- ☐ Did the customer read the document or notice of incorporation? If he or she did, the standard terms are successfully incorporated.[131]
- ☐ If the customer did not read the notice, did the supplier take reasonable steps to bring the notice to the attention of the customer? If the supplier did not, the notice is ineffectual and the terms are not included.[132]
- ☐ If reasonable steps were taken, would a reasonable customer have taken notice of the notice? If such a customer would have done so, the terms are included; otherwise they are excluded.[133]

Incorporation by reference in electronic transactions is governed by the provisions of section 11 which are similar to the common-law rules described above, but require something more. Section 11 reads thus:

> **11 Legal recognition of data messages.**—(1) Information is not without legal force and effect merely on the grounds that it is wholly or partly in the form of a data message.
>
> (2) Information is not without legal force and effect merely on the grounds that it is not contained in the data message purporting to give rise to such legal force and effect, but is merely referred to in such data message.
>
> (3) Information incorporated into an agreement and that is not in the public domain is regarded as having been incorporated into a data message if such information is –
>
> (*a*) referred to in a way in which a reasonable person would have noticed the reference thereto and incorporation thereof; and
>
> (*b*) accessible in a form in which it may be read, stored and retrieved by the other party, whether electronically or as a computer printout as long as such information is reasonably capable of being reduced to electronic form by the party incorporating it.

The common-law approach to incorporation does not usually require the terms being incorporated to be readily available for reference by the customer. It merely requires a clear reference to those terms. However, section 11(3) requires that the terms be accessible to the customer, either electronically or as a printout, in such a form that it can be read, stored and retrieved. This is one of the few occasions when the legislature has set higher standards for electronic transactions than it has for paper-based transactions. This higher standard is fully justifiable in the light of the fact that these terms can be made available easily and cheaply by the supplier.[134]

6.3 Transborder legal issues

6.3.1 *Introduction*

The advent of the Internet has given great impetus to the process of globalisation started in the early twentieth century by technological advances in transport and

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131 Christie *The Law of Contract* 180–181; *Essa v Divaris* 1947 (1) SA 753 (A) 763.

132 *Bok Clothing Manufacturers (Pty) Ltd v Lady Land Ltd* 1982 (2) SA 565 (C) 569E. See, for instance, *Africa Solar v Divwatt* 2002 (4) SA 681 (SCA); *Cape Group Construction v Govt of the United Kingdom* 2003 (5) SA 180 (SCA) in which the front page of the agreement, referring to additional terms on the reverse side, was faxed but not the reverse side!

133 *Durban's Water Wonderland v Botha* 1999 (1) SA 982 (SCA) 991G–H; *King's Car Hire (Pty) Ltd v Wakeling* 1970 (4) SA 640 (N) 643–644.

134 See similar requirements in German law: Schlechtriem and Schwenzer *Commentary on the UN Convention on the International Sale of Goods (CISG)* 199–202.

communications.[135] The movement of goods around the world became increasingly efficient with air transport and containerisation during the course of the twentieth century. Although communications technology also advanced steadily through the twentieth century, the Internet era (beginning in the last quarter of the twentieth century) represents such a quantum leap that distance and international borders have become almost meaningless in and no longer provide barriers to the exchange of information and communications. Whereas before the Internet era transborder business was largely limited to commercial parties, such business has now become a terrain where ordinary consumers regularly conduct transactions.[136]

From a legal point of view there are two main areas where international borders still play an important role, even though the parties concerned may not be actively aware of them: namely jurisdiction and applicable law. With the exception of public international law, which deals largely with the relationship between States, all law is territorial – it applies only within the political borders of a particular country. Accordingly, South African law for instance applies only within the borders of South Africa.

Any legal relationship between parties must therefore also have its foundation in the law of a particular country. A contract concluded between a South African business and a Nigerian business, for instance, must be governed by either South African or Nigerian law, or possibly even by a third legal system (if, for instance, the contract was concluded in Angola). There is no internationally applicable law, only the domestic contract law of the potentially applicable legal systems.[137]

There is a growing tendency in international trade to refer to an emerging international *lex mercatoria* but this concept is still very uncertain and without proper legal foundation,[138] being applied mostly only in arbitration proceedings. This putative international mercantile law seems to be based on instruments such as the Vienna Convention for the International Sale of Goods, 1980[139] or the UNIDROIT[140] Principles of International Commercial Contracts.[141] Despite these developments it is certain that in most instances the contractual relationship will have its foundation in a particular legal system to be determined by the rules of private international law.

