TrustCoM

Deliverable

15

Report on Legal Issues Appendix B

Analysis of International Legal Issues Related to the TrustCoM AS Scenario

WP9 Legal Issues

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TrustCoM

A trust and Contract Management framework enabling secure collaborative business processing in on-demand created, self-managed, scalable, and highly dynamic Virtual Organisations

SIXTH FRAMEWORK PROGRAMME

PRIORITY IST-2002-2.3.1.9

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1 Introduction

This appendix to TrustCoM Deliverable D15 (Report on Legal Issues) documents the results from the legal risk analysis related to international issues in the TrustCoM ad-hoc dynamic services (AS) scenario.[1]

1.1 Focus on choice of law and jurisdiction

The analysis presented in this appendix focuses on issues related to choice of law and jurisdiction. These issues are relevant for contracts in VOs, since both VO participants and third parties, e.g. suppliers and customers, may be situated in different countries. The focus on choice of law and jurisdiction is partly motivated by a request from other partners in TrustCoM, who explicitly asked for legal guidance on this matter in relation to the work that was being performed with respect to the TrustCoM conceptual models.

Legal issues related to private international law are of key relevance to TrustCoM and, in particular, for the eLearning scenario. In a global digital network of VO participants, customers and third parties, interactions are of a global character, and legal relations are not limited to the territory of one national state, but may cover several national states. Hence, as will be explained in more detail below in Section 3.1, private international law is considered a major concern by many eBusiness actors.

Instead of addressing issues of private international law in the abstract, this report discusses the specific legal risks arising in the context of the TrustCoM AS scenario.

1.2 Risk analysis

The analysis is based on the CORAS model-based risk analysis methods and tools.[2] The CORAS risk analysis process is divided into the following 5 sub-processes:

1. Context Identification
2. Risk Identification
3. Consequence and Frequency Analysis
4. Risk Evaluation
5. Risk Treatment

[1] TrustCoM Internal Report ID 2.2.4, Requirements for Ad-hoc dynamic services Test Bed, dated 1st December 2004, Version 2 Draft C.

[2] Folker den Braber, Theo Dimitrakos, Bjørn Axel Gran, Mass Soldal Lund, Ketil Stølen, Jan Øyvind Aagedal. The CORAS methodology: model-based risk management using UML and UP. Chapter in book titled UML and the Unified Process. Liliana Favre (ed), pages 332-357, IRM Press, 2003.

Due to the nature of risks related to international issues and due to the lack of specific details about the operations of the eLearning marketplace, the frequency of unwanted incidents was found to be difficult to assess. An analysis of frequencies would have required more details both about specific transactions and on related consequences in all of the targeted jurisdictions. At this point of time, the scenario did not provide details at this level. Since it also was considered unclear whether a detailed frequency analysis and risk evaluation would have been of relevance to the TrustCoM project, we have limited this analysis to the identification of risks and to available treatments.

The analysis will be carried out along the following lines:

- The problem is as follows: The same legal case regarding a specific issue, based on a particular legal foundation and arising between two or more parties, may – at least potentially – be heard and decided by competing courts from any country (including countries outside the EU). The same is true for the applicable law: Potentially, any country's material law may be applicable when deciding the case.
- From the VO's (and its participants') perspective, the aim is to facilitate cross-border contracts and provide copyrighted content for VO partners and customers, making the digital content globally available. Ideally, this should be done based on a consistent set of norms, in order to optimize the rights management and to establish control over the legal framework.
- Hence, the VO needs to identify and define a strategic program of actions to reduce legal uncertainty about cross-border contracts and international access to copyrighted content.
- The question is if and to what degree the VO can autonomously utilize choice of law and court agreements and rules defining the place of performance, thereby limiting the applicability of some states' potentially competing legal systems. The ambition is to exclusively assign a case to a specific legal system with a predefined and known set of rules, thereby limiting or eliminating the possibility of conflicting rules about what is allowed, prohibited or mandatory. Similarly, the uncertainty could be reduced if the VO knew that all legal cases will be heard by a court in a jurisdiction where the procedural rules are known, where legal advice is obtainable and where legal protection and safeguards are availed to the parties.
- Hence, legal and technical methods that may reduce the number of applicable laws and jurisdictions are assessed in order to determine their scope, their limits and how they may be combined.

