might be subject to the courts of this country. Although these reasons are justifiable, the business may lose the chance to manage its commercial risk. For example, it could not predict which transaction, *per se*, would give rise to the risk of cross-border litigation. It also loses the sense to adjust the price of transactions to reflect the commercial risk. The final result may be the business would systematically increase the price of its products sold online and offline to cover the potential risk of being sued abroad.

B. Classification

Classification also leads to some uncertainty. In practice, disputes exist as to whether a contract is indeed a 'consumer contract'. There are a lot of contracts falling in the grey area between typical commercial and consumer contracts, such as investment contracts, franchising contracts in which the franchisee is an unprofessional individual and contracts with mixed purposes. There are inconsistent rulings concerning contracts with mixed purposes. In *Gruber v Bay Wa*,[78] the CJEU provides that contracts with mixed purposes are non-consumer contracts, except where the usage for business purposes is 'so little as to be negligible'. In *Ceska Sporitelna AS v Feichter*,[79] the CJEU stated that "[o]nly contracts concluded outside and independently of any trade or professional activity or purpose, solely for the purpose of satisfying an individual's own needs in terms of private consumption" are consumer contracts. It does not allow any leeway to contracts in which the professional purpose exists but is negligible. The interpretation given in *Ceska* improves certainty, but it reduces the number of contracting parties that might enjoy protection as consumers.

C. Efficiency test

It is necessary to note that some commentators argue, from an economic perspective, that the protective conflicts rules increase transaction costs for businesses that want to enter into a broad internal market. In order to reduce commercial risk, some businesses may decide not to trade in other countries and others may decide to increase the price. The cost of commercial risk, eventually, will be transferred to consumers.[80] This

[76] Case C-190/11 *Mühlleitner v Yusufi*, ECLI:EU:C:2012:542.
[77] Case C-218/12 *Lokman Emrek v Vlado Sabranovic*, ECLI:EU:C:2013:666.
[78] Case C-464/01 *Gruber v Bay Wa* [2005] ECR I-00439.
[79] Case C-409/11 *Česká spořitelna AS v Feichter*, ECLI:EU:C:2013:165.
[80] G Bone, 'Party Rulemaking' (2012) 90 *Texas Law Review* 1329, 1364; RA Hillman and JJ Rachlinski, 'Standard-Form Contracting in the Electronic Age' (2002) 77 *New York University Law Review* 429, 439.

argument presumes that there is a perfect competitive market where the prices could correctly reflect the cross-border litigation risk of transactions. In this market, if the litigation risk is reduced, the business will accordingly reduce the prices, and *vice versa*. This market, however, does not exist in reality. In other words, without protective conflicts rules, businesses may be happy to unilaterally insert jurisdiction and choice of law clauses to reduce commercial risks or even to hamper consumers' ability to sue, without reducing prices and taking all the additional benefits result from the reduction of risk.[81]

One may argue that consumers may enter into contracts rationally by comparing various suppliers. If a business inserts an unfavourable conflicts clause in the contract and does not reduce the price, it has put itself in an inferior position in the market because rational consumers would select other suppliers. This argument presumes that, firstly, consumers are adequately rational and, secondly, there are no factors other than the conflicts clause that may affect the price. Both presumptions are unrealistic. Firstly, consumers can barely make truly rational choices. Many e-consumers simply enter into contracts without carefully calculating the risk or making any comparison. Although some e-consumers may rely on the comparison website to help make decisions, the website usually only compares the price without any warnings on the potential remedy risk in the future. Furthermore, most consumers would not actually read the business's terms and conditions, and even if they read, they would not pay attention to any conflicts clauses. Therefore, it is unrealistic to argue that the business will be obliged to adjust their price to reflect the risk brought about by the conflict of laws. Secondly, even if consumers are rational enough to link the price with the conflicts clause (which is highly unlikely in practice), there are many other factors that affect the price, such as the cost of production, transportation, storage, staffing, management and legal risk. Putting all the relevant factors together, the cost of legal risk only affects the final price very lightly. Within the legal risk, the additional risk associated with cross-border litigation occupies an even smaller proportion.[82] The argument to rely on the market to protect consumers is unrealistic.

It is thus concluded that the EU protective conflicts rules are necessary and they do not cause great inefficiency in economic terms. The legal framework, in general, balances the two objectives of protecting the weaker party and providing commercial certainty. The competent court and applicable law in most cases are easily predictable. However, uncertainty continues to exist in classification between ordinary contracts and consumer contracts and also in the application of the targeting test.

IV. Conclusion

The EU conflicts rules in cross-border contracts have been improved continuously. A lot of previous difficulties that hampered the effective application of the law in practice have been addressed by the later reforms and the CJEU's judgments. All those reforms and interpretations have shown a consistent tendency to improve certainty and predictability for the parties. Certainty is an objective not only in ordinary commercial contracts, but also in contracts with inequality of bargaining power. Although the protective conflicts rules make fairness the most important goal, they also seek to balance fairness and certainty. It is necessary to note that certainty may not necessarily lead to efficiency. The law can only promote commercial efficiency if it allocates risk

[81] Bone, ibid, 1365.
[82] Ibid, 1366.

in the most appropriate and reasonably predictable way. As a result, certainty cannot be achieved by establishing rigid and improper rules. In ordinary commercial contracts, authorities should trust sophisticated commercial participants which are in the best position to allocate their own commercial risk, and provide them with as much autonomy as they can. The law will only be there to assist such autonomy to be exercised in a mutually predictable manner. In the absence of autonomy, certainty is achieved by considering the most reasonable expectations of rational businessmen in this field and the rules should avoid being too rigid. In consumer contracts, certainty should be achieved by appropriate legal intervention, given the existence of inequality of power. It is fair to conclude that the EU conflicts scheme in contractual litigation is generally successful in providing certainty without sacrificing other important values in both commercial and consumer contracts.

However, uncertainty continues to exist, though only on a small number of occasions. Uncertainty is mainly caused by ambiguous and not well thought-through legislative provisions; inconsistent and unclear CJEU interpretation in some cases; and inconsistency between jurisdiction and choice of law rules. They are not fundamentally problematic but small weaknesses reduce certainty and efficiency of cross-border transactions. These weaknesses are relatively easy to address by updating the legislation or the CJEU's interpretation. Attention should be paid to the consistency between existing judgments on the same provision and related provisions. Guidance needs to be detailed enough to avoid different implementation and misunderstanding by national courts.