Law, jurisdiction and the digital nomad[1]

Overview

Free movement is a central notion of the European community, and the Internet provides the capability for individuals to live a locationless existence, running their businesses and providing services from wherever they happen to be. However, whilst cyberspace may be without borders, the laws of physical countries still apply; and, for digital nomads, determining which laws apply, and which courts have jurisdiction, is no easy task.

Four fundamental problems exist with the current regime: determining when someone is dealing as a consumer, such that consumer-specific measures take effect; determining the place of performance of a service, for working out the relevant jurisdiction; the ongoing possibility of being sued in one's domicile, determined by a geographically focussed legal construct without any bearing on a party's actual life and links; and the problems of determining to which country a contract performed across multiple states is more closely connected.

This article considers each of these problems in turn, exploring some of the complexities in solving the underlying issues where parties to a contract may be highly mobile and effectively stateless, and examines very briefly the issue of online dispute resolution as an alternative approach.

[1] eCommerce: theme 4

Freedom of movement: the digital nomad, the Internet and eCommerce

The single market is of the key tenets of the European community,[2] with the free movement of goods, people and capital arising from the removal of borders. The Internet, and communications technology more generally, permits a business to offer services to multiple markets — European and beyond — easily and cheaply, by eliminating the need to be physically present in a country to do business. Together, these are a potent combination.

Whilst many businesses have taken advantage of the Internet by trading and providing services across borders,[3] there is a growing number of individuals choosing to live and work in a "locationless" manner, engaging their clients over the Internet, whether providing legal advice,[4] offering creative design services[5] or making money from writing about their lifestyle.[6] With their reliance of Internet connectivity, and without a fixed abode, these businesspeople have adopted the moniker of "digital nomads." [7]

Indeed, although far from the lifestyles led by some digital nomads, studying the LLM has, for me, been a manifestation of the nomadic approach — I have listened to podcasts whilst waiting in airports, read and researched in hotel rooms and hotel lobbies in far-flung corners of the world, chatted with fellow students via Skype, FaceTime, instant message and online chat, and typed up my thoughts whilst riding trains, boats and planes. It matters not at all where I have studied or written, and it is of no consequence where you should happen to be sitting reading this — the omnipresence of cyberspace breaks down notions of geographic difference and borders with remarkable ease.

John Perry Barlow, writing in 1996, declared that cyberspace is a space of independence, warning governments that:

> "[y]ou have no sovereignty where we gather… I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us… Cyberspace does not lie within your

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[2] "*The Single Market: yesterday and tomorrow*" (2006), Bureau of European Policy Advisers

[3] See, for example, the European Commission's "*Report on cross-border e-commerce in the EU*" SEC(2009) 283

[4] http://www.nomadlaw.com

[5] http://www.neverendingvoyage.com

[6] http://www.lifeofjustin.com

[7] "*Digital Nomad*" (1997) Makimoto and Manners (Wiley)

> borders… Ours is a world that is both everywhere and nowhere, but it is not where bodies live..."[8]

Whilst cyberspace itself may be substantially without borders, Barlow's proclamation that it is a space without sovereignty has not — perhaps not unsurprisingly — materialised. Real-world legislatures and courts have attempted to work out how they fit in this new technical environment, and over what they can claim to legislate, and to have jurisdiction. Although it is reasonably straightforward to determine the reach of a country's laws as relating to actors in the physical world, making the same determinations in respect of remote computers and users in cyberspace is much less easy. As one commentator notes:

> "For the most part, the production of the legal meaning of Internet borderlessness has followed two narrative lines, both of which operate within the cosmopolitan–parochial rubric. The first began with the early consideration of Internet activity as occurring in a virtual place without borders, and therefore not subject to conventional territorial law (where Internet activities take place "everywhere and nowhere"). This early form of the narrative soon shifted to one more fundamentally connected with the territorial world, where universal accessibility is feared to lead to parochial assertion of state authority in every jurisdiction—that is, "everywhere and nowhere" became *everywhere and anywhere*."[9]

The question is no longer that of Barlow's techno-independence, asking whether laws apply in cyberspace, but how to determine which law and jurisdiction should be applied in any given circumstance. As Jack Goldsmith has argued "extraterritorial claims of jurisdiction, and application of law, are legally legitimate when local harm been caused."[10]

This article considers the EU regulations on jurisdiction and applicable law, and applies them critically to the lifestyle of digital nomads, questioning whether those with such a lifestyle, arguably those most embracing of the notions of the European single market and information society, are afforded adequate protection.