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135 Reed and Angel (eds) *Computer Law* 227–228; Hedley *The Law of Electronic Commerce and the Internet* 258; Todd *E-Commerce Law* 209; Pistorius "Formation of Internet contracts" 1999 *SA Merc LJ* 284–285; Lloyd *Legal Aspects of the Information Society* 268–269.

136 Reed and Angel (eds) *Computer Law* 226–227; Schneider *Electronic Commerce* 314–315.

137 Forsyth *Private International Law* 2–3, 294–295; North and Fawcett *Cheshire and North's Private International Law* 3–5, 533–534.

138 See, for instance, http://lawprofessors.typepad.com/contracts prof_blog/2005/12/theres_no_such_.html (accessed 26 August 2007) where Sachs argues against such a concept. See also Mazzacano "Canadian jurisprudence and the Uniform Application of the UN Convention on Contracts for the International Sale of Goods" 2006 *Pace International LR* (also at www.cisg.law.pace.edu/cisg/biblio/mazzacano1.html) (accessed 26 August 2007).

139 For a discussion of and materials concerning the convention see Schlechtriem and Schwenzer *Commentary on the UN Convention on the International Sale of Goods (CISG)* and the website of the Pace Law School Institute of International Commercial Law, www.cisg.law.pace.edu (accessed 26 August 2007).

140 The shortened "name" – probably derived from the French for "one law" – adopted by the International Institute for the Unification of Private Law. See the Institute's website at www.unidroit.org.

141 The text of which is available, together with comments, at www.unidroit.org/english/home.htm (accessed 26 August 2007). See also Bonell *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts.*

A related but distinct problem arises when a dispute between the parties needs to be resolved by legal action, namely that of jurisdiction. The fact that the contract is governed by a specific legal system does not necessarily mean that the courts of that same legal system will have jurisdiction over the parties or the dispute.[142] Jurisdiction is determined by each country's principles and rules of jurisdiction, which have no connection with the rules of private international law that determine the applicable legal system.[143]

In a dispute the party lodging proceedings must first determine which courts have jurisdiction. If there is more than one such court, that party must choose one of those courts and lodge its action there. Only when the action has been lodged with a court will the rules of private international law of the *lex fori*[144] be applied to determine the applicable legal system. For instance, should a contractual dispute arise between the South African and Nigerian parties, the South African plaintiff may have no choice but to sue the Nigerian party in a Nigerian court if only the Nigerian court has jurisdiction. The Nigerian court will then apply either Nigerian contract law or South African contract law to the dispute, according to its rules of private international law.

6.3.2 *Jurisdiction*

In 1995 the Attorney-General of Minnesota stated that "Persons outside of [*sic*] Minnesota who transmit information via the internet knowing that the information will be disseminated in Minnesota will be subject to the jurisdiction of Minnesota Courts for the violations of state, criminal and civil law".[145]

Cameron correctly points out that, were this attitude adopted throughout the world, all States would in effect be imposing their jurisdiction over all persons using the Internet.[146] This is simply not realistic. Courts will have to apply their traditional grounds of jurisdiction to this specific field. Clearly, however, the advent of the Internet poses interesting challenges to the law of jurisdiction.[147]

The law that determines jurisdiction is the domestic national law of the court or courts where proceedings may potentially be initiated.[148] In contractual proceedings the plaintiff often has a choice of various courts where proceedings may be lodged because there may be a number of jurisdictional factors that apply to the particular facts. The choice made depends on a number of factors, including costs, location of witnesses and tactical advantages. In most cases it would be tactically advantageous to

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142 Forsyth *Private International Law* 158–162; North and Fawcett *Cheshire and North's Private International Law* 179–182.

143 In some instances there may be harmonised law within a region such as Europe. See Øren "International jurisdiction over consumer contracts in e-Europe" 2003 *ICLQ* 667 for a discussion of the European Jurisdiction Regulation which contains specific provisions on consumer contracts.

144 The law of the court exercising jurisdiction.

145 As quoted in Cameron "Jurisdiction on the Internet" 2001 (34) *Law/Technology* 1.

146 Cameron "Jurisdiction on the Internet" 2001 (34) *Law/Technology* 1.

147 See, for instance, Osborne "Jurisdiction on the Internet – not such a barrel of laughs for the Euromarket!" 2000 *Computers and Law* 26–28.