2 Context description

The goal of the risk analysis documented in this appendix was to analyse legal risks related to international issues in the TrustCoM Ad-hoc dynamic Services (AS) scenario, developed by TrustCoM partners Atos Origin and BT. This work was performed as part of the TrustCoM WP9 – Legal Issues – for public report D15.

Table 1 defines the main roles of the participants of the risk analysis. The main part of the risk analysis work was performed by the WP9 partners from SINTEF, NRCCL and KCL. British Telecom (BT) and Atos Origin were the authors of the scenario under analysis and played the role of the target owner during the risk analysis sessions.

Role	Name	Organisation	Background/Expertise
RA leader	Fredrik Vraalsen	SINTEF	Risk analysis
RA secretary	Bjørnar Solhaug	SINTEF	Logic and formal languages
Target owner	Paul Kearney	BT	Telecom industry, software engineering
Target owner	Tomás Zaragoza	Atos Origin	Software engineering
Legal expert	Tobias Mahler	NRCCL	Law
Legal expert	Dana Irina Cojocarasu	NRCCL	Law
Legal expert	Vebjørn Krag Iversen	NRCCL	Law
Legal expert	Olav Torvund	NRCCL	Law
Legal expert	Jon Bing	NRCCL	Law
Observer	Xavier Parent	KCL	Logic

Table 1 Assessment roles

The scenario description consists of two parts. The first part focuses on an Enterprise Network Operator offering loosely coupled federations of SMEs a secure and trusted ‘virtually hosted’ cooperation environment. By ‘virtually hosted’ we mean that the EN Operator hosts kernel services to which the participating SMEs federate their resources. The second part concerns a particular SME Enterprise Network specialising in eLearning services. Participants in the EN offer modular eLearning services that may be recombined flexibly. The focus of the present legal analysis is the provision of eLearning services by a dynamic VO. This part of the scenario was chosen, since it includes more specific details about cooperating partners in the VOs, which are necessary for the legal analysis.

In this eLearning scenario, a learner connects to an eLearning portal (where he may already be registered) which will offer access to a large variety of modularised and personalized learning resources with agent search support. The scenario covers the following actors:

- **Learners (end-users)** – individuals who need to acquire or complement knowledge and skills in a given domain.
- **Training Consultants (TCs)** – who interact with end-users to understand their training requirements and formulate them in a way that may be used to construct a personalised training programme. For the purpose of this analysis we assume that the services of the TCs include those of the **Training/eLearning providers**, who act as integrators, building bespoke training packages and co-ordinating their delivery to the end-user.
- **Learning Content Providers (LCPs)** – these provide modular resources that may be used with training packages.
- **The eLearning EN operator** – provides additional services such as a specialised portal, payment services via banks, etc. as well as generic services supporting trust, security and contract management in the operation of the VO.

A typical use case might go as follows:

The end user accesses the portal and selects a training consultant. This might be one the user has an existing relationship with, or might specialize in a particular topic or category of user. The training consultant interacts with the user to obtain training requirements, and then issues an invitation to selected training providers to offer bespoke courses that meet the requirements. The training providers respond with programmes constructed from modules offered by various content providers. Advised by the training consultant, the user selects an offer from one of the training providers. The selected training provider coordinates the delivery of the training as required by the user. The training consultant may maintain and involvement in this phase to monitor the user's progress and advise on changes to the programme. At the end of the course payments are distributed to the various service providers subject to user satisfaction and fulfilment of obligations.