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[8] "*A Declaration of the Independence of Cyberspace*" (1996), Barlow (available at https://projects.eff.org/~barlow/Declaration-Final.html as at 1st January 2012)

[9] "*Tales, Techs and Territories: Private International Law, Globalization, and the Legal Construction of Borderlessness on the Internet*" (2008) Slane, Journal of Law and Contemporary Problems, Vol. 71, at page 132

[10] Jack Goldsmith's "*Against Cyberanarchy*", through "*Borders on, or border around — the future of the Internet*" (2006) Svantesson, Albany Law Journal of Science and Technology, Vol. 16, at page 352

Overview of applicable jurisdiction and law:[11]

Jurisdiction:

The mechanism for determining the jurisdiction applying to civil and commercial matters within the EU[12] is set out in Council Regulation 44/2001 — the Brussels regulation. The default position under these regulations is that a person domiciled in a Member State is to be sued in the courts of that Member State.[13]

The default position is subject to a number of exceptions, and, in matters relating to contract, the applicable jurisdiction is that of "the place of performance of the obligation in question."[14] Unless the parties have agreed otherwise, in the case of sale of goods, this place is the place where goods were, or should have been, delivered, and, in the case of services, the place where the services were or should have been provided.

Consumers represent an exception to the general approach, both in terms of the Brussels regulations, and the Rome 1 regulations on applicable law;[15] consumers are afforded greater protection than general business customers. Where services are supplied in the course of a trade to consumer, the applicable jurisdiction is the country where the consumer has his domicile, provided that the supplier "pursues commercial or professional activities" in that country, or else "directs such activities" to that country, and the contract falls within the scope of such activities.[16]

Because of this, a digital nomad advertising her services to English customers could be required to defend her contract in the courts of England and Wales, even if she is based in another Member State. However, if a consumer within a Member State had sought out her services, which she was not advertising into that Member State, the consumer may not benefit from the protection of Article 15; the *Alpenhof*[17] case sets out the CJEU's considerations as to when a party is "directing" his activities to a Member State, and the lack of clarity as to what this entails

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[11] In respect of each of law and jurisdiction, the relevant regulation provides a general rule, and a number of exceptions or reasons for variation. This paper does not attempt to consider all the special rules, but only those which will applicable most commonly

[12] With the exception of Denmark

[13] Article 2

[14] Article 5(1)

[15] Council Regulation 593/2008

[16] Article 15

17 C-144/09

constitutes a particular burden to those offering services over the Internet — a case of *caveat mercator*.

Finally, where the digital nomad is the consumer, she is able to bring an action in the jurisdiction in which she domiciled, or else in the courts of the other party's domicile.[18]

Applicable law:

As with jurisdiction, the EU legislation on applicable law is set out by way of a regulation — regulation 593/2008, on the law applicable to contractual obligations.[19] The regulation splits the determination of applicable law into three cases: where there is an agreement, where there is no agreement and the contract is between businesses, and where there is no agreement and the contract is between a business and a consumer.

Applicable law by agreement

The basic principle of these regulations is that of choice by the parties to the contract[20] — a choice which can be made and modified by agreement at any time.[21] Where a person can demonstrate that he has agreed with the other party the applicable law, that is the law which applies to the contract.

The exception for consumers is that, where one of the parties is a consumer and the other a professional,[22] an agreement as to applicable law does not override protection afforded to the consumer by laws of his domicile, from which derogation is not permitted. For example, a consumer domiciled in the United Kingdom would not lose his ability to rely on an implied warranty that goods will be of satisfactory quality as against a business seller in another Member State, even if he has purportedly agreed to lose such rights.[23]

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[18] Article 16

[19] Discussion of Rome II is outside the scope of this piece, although, in the case of tortious claims of negligence, for example — a risk in the case of the provision of professional services — this may remain relevant in an eCommerce environment

[20] Article 3(1)

[21] Article 3(2)

[22] In each case within the meaning of Article 6

[23] By virtue of s7(2), Unfair Contract Terms Act 1977: "As against a person dealing as consumer, liability in respect of the goods' correspondence with description or sample, or their quality or fitness for any particular purpose, cannot be excluded or restricted by reference to any such term."