148 Forsyth *Private International Law* 158–159. For a discussion of Australian and American rules of jurisdiction regarding the Internet see Cameron "Jurisdiction on the Internet" 2001 (34) *Law/Technology* 1–17.

lodge proceedings in the courts of one's own jurisdiction for such purely practical reasons as convenience, easy access to lawyers familiar with the system, and reduced costs. However, there are also instances where a legal advantage may be gained because of the rules of private international law that will be applied or through the application of more liberal (or stricter) laws of procedure and evidence. All of these factors need to be considered before a choice of jurisdiction is exercised by the plaintiff.

The defendant on the other hand has no such choice because he or she is being dragged into court against her or his will. It is for this reason that in most countries the place of business or usual place of residence of the defendant is an important jurisdictional factor. The defendant can raise objections against the exercise of jurisdiction by the particular court, if such a defence is available. The scope of such a defence is usually fairly limited if the necessary jurisdictional factors exist.

In South African law jurisdiction, or "the power vested in a court by law to adjudicate upon, determine and dispose of matter",[149] is based first on the principles of the common law – Roman-Dutch law – and secondly on statute.[150] Although the South African High Court is a creature of the Constitution and statute, its jurisdictional limits are determined by the common law.[151] Section 19(1)(*a*) of the Supreme Court Act[152] states that "A provincial or local division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all other matters of which it may according to law take cognizance". The jurisdiction of the magistrates' court, however, is determined solely by the provisions of the Magistrates' Courts Act.[153]

In South Africa the supreme courts, now the high courts, have interpreted section 19(1)(*a*) of the Supreme Court Act as meaning simply that their jurisdiction is based on common-law principles.[154] Two common-law principles underlie all issues relating to and rules of jurisdiction: (a) the power of the court to deal with the particular subject-matter, and (b) the effectiveness or the subordination of the defendant to the power of the court. In *Hugo v Wessels*[155] the court stated that whether a court has jurisdiction in a particular instance depends on a dual investigation. The first question is whether the court is entitled to take notice of the particular subject-matter. The answer to this depends on the existence of one or more recognised grounds of jurisdiction (*rationes jurisdictionis*). The second question is whether the defendant is subject to the court's powers. The answer to this depends on the doctrine of effectiveness. A court will not exercise jurisdiction when it cannot give an effective judgment.

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149 See *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) 256; *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) 484.

150 The Constitution of the Republic of South Africa, 1996, the Supreme Court Act 59 of 1959 and the Magistrates' Court Act 32 of 1944 are the primary pieces of legislation, but there are a number of others also conferring jurisdiction on the High Court in special instances, for instance the Income Tax Act 58 of 1962, the Patents Act 57 of 1978 and the Admiralty Jurisdiction Regulation Act 105 of 1983.

151 Forsyth *Private International Law* 164–165.

152 Act 59 of 1959.

153 Act 32 of 1944.

154 See, for instance, *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) 486. For a more comprehensive discussion see Forsyth *Private International Law* 164–168.

155 1987 (3) SA 837 (A) 849.

The following grounds establishing jurisdiction are recognised in South African law.

6.3.2.1 The domicile or residence of the defendant

A South African court will always exercise jurisdiction when the defendant is domiciled or resident within its area of jurisdiction at the time of the proceedings. A natural person is domiciled at the place where he or she has a lawful physical presence and the subjective intention of residing indefinitely or permanently,[156] or at the place assigned by law when he or she cannot exercise a domicile of choice.[157] According to the common law every person must have a domicile, but can have only one domicile at a time.

Courts also exercise jurisdiction over a person who is resident within its area of jurisdiction at the time of the proceedings. "Residence" in this context is not entirely clear but requires something more than the person's being in a place for a brief period of time. Thus, courts have regarded a person as being resident where he or she has a house and family, although shorter periods of periodic nature for recreational, business or family purposes may also amount to residence. Much depend on the particular circumstances.[158] A natural person can have more than one place of residence at the same time, but not more than one domicile.