The scenario features Virtual Organisations (VOs) on two levels:

- Enterprise network: The EN itself is (or at least has many of the characteristics of) a VO of a relatively static type;
- Virtual Organisation: EN participants from dynamic VOs within the context of the EN to provide aggregated services to the client, by combining component services from different participants.

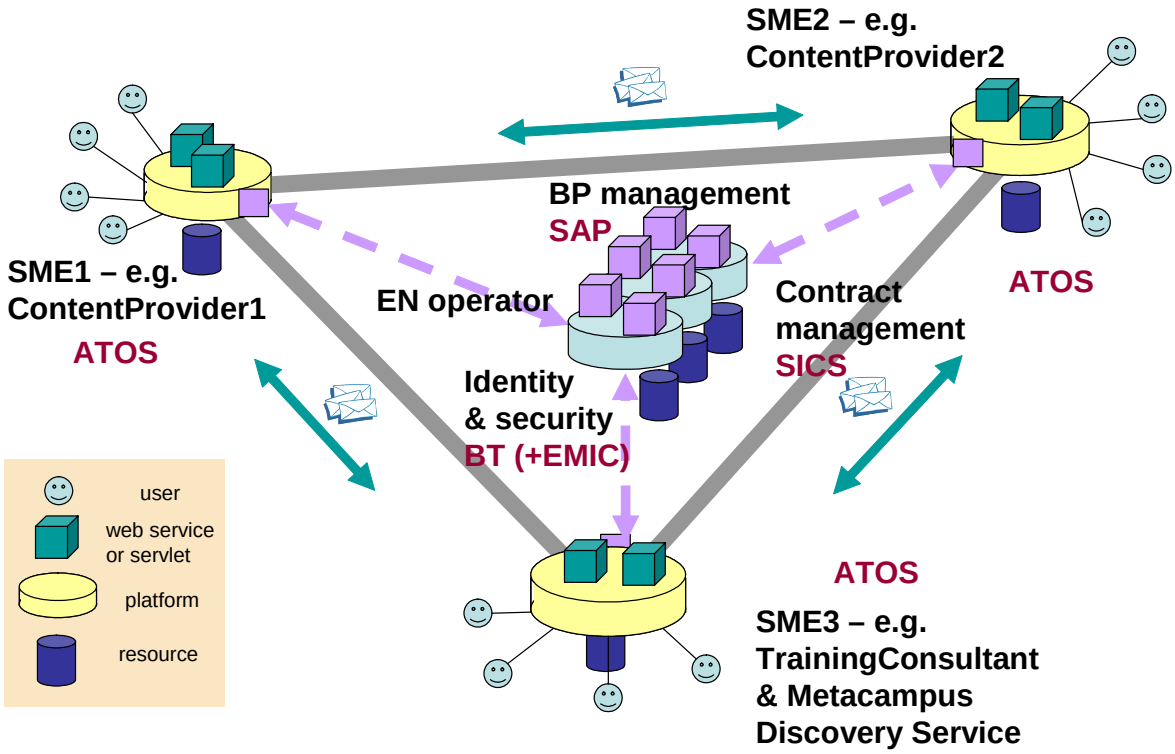

Figure 1 AS scenario organisational structure

Our analysis focuses on the agreements and contracts that need to be created between the various actors: EN members, VO members and customers. These agreements control the activities and information flow during the operation and dissolution phases. As we have seen, the TC helps the eLearning customer select the most appropriate courses and provides custom training courses tailored to users' needs and circumstances. Due to the central importance of the TC, this analysis will focus on the risks from the perspective of the TC.

In order to be able to assess specific legal risks in an international context, the general scenario was made more specific for the purpose of this analysis, by adding names to some of the actors and by defining where the actors have their statutory seat. The analysis concentrated on the relations between the Training Consultant (whose statutory seat was defined to be in Spain) and a number of Learning Content Providers, including AnyContent (Germany), ManiaContent (Romania) and NoContent (Norway). A possible contractual structure for the scenario is depicted in Figure 2.