Applicable law in the absence of agreement (business)

The regulations acknowledge that not every contract will have a clear choice of law clause, and provide what amounts to a rather confusing series of options to deal with this.

The general position where there is no choice is that the deemed applicable law is that of the law of the country where the seller or service provider has his habitual residence,[24] a notion different to that of "domicile." However, where "all the circumstances of the case" make it clear that the contract is "manifestly more closely connected" with another country, the laws of that other country shall apply.[25]

In a similar vein, if a court is unable to reach a decision as to applicable law based on either of the approaches above, the applicable law is that of the country to which the contract "is most closely connected,"[26] again necessitating a comparative exercise.

Applicable law in the absence of agreement (consumers)

Where there is an agreement between a business and a consumer, the same exception applies in respect of applicable law as it does with applicable jurisdiction, but with one potentially significant difference; the language around directing remains the same, but the law in question is that of the country of his "habitual residence", rather than relating to his domicile.[27]

The problems with this approach for digital nomads

Although reasonably straightforward at first glance, the approach does not make it at all easy to determine which jurisdiction or law would apply in the case of services provided by digital nomads, for four reasons:

Firstly, the exceptions relating to dealing with consumers necessitate that a digital nomad service provider must determine whether the service recipient is a consumer before he can be sure of the applicable law or jurisdiction. With the overlapping of "consumer" services and "professional" services, identifying whether the person with whom you are dealing is a consumer is not easy, especially as the courts — at least in England — would seem to err on the side of finding that the party is a consumer unless there is overwhelming evidence to the contrary.

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[24] Article 4(1)

[25] Article 4(3)

[26] Article 4(4)

[27] Article 6

Secondly, the default jurisdiction for contract, unless otherwise agreed, is the place of performance of the contract. Whilst this might be appropriate in some cases, the provision of intellectual or information services has insufficient ties to the geographic world, such that determining "place of performance" is no easy task, with application of the regulation leading to uncertain, and likely unjust, outcomes.

Thirdly, the notions of "domicile" and "habitual residence" are rooted in physical location and real world geography. The strict nature of the legal concept of "domicile" is particularly problematic to a digital nomad leading a "locationless"[28] lifestyle since, under the Brussels regulation, the defendant to an action can always be sued in the courts of his domicile. What was envisaged as a protective measure, to give defendants the benefit of their home courts, becomes a risk, with the potential for a nomad to be dragged back to a country with which he only has ties as a matter of law, for the purposes of litigation.

Fourthly, a court seeking to ascertain applicable law may be required to conduct a balancing act to determine whether one country is "more closely linked" to the contract than another. The statutory guidance provided to help a court make this determination is insufficient. However, the greater problem is that the notion of "more closely linked" is embodied in legislation without a clear, overarching principle as to why a court should rule in a particular way — without this, an analysis of proximity might produce more certain results, but not necessarily more just results.

The following sections explore these four issues.

[28] For example, http://locationlessliving.com/

Who is a "consumer" — and how can a service provider tell?

Both the Brussels and Rome 1 regulations make particular provisions for consumers, affording them a greater degree of protection than a business actor. The rationale for this is reasonably clear, as acknowledged in the 2003 green paper on the Rome 1 regulations, which states that conventions in place prior to the regulations sought to differentiate between consumers, and "those who had knowingly taken the "risk of foreign trade."[29] Whilst the paper seems to argue that this notion is outmoded given the new regulatory approaches, the principle of granting greater protection to consumers remains a part of each of the regulations discussed here.