A corporation is deemed to have its residence where its principal place of business is or where its registered office is situated.[159] A branch office does not qualify as a residence.[160] Foreign corporations are deemed to have their residence at their registered offices in the foreign jurisdiction, but if they conduct business in South Africa even a branch office will constitute residence here for the purposes of any legal disputes arising from the business conducted in South Africa.[161]

6.3.2.2 Where the cause of action arose

A court may have jurisdiction if the cause of action arose within its area of jurisdiction. Normally this condition refers to the place where a contract was entered into or to be performed. Where the breach of contract takes place, for some strange reason, is not generally accepted as grounds for jurisdiction. In *Leibowitz t/a Lee Finance v Mhlana*[162] the court stated that "'cause' means an action or legal proceeding (not a cause of action) and that 'a cause arising within its area of jurisdiction' means 'an action or legal proceeding which, according to the law, has duly originated within the Court's area of jurisdiction'". These grounds, however, are not sufficient on their own to found jurisdiction but must be combined with other grounds such as submission,

156 See s 1 of the Domicile Act 3 of 1992.

157 A domicile is assigned to minors or persons mentally incapable of making such a choice, in terms of s 2 of the Domicile Act 3 of 1992.

158 See Forsyth *Private International Law* 191–193.

159 *Bisonboard Ltd v K Braun Woodworking Machinery (Pty) Ltd* 1991 (1) SA 482 (A) 486.

160 Forsyth *Private International Law* 195.

161 *ISM Inter Ltd v Maraldo* 1983 (4) SA 112 (T); Forsyth *Private International Law* 195–196. See, however, *Joseph v Air Tanzania Corporation* 1997 (3) SA 34 (W).

162 2006 (6) SA 180 (SCA) 183 para. [7].

arrest or attachment when the defendant is a so-called foreign *peregrinus*, a person with no South African domicile or residence.[163]

6.3.2.3 Submission

Until fairly recently mere submission to the court's jurisdiction by a foreign *peregrinus* was regarded as insufficient to establish jurisdiction in the absence of additional jurisdictional grounds such as the cause of action's arising in South Africa or the arrest of the *peregrinus* or attachment of goods or property. However, in *Jamieson v Sabingo*[164] this rule was authoritatively changed. The court stated that judgment against a defendant who has submitted to that court's jurisdiction voluntarily will not be without effect as it will be recognised and enforceable internationally; accordingly, mere submission without the aid of any other jurisdictional grounds is sufficient to found jurisdiction over the person of a foreign *peregrinus* when the other party is a South African *incola* (person resident or domiciled in South Africa).

Submission can take place at any time, even at the time of the lodging of proceedings. It can therefore be given at the time that a contract is concluded by the inclusion of a clause stipulating that a South African court will have jurisdiction over a dispute arising from that contract. A webtrader therefore can simply include such a jurisdictional clause in its standard terms and conditions. Submission can also take place expressly or tacitly prior to or during the course of the proceedings if the *peregrinus* does not object to the jurisdiction of the court. However, submission is ineffective if it takes place after the attachment of goods.[165]

6.3.2.4 Attachment or arrest

The goods of a foreign *peregrinus* may be attached, if they are within the borders of South Africa, to confirm jurisdiction (*ad confirmandam jurisdictionem*) when other grounds of jurisdiction exist, or to found jurisdiction (*ad fundandam jurisdictionem*) when other grounds of jurisdiction are absent. Attachment serves to provide the plaintiff with security and to ensure that any judgment in the plaintiff's favour will be effective.[166] However, when the defendant has submitted to the jurisdiction of the court, the plaintiff is not entitled to have the defendant's goods attached.[167] Attachment is also not permitted when the defendant is a South African *incola*. Previously the plaintiff was also entitled to have a foreign *peregrinus* arrested to confirm or found jurisdiction. However, arrest in these circumstances has been found to be unconstitutional and is therefore no longer allowed.[168]

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163 *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA) para. [3]; *Ewing McDonald & Co Ltd v M & M Products Co* 1991 (1) SA 252 (A) 258D–G; *Naylor v Jansen; Jansen v Naylor* [2005] 4 All SA 26 (SCA) para. [20].

164 *Jamieson v Sabingo* 2002 (4) SA 49 (SCA). See also *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA) and *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA) in which cases this principle was confirmed.

165 *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA).

166 *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA).

167 *Jamieson v Sabingo* 2002 (4) SA 49 (SCA) para. [30]; *Tsung v Industrial Development Corporation of SA Ltd* 2006 (4) SA 177 (SCA).