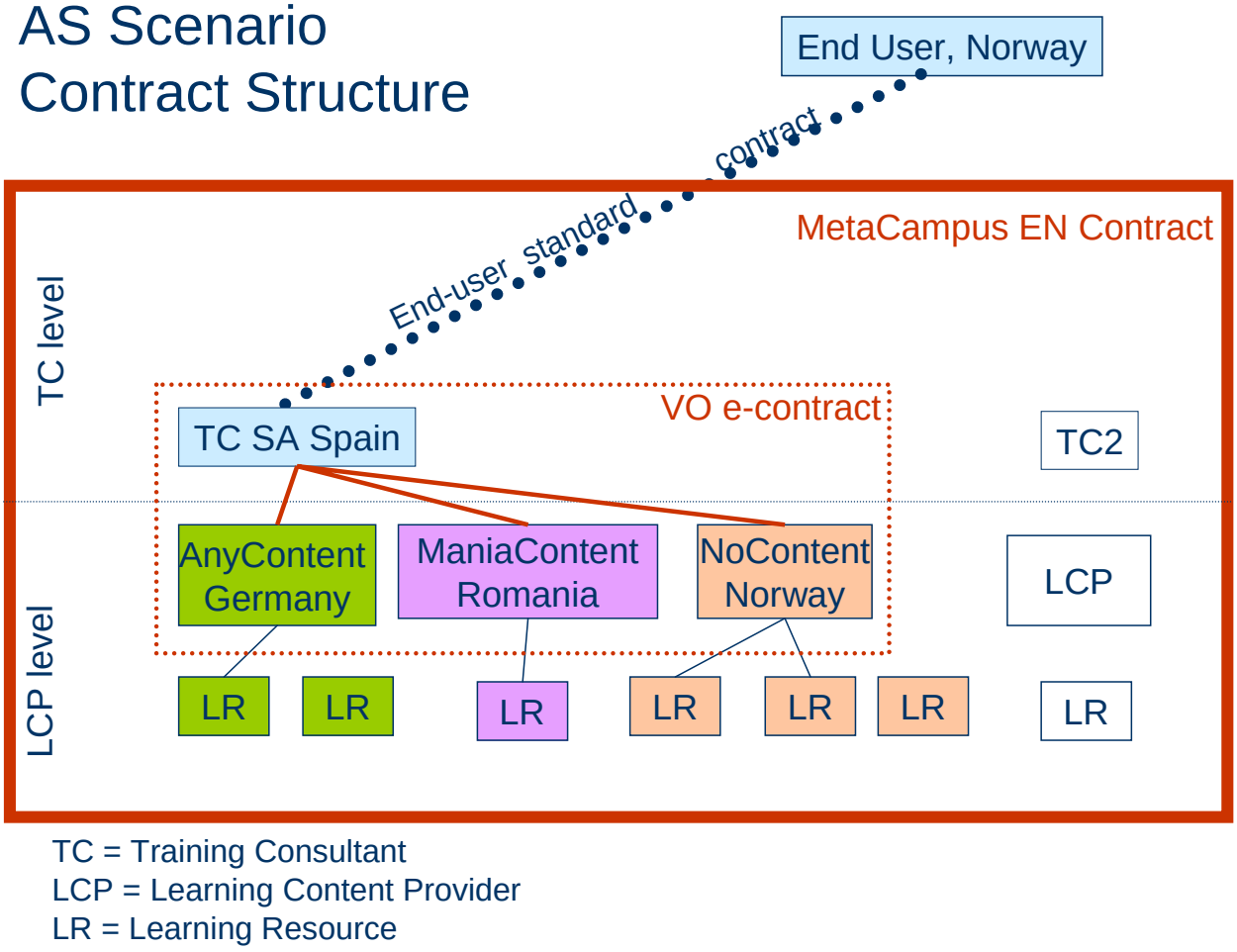

Figure 2 AS scenario contract structure

A number of contracts should be put in place for the scenario to be operable: First, there will be a Metacampus Enterprise Network (EN) contract, regulating the general co-operation among the EN members. In our example these members are training consultants and learning resource providers. Second, once a business opportunity has arisen (i.e. an end-user is willing to perform a suggested learning path), there will be an internal contract defining how the aggregated services will be performed. The third contract level will be an end-user contract, most likely based on a standard agreement. Amongst the issues discussed with the TrustCoM partners who had developed the scenario, was who should be the contractor in relation to the end-user. In principle, there are at least two options: The end-user can contract with the training consultant, who then sub-contracts with the respective learning content providers. Alternatively, the TC can act as a representative of the LRPs, which would allow a contract between the end-user and all of the VO members. The difference is in essence whether the end-user can claim fulfilment of the contract from all partners, or if he is confined to the TC. The following analysis includes both options: In general it will be presumed that the end-user has a contract only with the TC, who then subcontracts with other VO participants. To the degree the second contract model (customer contracts with all/several VO

members) leads to different problems or risks in an international context, this will be made explicit.

The Metacampus EN contract could be based on existing templates for the collaboration of SMEs, for example the template drafted by the Legal-IST project in relation to SME clusters.[3] This contract template envisions a management structure for the EN, i.e. a management committee. This management committee could represent the EN in relation to third parties, including, for example, in a contract with the EN operator.

[3] www.Legal-IST.org.

3 Risk Identification

This section presents selected results of the risk identification sessions held together with TrustCoM partners Atos Origin and BT. This appendix covers merely the identified risks related to international legal issues. Other risks, e.g. related to access to digital content in the eLearning Marketplace, will be covered in our next report.