The approach to the definition of "consumer" taken in each of the regulations shares some commonalities, but is not identical. For the purposes of determining applicable law, a consumer is defined as "a natural person" who enters into a contract "for a purpose which can be regarded as being outside his trade or profession."[30] In respect of applicable jurisdiction, there is no requirement that the consumer is a natural person, leaving it open for companies and other legal personae to claim that they are consumers, but with the same approach of looking at the purpose of the contract in question, again as to whether it is "outside his trade or profession."[31]

Looking at a similar situation under English law, the Unfair Contract Terms Act 1977 seeks to limit the scope of a business's purported exclusion or limitation of liability when engaging *inter alia* with a party dealing as a consumer.[32] Like the regulations, the Act focusses on the nature of the behaviour, rather than the status of the actor, since it covers a party "dealing as a consumer" rather than someone who is a consumer. The Act states that, amongst other criteria, a party to a contract "deals as a consumer" in relation to a third party where he "neither makes the contract in the course of a business nor holds himself out as doing so." Demonstrating how difficult it is to determine whether this is the case or not, the Court of Appeal was required to rule on a case[33] in which a business had purchased a car, which turned out not to be fit for purpose — the dealer attempted to rely on contractual terms to exclude liability, since he considered he was dealing with

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29 "Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation" (COM(2002) 654), at s3.2.7.3(vi), page 31

30 Regulation 593/2008, article 6(1)

31 Regulation 44/2001, article 15(1)

32 s3, Unfair Contract Terms Act 1977

33 *R & B Customs Brokers v. United Dominion Trust* [1987] EWCA Civ 3

someone as a business, and appealed against the decision of the lower court that the company had, in fact, bought the car whilst "dealing as a consumer." The Court of Appeal upheld the decision, applying a House of Lords' ruling on a similar point[34] under the Trade Descriptions Act 1968, ruling that the business' purchase of the car was not "an integral part of the business carried on," and that, as such, a "degree of regularity" would be required before such a transaction could be considered within the course of that business.

The ruling, in effect, was that, despite the car being bought in the name of the business, the purchase being made by part-exchange of a vehicle owned by the business and the balance being paid by way of credit obtained through the dealer in the name of the business, the business dealt as a consumer. For nomads engaged in creative activities in particular — for example, in building and maintaining websites — the line between activities most likely to indicate business activity and those indicating consumer activity is very blurred indeed, making the situation even harder.

On this basis, short of asking a client outright whether they are dealing as a consumer or as a business, it is not clear how a service provider could satisfy themselves that they were dealing with a business for the purposes of jurisdiction. Whilst the apparent exclusion of companies and other non-natural persons from the definition of "consumer" for the purposes of the Rome 1 regulation might make the determination easier, it is still not a clear-cut situation. However, an approach based on asking a question does nothing to clarify the situation for cases without formalised agreements, nor does it prevent a third party from changing its status after the question has been asked — what might have started out as a contract for a business may cease to be so, or else the recipient may not have understood whether, as a matter of law, he was acting in the course of business or not.

Weak though such an approach might be, other than asking the question, it is not clear what else a service provider could do and, as such, a digital nomad may well have to resign himself to the possibility that he may be forced to defend his rights in a court of a different jurisdiction, and under a different body of laws, to that which he had intended, no matter how carefully he approaches the engagement. Equally, it is not clear to see how the law could be improved, since the core of the provisions is the protection of the consumer, which means that there can be no burden on the consumer to "opt-in" or make any form of positive act, since this would require the consumer to be aware of the legislative environment, and to act accordingly.

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[34] *Davies v. Sumner* [1984] 1 W.L.R. 1301

"Place of performance" and applicable jurisdiction[35]

The default jurisdiction for a contract, unless otherwise agreed, is the place of performance of the contract.[36] However, determining where this is, in anything other than the most straightforward of situations, is complicated, and is unlikely to lead to either certain or just outcomes.

In the example of tiling a bathroom, this is reasonably straightforward — the location of the bathroom determines the jurisdiction of the courts. As such, for nomads who earn by undertaking physical tasks in the country in which they currently reside, the likely jurisdiction for their agreements is that of the host country. This approach seems imminently reasonable.

However, for those providing services over the Internet — the "digital" nomads — the situation is far less clear. If I were commissioned to provide you with legal advice, where is the place of performance? The regulation provides that, in the case of the provision of services, the place of performance is

> "the place in a Member State where, under the contract, the services were provided, or should have been provided."[37]

If I were based in Germany, and provided you, as a German resident, with legal advice, then the place where the services were provided would, quite clearly, be Germany. However, such an example does no justice to the cross-border nature of the digital nomad's activities, where being in the same country as the service recipient is nothing more than a matter of chance. If, for example, I were to reside in Spain, and to agree to provide legal advice to a German national whilst he holidays in France, where are the services provided? If the country of origin principle were adopted, Spanish jurisdiction would apply; if the country of destination, French, even though the recipient may only be in France temporarily before returning to Germany.