168 See *Bid Industrial Holdings v Strang* [2007] SCA 144 (RSA).

6.3.2.5 Foreign examples and principles

Referring to Australian law, Cameron says that the following facts are regarded as sufficient jurisdictional grounds in most legal systems:[169]

- ☐ existence of a contract concluded within the jurisdiction
- ☐ breach of contract within the jurisdiction
- ☐ commission of a tort (delict) within the jurisdiction
- ☐ defendant's submission to the jurisdiction
- ☐ contract governed by the jurisdiction, in other words subject to its domestic law
- ☐ damages occurring within the jurisdiction
- ☐ defendant's owning land within the jurisdiction.

In Europe the Consumer Contracts Regulation of 1999[170] determines that when commercial activities aimed at consumers in a specific country or in several States including that country, the courts in that country will have jurisdiction over any dispute arising from contracts resulting from such activity even if the defendant is not resident in that country. Consumers in fact have a choice to pursue the matter in their own courts or those of the business party. Any advance choice-of-jurisdiction clause is normally invalid, but an agreement concluded after the dispute has arisen is valid and enforceable.[171]

In most legal systems the principle of freedom of contract allows parties to agree to the jurisdiction of courts to determine contractual disputes between them. The contract may make provision for the exclusive jurisdiction of a particular country's courts, or it may make provision for alternatives. When jurisdiction is not exclusive, the general rules of jurisdiction of a particular country may provide additional grounds of jurisdiction over and above the choice of the parties.

However, the fact that parties agree does not necessarily mean that their choice is effective or enforceable. It is particularly in the case of consumer contracts that choice-of-jurisdiction clauses may be invalid or unenforceable.[172] In certain countries with an English common-law background[173] the principle of *forum non conveniens* may persuade a particular court not to exercise jurisdiction over a matter, even though that court may, strictly speaking, have jurisdiction in terms of its own rules, when it seems that a court in another country is the more appropriate forum to decide the case.[174] A wide range of circumstances may influence the court's decision to decline to hear the case. The *forum non conveniens* doctrine does not apply in South Africa and there is no good reason to introduce it.[175]

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169 Cameron "Jurisdiction on the Internet" 2001 (34) *Law/Technology* 3. See also Reed and Angel (eds) *Computer Law* 227.

170 Art. 15 of the Unfair Terms in Consumer Contracts Regulation 1999, 1999/2093.

171 See Seaman "E-commerce, jurisdiction and choice of law" 2000 *Computers and Law* 28–37. See also Reed and Angel (eds) *Computer Law* 230.

172 See Reed and Angel (eds) *Computer Law* 229.

173 Such as England, Scotland, the United States and Canada.

174 See Forsyth *Private International Law* 173–176.

175 For a contrary argument, however, see Forsyth *Private International Law* 174–175. It is uncertain whether the court intended to introduce the doctrine in *Bid Industrial Holdings v Strang* [2007] SCA 144 (RSA). Certainly the doctrine was not adequately discussed before the court to warrant the deduction that the court intended doing so.

In the United States courts apply a "minimum contacts" doctrine to determine jurisdiction over non-resident defendants.[176] In *Cacioppo v Pool Mart Services, Inc.*[177] the court described the doctrine as follows:

> The threshold requirement for specific jurisdiction is the concept of "minimum contacts" where "there [is] some act by which the defendant purposefully avails [oneself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L. Ed.2d 1283, 1298 (1958) (citing *Int'l Shoe v. Wash.*, 326 U.S. 310, 319, 66 S.Ct. 154, 160, 90 L. Ed. 95, 104 (1945)); *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 323 (1989) (holding that the minimum contacts requirement is satisfied so long as the contacts resulted from a defendant's purposeful conduct and not the unilateral activities of a plaintiff).

In *Maritz, Inc. v Cybergold, Inc.*[178] the court distinguished between active and passive websites. When a website actively solicits business – that is, it interacts with the other party – the webtrader will be subject to the jurisdiction of the American courts. If the website merely provides information with no interactive solicitation of business the courts will not exercise a jurisdiction.[179] An active website satisfies the minimum-contacts doctrine, the passive website does not.[180] The court held as follows:

> CyberGold's posting of information about its new, up-coming service through a website seeks to develop a mailing list of internet users, as such users are essential to the success of its service. Clearly, CyberGold has obtained the website for the purpose of, and in anticipation that, internet users, searching the internet for websites, will access CyberGold's website and eventually sign up on CyberGold's mailing list. Although CyberGold characterizes its activity as merely maintaining a "passive website," its intent is to reach all internet users, regardless of geographic location. Defendant's characterization of its activity as passive is not completely accurate. By analogy, if a Missouri resident would mail a letter to CyberGold in California requesting information from CyberGold regarding its service, CyberGold would have the option as to whether to mail information to the Missouri resident and would have to take some active measures to respond to the mail. With CyberGold's website, CyberGold automatically and indiscriminately responds to each and every internet user who accesses its website. Through its website, CyberGold has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally. Thus, CyberGold's contacts are of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence, that they favor the exercise of personal jurisdiction over defendant.

6.3.2.6 Conclusion

Whether a court has jurisdiction depends on the rules of jurisdiction of that court. The general trend in most legal systems in respect of Internet transactions is to refer to the physical presence of parties rather than their virtual presence in a specific place.[181] This principle ought to apply also to the residence or domicile of parties or

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176 First expounded in *International Shoe Co. v State of Wash., Office of Unemployment* 326 US 310, 66 SCt 154; US 1945.

177 A.2d, 2007 WL 2162427.

178 947 F Supp. 1328; ED Mo. 1996.

179 *Bensusan Restaurant Corp. v King* 126 F 3d 25; *Southern New England Tel. Co. v Global NAPS Inc.* 2007 WL 1089780 D Conn., 2007.

180 Reed and Angel (eds) *Computer Law* 230–231.

181 Cameron "Jurisdiction on the Internet" 2001 (34) *Law/Technology* 1–17; Svantesson "Jurisdictional issues in cyberspace" 17 (2001) *Computer Law & Security Report* 318–326; Thatch "Personal jurisdiction

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to such jurisdictional factors as where performance is to take place or where the breach occurred.

For instance if a party situated in India develops software for a client in South Africa and delivers that software over the Internet, performance by that party takes place partly in India, where the product was developed and from where it was sent, but also partly in South Africa where it was delivered. Defects in the software must relate to a breach of contract that took place in India because that is where performance took place. However, if there is a choice-of-jurisdiction clause in the contract stipulating that South African courts will have jurisdiction over any dispute between the parties, the South African client is entitled to lodge proceedings in South Africa in the division where the contract is deemed to have been concluded or where delivery had to take place, in this case the place of business or residence of the South African party.

However, American courts have extended their jurisdictional rules with reference to the minimum-contracts doctrine potentially to all webtraders. A party who maintains an active website may potentially be liable to the jurisdiction of American courts, other than any other court that may also have jurisdiction, when the plaintiff is an American resident or accessed the website from America.

6.3.3 *Applicable law*

The law applicable to a cross-border contract has to be determined in terms of the rules of private international law. Like the rules of jurisdiction, the rules of private international law are part of domestic law and may differ from country to country. It is only when litigation has been initiated in a particular court that it will be definite which rules of private international law will be applied, namely those of the *lex fori*. Unlike the rules of jurisdiction, the contract can only be governed by one legal system, usually referred to as the "proper law" of the contract.

South African rules of private international law are premised on the principle of private autonomy in terms of which parties are free to choose the law that governs their agreement. Courts will generally uphold such a choice unless there is a mandatory law that applies regardless of the parties' choice or the choice is unlawful – for instance, when the choice is made in an attempt fraudulently to evade otherwise applicable mandatory rules.[182]

The proper law of the contract in South African law is determined in the following manner:

- ☐ When there is an express choice of law in the agreement, the legal system chosen is applied in accordance with the principle of party autonomy.[183]
- ☐ When there is a tacit choice of law – in other words, there is actual consensus but it is not expressly stated in the agreement – the law chosen by the parties applies.

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and the worldwide web: Bits (and bytes) of minimum contact" 1997 *Rutgers Computer and Technology LJ* 143–178.

182 *Guggenheim v Rosenbaum* 1961 (4) SA 21 (W) 31. Generally see the discussion of Forsyth *Private International Law* 298–302; Pistorius "Formation of Internet contracts" 1999 *SA Merc LJ* 284–285.