None of these alternatives are more attractive than any of the others, particularly considering that a nomad may be travelling throughout the duration of a contract — the place in question is the place where the services were provided, rather than where the contract was made (although that in itself would likely be problematic to determine), and, where there is a chain of activity, such as a lawyer taking instructions, researching and thinking

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[35] Although Article 4(2) of the Rome 1 regulation refers to the "characteristic performance" of the contract, this is solely to determine which party is the service provider, so that the test of habitual residence can be applied. As such, it does not suffer from the same problems as the Brussels regulation

[36] Article 5(1), regulation 44/2001

[37] Article 5(1)(b)

about the problem, drafting guidance, sending it to the client, having a follow-up discussion and providing written answers to questions raised, various elements of the contract may have been performed in many different countries.

Other than where both provider and recipient are in the same country for the duration of the provision of the service, trying to determine the "place of performance" of an information or intellectual service is unlikely to assist in ascertaining the applicable jurisdiction; whatever result it produces is unlikely to be certain, and, in the case of a nomadic service provider, is unlikely to be just.

Fundamentally, the link between physical location and jurisdiction is weak in the age of delivery of services through cyberspace, since the place of performance has minimal, if any, relevance to the nature of the parties' relationship. Although the test of "more closely connected," as provided in the Rome 1 regulation, is not without flaws (as discussed below), at least the approach has the benefit of taking into account the realities of the situations, rather than adopting a purely geographic approach.

Domicile, habitual residence and a nomadic lifestyle

The notions of "domicile" and "habitual residence" occur as the default positions for jurisdiction and law respectively. Whilst usually seen as mechanisms for providing certainty and security, particularly to consumers, to a digital nomad living with no ties to any one geographic state, the concepts represent a degree of risk.

Domicile

The default jurisdiction under the Brussels regulation is the domicile of the defendant. However, by virtue of Article 5, an alternative jurisdiction is available in the case of contractual disputes — the place of performance of the obligation in question.

From the point of view of the digital nomad, the key risk is that this second jurisdiction is an alternative to, not a replacement for, the domicile of the defendant. As such, a digital nomad born in one Member State could, simply because of their parentage, always be sued in that Member State, even if they no longer have any ties with it, because of the laws on domicile which, whilst usually straightforward to determine,[38] are strict, and centred on real-world geography.

Irrespective of whether an individual has a permanent home, a person has a domicile for the purposes of the law — under English law, it is not possible for a person to be without a domicile.[39] Similarly, it is not possible for a person to have more than one domicile at any point in time,[40] and a domicile continues until a new domicile arises.[41] The starting point is the domicile of origin,[42] and this domicile never changes; where it is not possible to identify another domicile, the domicile of origin stands. It is possible for a secondary, weaker domicile to arise — a domicile of choice — where the person is resident in another country, and intents to resider there permanently or indefinitely.

On this basis, everyone, nomad or otherwise, has a domicile of origin. However, whilst someone who emigrates to another country, with the intent to remain indefinitely, may acquire a domicile of choice, a nomad is unlikely to do so, on the grounds that, by definition, a nomad does not intend to remain in one

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[38] COM(2009) 174

[39] *Mark v. Mark* [2006]1 AC 98

[40] *IRC v. Bullock* [1976] 1 WLR 1178

[41] *Winans v. Attorney General* [1904] AC 287

[42] The domicile of origin is the father's domicile where the baby is legitimate, and the mother's where illegitimate or else the father has died before the birth

place indefinitely. Whilst the trigger event for a change of country may be unknown, it is unquestionable that the person will move on, else the person ceases to be nomadic.