183 Forsyth *Private International Law* 304.

A tacit choice is usually determined from the provisions of the contract itself and surrounding circumstances pointing to such an agreement. References to specific concepts or legislation from a particular country may be useful indications of the parties' choice.[184] Choice of jurisdiction is not in itself a conclusive indication of a tacit choice of law. The choice of jurisdiction may be influenced by factors that do not relate to the applicable law.

- When the parties make no choice of law, the court applies the presumptive intention of the parties. In the leading case *Standard Bank of South Africa Ltd v Efroiken and Newman*[185] the court stated that one must determine what ought to be presumed to have been the intention of the parties having regard to the subject-matter of the contract, its terms and the surrounding circumstances. Relying on the English case *Bonython v Commonwealth of Australia*[186] most courts now describe the proper law as being determined by an objective weighing of the factual links between the contractual relationship and the various legal systems that could possibly apply, although lip service is still paid to the *Efroiken* formula. The search is for the legal system with which the contract has the closest connection.[187]

  Where the contract was concluded or is to be performed is an important factor in determining the proper law, but courts must look at all the relevant factors to determine the closest relationship.

The autonomy of the parties and their choice of law may in certain circumstances be limited by directly applicable statutes, legislation that overrides the normally applicable rule of private international law with provisions that govern certain situations irrespective of the applicable law.[188] Usually such directly applicable laws are only effective in their own area of jurisdiction. For instance, a directly applicable South African law applies to a dispute adjudicated by a South African court despite the fact that the law applicable, according to the rules of private international law, is Dutch law. However, should a Dutch court be seized of the matter it will apply Dutch law without recourse to South African legislation, because the latter is territorially limited in its application.

The ECT Act contains one such directly applicable provision in respect of electronic trade, namely section 47. Section 47 is similar to provisions found in European consumer-protection legislation and is aimed at preserving the consumer-protection provisions of Chapter VII by stipulating that the "protection provided to consumers in this Chapter, applies irrespective of the legal system applicable to the agreement in question".

The approach in South African law conforms broadly with that followed in many other countries. In Europe the applicable law in respect of contracts is governed by

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184 See, for instance, *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 (2) SA 138 (C).

185 1924 AD 171.

186 [1951] AC 201 209.

187 See *Improvair (Cape) (Pty) Ltd v Establissements Neu* 1983 (2) SA 138 (C) 146–147; *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D); *Ex parte Spinazze* 1985 (3) SA 650 (A) 664; *Society of Lloyd's v Romahn and Two Other Cases* 2006 (4) SA 23 (C) para. [82].

188 Forsyth *Private International Law* 2–3. See Øren "International jurisdiction over consumer contracts in e-Europe" 2003 *ICLQ* 667 for a discussion of the European Jurisdiction Directive which has a directly applicable effect.

the Rome Convention on the Law Applicable to Contractual Obligations, 1998.[189] The Convention also recognises party autonomy as the point of departure, that is that the parties can freely choose the applicable law.[190] Article 4(1) states that, when there is no express or tacit choice of law, "the contract shall be governed by the law of the country with which it is most closely connected". Article 4(2) contains a presumption that the contract is most closely connected with the country in which the party who has to perform the characteristic performance is habitually resident or, in the case of a corporation, has its central administration. The characteristic performance of a sale, for instance, is the delivery of the goods, and not payment for them. The proper law therefore is the legal system of the country in which the seller resides.

These rules, however, only apply when the parties are commercial parties. If one of the parties is a consumer, article 5(2) of the Rome Convention determines that the mandatory rules of the consumer's country of residence apply in addition to the provisions of the chosen law. The law chosen is therefore valid and governs the agreement, but the commercial partner cannot evade the protective law applicable in the consumer's country. This is a form of directly applicable legislation that overrides the normal rules of private international law.[191]

In South African law webtraders may include a choice-of-law clause in their standard terms and conditions. Such a clause is valid and binding in South African law but may fall foul of directly applicable statutes, such as the European Rome Convention or Brussels Regulation,[192] which protect consumers.[193] In terms of those provisions[194] the mandatory protective provisions of the European country in question will still apply despite the fact that South African law is the proper law.[195] It remains an open question whether a South African court will apply the mandatory foreign provisions if the dispute should be adjudicated in South Africa. Normally courts will refuse to apply such foreign legislation.