Even though imprecise, moving on is both foreseeable and reasonably anticipated and, as such, is likely to prevent the nomad acquiring a domicile of choice, leaving them only with their domicile of origin. Similarly, having some real-world connections may remain an inevitability. As the authors of the "Never Ending Voyage" blog note:

> "[i]t's impossible to get by without some kind of address and we are very grateful to Simon's mum who scans in and sends us any post we get and deposits the occasional cheque."[43]

It is not necessarily the case that relying on infrastructure of systems "back home," whether a postal address, bank account or otherwise, would make it impossible for a nomad to support a claim of a new domicile of choice, but it is unlikely that this would make the task any easier.

The effect of this is that it would be challenging for a digital nomad to override their domicile of origin, even if their links to that country are minimal, and arise solely through inheritance of the domicile of parents. In other words, despite the nomad having lived outside that country for the entirety of his adult life, he could be forced to defend an action in that jurisdiction.

As such, if the courts of the place of performance are, in the claimant's opinion, less attractive than the courts of the nomad's domicile, the nomad may be forced to submit to the jurisdiction of a court which has no bearing on the substance of the contract, or on the nomad himself, even though he may not consider himself to have any links to that country.

In practice, these concerns may have no real impact; they may be entirely theoretical, if there is no practical utility in exploiting the possibility. However, the fact that the possibility exists is sufficient to question whether, if the advancement of the information society, and of the single market, is to be a continuing goal of the European Commission, the use of one's domicile as a determinant for applicable law should be reconsidered, or else the scope of domicile reconsidered for those leading a genuinely nomadic lifestyle.

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43 http://www.neverendingvoyage.com/33-useful-resources-for-digital-nomads/

Habitual residence

"Habitual residence" of the service provider forms the default applicable law, if the parties do not choose a law to govern the contract, although this residency test is overridden by a country which is "more closely connected" with the contract in question. In the case of a consumer contract, if the provider is active, or else directs his activities, into the habitual residence of the consumer, it is the habitual residence of the consumer which forms the starting point in the absence of agreement. The risk to the digital nomad of the geographical construct "habitual residence" is lower than that of "domicile," for three reasons:

Firstly, unlike the situation relating to domicile, the Rome 1 regulations do not establish alternative choices of law — whilst there are different mechanisms for determining which law is applicable to the contract, only one law can be applicable; there is no scope for the claimant to choose under which law he wishes to bring a claim.

Secondly, the emphasis of the Rome 1 regulations is on choice by the parties to the contract; any concerns about the impact of "habitual residence" can be fully mitigated by "expressly or clearly" choosing a law applicable to a contract, although this may require more formality to an agreement than might otherwise be the case.

Thirdly, where the application of the law of the seller's habitual residence produces a nonsensical result, it is likely that there would be another law which would be more closely connected to the contract, which could be applied by the court by virtue of Article 4(3).

As such, although the notion of "habitual residence" may seem inappropriate in the context of a nomadic existence, the risk it poses is lower than that of the concept of domicile; a nomad concerned about the applicable law to an agreement would be advised to focus on agreeing applicable law in writing, although the risks around determining whether the service recipient is a consumer remain.

Determining whether a contract is "more closely connected" with a particular country

In a business to business relationship, the general principle for determining applicable law is that of agreement — the courts will attempt to apply the choice of the parties, where that choice is "expressly or clearly demonstrated."[44]

In the absence of choice, Article 4(1) lays down a series of tests, which courts are required to follow to determine the law applying to the contract. Where the tests do not prove conclusive, the court is required to apply the law of the country with which the contract is most closely connected.[45] Lastly, where it is clear from all the circumstances of the case that the contract is "manifestly more closely connected" with a third country, the laws of that country apply.[46] The CJEU has held[47] that, where there is doubt as to the applicable law, courts should utilise the "more closely connected" test to secure an outcome.

The rationale for this approach is to ensure certainty whilst reflecting the realities of the parties' arrangements. As recital 16 to the regulations provides,

> "the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation."

The language of "most closely connected" is far from helpful, however. As one commentator has argued the "escape" provisions of Articles 4(3) and 4(4) "are not correlated to an overarching principle."[48] He argues that

> "[t]o simply say that one should look for a "closer" connection gives courts little meaningful guidance and entails the risk of degenerating into a mechanical counting of physical contacts."

Indeed, the only guidance given by the regulations as to whether a country might be more closely connected with the contract than another is that

> "[i]n order to determine that country, account should be taken, inter alia, of whether the contract in

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[44] Article 3(1), regulation 593/2008

[45] Article 3(4)

[46] Article 3(3)

[47] See, for example, the opinion of the Advocate General, and the ruling of the CJEU, in *Color Drack GmbH v. Lexx International Vertriebs GmbH*, C-386/05

[48] "*Rome II and Tort Conflicts: A Missed Opportunity*" (2008), Symeonides, 56 American Journal of Comparative Law (2008), at page 25

> question has a very close relationship with another contract or contracts."[49]

In effect, the only guidance to a court in determining whether a contract is "more closely connected" to one country than to another is to examine the wider contractual situation. Whilst this might be of use in some situations, it is of no use for one-off or standalone agreements.

Consider, for example, the digital nomad with habitual residence in Portugal, currently based in Germany, providing professional website design services to a business in France. In the absence of agreement, the regulations would stipulate that the law of Portugal — the nomad's habitual residence — would apply, even though the French business may have no knowledge that the nomadic professional had any ties to Portugal; this would seem an unjust approach. However, if the law of Portugal were to be discounted, are the laws of France or the laws of Germany more closely connected to the situation? The approach of looking for a "very close relationship with another contract" may provide some guidance, but equally might not.

For example, one might envisage the situation in which a court viewed the relationship between the parties as a whole, rather than a series of one-off engagement; if there was an established course of dealing, this would likely provide a rebuttable presumption in favour of applying the same law as previous agreements. On this basis, if the first in a series of contracts had made express provision for law and jurisdiction, and latter agreements, whilst not subsidiary to the first contract, were made on an informal basis, the initial understanding of the parties is likely to flow through. Where the contracts in question are between the same parties, such an approach would seem to make sense, if only because it is akin to the standard "course of dealing" approach.[50]

However, if the courts would seek to take into account third party contracts, the result might be less appropriate, unless both of the parties in question had knowledge of this third contract. Even if both parties had knowledge of a third contract, the question of proximity of connection is difficult to imagine working in practice outside very obvious situations. For example, if a nomadic lawyer were to advise a client on a contractual arrangement, it is unclear whether the link between (a) the contract between the lawyer and the client for the provision of legal services, and (b) the contract on which the nomadic lawyer is advising was of sufficient proximity that the courts would be entitled to hold the applicable law clause the nomadic lawyer puts into the contract forming the

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[49] Recital 20

[50] *McCutcheon v. David MacBrayne Ltd* [1964] UKHL 4

subject of his advice should govern the professional services relationship too, where no choice of law is indicated.

An alternative approach would be to replace the provisions requiring determination of the "more closely connected" law with a statement of intent. For example, recital 14 to the Rome 2 regulations on the law applicable to non-contractual obligations,provides that

> "[t]he requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice."

If Articles 4(3) and 4(4) of Rome 1 were to be reformulated, instead providing that the court has discretion to override the strict principles of the regulations where doing so would strike a more suitable balance of legal certainty and the need to do justice in the particular case, the notion of determining whether a contract is "more closely connected" with one country than another becomes a mechanism which could be used for determining the just outcome, rather than being the only mechanism available.

The balancing act inherent in the Rome 2 regulations — finding an outcome which is both certain and just — may be easy to write, but likely much harder to apply in practice. For example, in the situation described above of the Portuguese nomad based in Germany providing remote services to the French company, the laws of France and Germany would seem to be equal in proximity, thus requiring an arbitrary determination as to which law applied, eradicating any semblance of certainty or foreseeability. Unless wider circumstances of the case lead to a clear approach to determining justice, the "just" outcome is far from certain.

Whilst a wise digital nomad would look to ensure that a documented agreement was in place, so that the choice of law prevails, the mechanisms of Article 4 exist to provide guidance in the absence of choice — to deal with situations outside the simple and straightforward documentary route. If these mechanisms do not provide a viable and efficient method for ensuring certainty and justice in transactions, those seeking to do business in a trans-national manner are placed at a substantial disadvantage to those doing business within a given territory; nomads, of course, are affected more than most by this.