The same interesting question arises when a European court exercises jurisdiction in terms of the Brussels Regulations and the South African court is asked to enforce the eventual judgment of the European court here. It is submitted that the South African court should refuse to enforce the foreign judgment in the absence of the submission of the South African commercial party to the jurisdiction of the European court, because the foreign court would then have lacked international competence.[196] In South African law only three grounds for international competence are recognised in respect of claims sounding in money, namely the residence or

189 See also North and Fawcett *Cheshire and North's Private International Law* 535 ff.

190 Art. 3. See also North and Fawcett *Cheshire and North's Private International Law* 552–553.

191 North and Fawcett *Cheshire and North's Private International Law* 575–577.

192 Council Regulation (EC) No. 44/2001 of 22 December 2000, "Jurisdiction, recognition and enforcement of judgments in civil and commercial matters" (the Brussels Regulation).

193 Reed and Angel (eds) *Computer Law* 226–231; Todd *E-Commerce Law* 197–207; Hedley *The Law of Electronic Commerce and the Internet* 261–265.

194 Art. 16 of the Brussels Regulation and art. 5(2) of the Rome Convention.

195 Reed and Angel (eds) *Computer Law* 226–231; Todd *E-Commerce Law* 197–207; Hedley *The Law of Electronic Commerce and the Internet* 261–265.

196 In respect of the issue of enforcement of foreign judgments and international competence, see Forsyth *Private International Law* 412–414.

physical presence of the defendant in the foreign court's area of jurisdiction,[197] or his or her submission.[198]

6.4 Consumer protection

6.4.1 *Introduction*

The growth of mass production, marketing and contracting during the twentieth century made consumer goods available more widely and more cheaply than ever before. At the same time these developments strained the traditional concepts of the law of contract and delict. The notion of an arm's-length deal negotiated between two equal contracting parties became largely a myth as far as consumer contracts were concerned. Consumers were rendered increasingly subordinate in these transactions, subjected to mass advertising which has often been misleading or deceptive, standard terms of agreement which became increasingly one-sided, and oppressive lending practices.

Throughout the world consumer-protection measures were adopted to counter these developments. The scope and comprehensiveness of these measures, however, vary dramatically from jurisdiction to jurisdiction. According to Reed and Angel the European Union has the most comprehensive consumer-protection policy and legislation of any region, covering every area of consumer activity.[199] In other jurisdictions, such as South Africa, consumer protection has been lagging behind developments in Europe and the United States with only a small number of consumer-protection instruments aimed at a few problem areas.

Legislative consumer-protection measures in South Africa are largely limited to consumer credit,[200] advertising and certain deceptive practices.[201] There are no provisions protecting consumers against unfair standard terms and conditions, although this may change soon with discussions on the Consumer Protection Bill 2006 nearing completion, and no provisions protecting consumers against problems related to distance selling[202] or aimed at product liability, outside normal common-law rights. Apart from legislative measures, however, several industry-specific self-regulating codes such as the Banking Code of Practice and the Code of Advertising Standards provide an effective measure of non-statutory protection.[203]

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197 *Richman v Ben-Tovim* 2007 (2) SA 283 (SCA).

198 Forsyth *Private International Law* 392–402.

199 See Reed and Angel (eds) *Computer Law* 53–55; Lloyd *Legal Aspects of the Information Society* 268–269.

200 Through such Acts as the erstwhile Hire Purchase Act 36 of 1942, Credit Agreements Act 75 of 1980, Usury Act 73 of 1968 and Price Control Act 25 of 1964 and now by the National Credit Act 34 of 2005.

201 Tackled by the largely ineffective Consumer Affairs (Unfair Business Practices) Act 71 of 1988.

202 In respect of European legislation see the European Distance Selling Directive (EC) 97/7 on the protection of consumers in respect of distance contracts [1997] OJ L144/19; Lloyd *Legal Aspects of the Information Society* 233–234; Reed and Angel (eds) *Computer Law* 53–55. See also Geist *Internet Law in Canada* 646 ff; Øren "International jurisdiction over consumer contracts in e-Europe" 2003 *ICLQ* 666 ff.

203 Buys "Online consumer protection and spam" 138–139 refers to the Banking Code at www.banking.org.za (accessed 26 August 2007), the Code of Advertising Standards at www.asasa.org.za (accessed 26 August 2007) and the Direct Marketing Association's Code of Conduct and Best Practice Guidelines for the Marketing of Goods and Services Through the Internet at www.dmasa.org/articles.php (accessed 26 August 2007).