Conclusion:

The steps which the European Commission has taken, in an attempt to ensure that trans-border commerce exists on a stable footing, are laudable. If we are to proceed on the basis that, despite Barlow's proclamations, cyberspace is not to be treated as a separate forum, and that real-world laws govern cyberspace transactions, just as they do a contract made by a trans-national phone call, the need for an appropriate mechanism for determining sovereignty over disputes — both in terms of venue and rules — cannot be understated. However, such a mechanism does not yet exist; the current rules, under the Brussels and Rome 1 regulation make but a fair first draft.

In revising the regulations, the Commission should bear in mind those who live most closely to the ideals of a single European marketplace — digital nomads. If it is not possible for those who attempt to live a borderless existence to work and contract in a fair and predictable climate, then one of the core objectives of the European community will have failed.

At least four areas are in need of reconsideration; most likely, there are others.

Firstly, the Commission must consider whether consumers, as a class, remain deserving of additional protection, or whether one standardised approach — whether universally raising the bar or lowering the bar — would be more appropriate. If the differentiation of consumers must remain, then there must be careful thought as to how a service provider can determine whether someone is dealing as a consumer since, without this, there is a lack of clarity at a fundamental level.

Secondly, the notion of "place of performance" is of no real relevance in the digital age; the Member State in which someone is sitting when they draft their legal advice to you has no bearing on the court most suitable to determine a dispute based on that advice. Whilst the concept remains of value for certain physical services, such as tiling a bathroom, other approaches could achieve the same certainty for these limited situations whilst being more appropriate for intellectual and information services.

Thirdly, the ability to sue a defendant in their domicile irrespective of its relevance to the contract at hand creates an unnecessary risk for those for whom domicile is no more than a legal construct. Restating the principles such that only one jurisdiction is available — as with the situation on applicable law — would reduce this risk. Better would be to remove the link between domicile and jurisdiction, recognising that the purely legal nature of "domicile" may have no bearing to the lifestyle of the party in question.

Fourthly, whilst a notion of setting choice of law to a country "more closely connected" to an agreement seems sensible, in practice, it could be improved. In particular, the test should be the country which would afford the parties the greater degree of certainty and justice, making "more closely connected" but one of the possible mechanisms for determining this. Such an approach would afford no lesser certainty, but would likely result in a more just outcome.

However, more radical approaches may also be justified; the ICC, in particular, has argued that, before cross-border legal action could be taken, a complainant must

> "make reasonable attempts to utilize a company's internal customer satisfaction mechanisms; utilize online alternative dispute resolution (ADR)"[51]

and only resort to legal action "if the dispute persists." The European Commission, towards the end of 2011, published a communication on ADR and ODR (online dispute resolution), arguing that such procedures would contribute to:

> "promoting access to swift, cheap and effective dispute resolution through alternative dispute resolution procedures as means to empower consumers and put them at the heart of the single market."[52]

Although aimed at consumers, if the objectives of speed, low price and efficacy were met, such an approach would likely attract businesses looking to resolve business to business disputes. In particular, if a trans-national dispute resolution service could exist, so that parties in separate countries could make their case in the country most convenient to them, without needing to travel to make a defend a claim, the concerns of which law applies, and where cases must be heard, would substantially diminish.

Such an approach should be attempted with caution, though — doing away with established rules would, in the early stages at least, result in considerable uncertainty, and Member States may be unlikely to want to give up established consumer protection measures. If, however, an ODR mechanism is not exactly the same across all markets within Europe, many of the same concerns as exist with the approaches today are likely to remain, with some markets being more beneficial for certain types of claim than others.

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[51] "*Jurisdiction and applicable law in electronic commerce*" (2001), ICC, available at http://www.iccwbo.org/id478/index.html

[52] "*Alternative dispute resolution for consumer disputes in the Single Market*" (2011), COM(2011) 791/2

Lastly, unless ODR was binding — for example, arbitration — then, whilst the question of law and jurisdiction may be suppressed, it is certainly not eliminated; the ICC's approach would allow recourse to the courts if ODR did not satisfy the parties, thus merely prolonging the time before parties need to consider issues of law and jurisdiction under the regulations.

Until there is a clearer, geographically neutral position, perhaps the only approaches for digital nomads are clearly phrased agreements, and an attempt to resolve any problems amicably, without recourse to courts — although running a new online dispute resolution business from a beach in Spain sounds attractive too.