Due to the fact that the present study does not analyse the frequencies of the identified incidents, the use of the term risk in this Appendix is not always in accordance with the ISO vocabulary for risk management. As mentioned in Section 2 of the main report (TrustCoM D 15), the term risk is in the ISO vocabulary understood as a combination of an unwanted incident and its frequency. In this Appendix, the term risk is instead used as merely referring to unwanted incidents, which is more in line with the traditional use of the term risk in legal literature.

3.1 Concerns about being sued abroad

VO partners engaged in the eLearning marketplace will interact with individuals and organisations that are situated in different countries and jurisdictions. A survey conducted by the American Bar Association and the International Chamber of Commerce identified that the risk of being sued abroad was a primary concern among the responding e-commerce companies.[4] Traditionally the questions of jurisdiction and choice of law have been linked to geographical factors.[5] However, geography and boarders are more difficult to assert in digital networks. There is therefore a certain level of uncertainty as to how the rules of jurisdiction and choice of law are to be applied when disputes arise between parties who interact through a digital network.[6]

This uncertainty could also affect VO partners like the TC in the above mentioned eLearning scenario. The threat relates to the possibility of being hauled into a court in a country where the TC or other VO members are not accustomed to operating in. Moreover, it will be conceived as risky if a VO-related contract would be interpreted according to the law of a foreign country, for which the contract was not intended. This could lead to additional human and economic costs for the affected party: Conducting a lawsuit in a foreign country will possibly increase the costs of the trial and reduce the probability of a favourable outcome of the trial for the TC or

[4] The ABA/ICC Global Internet Jurisdiction Survey available at www.mgblog.com/resc/Global%20Internet%20Survey.pdf.

[5] See e.g. Article 2 of the COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (commonly referred to as Brussels I Regulation), and Article 4 (1) of the EC Convention on the law applicable to contractual obligations, Rome, 1980 (commonly referred to as the Rome Convention).

[6] Georg Philip Krog ”Jurisdiksjon og lovvalg i et globalt marked for digitale ytelser”. Nordisk konferanse i Rettsinformatikk 2001 Oslo 27.-28. September. Download: 15.06.2005 http://folk.uio.no/georgpk/artikler/nkri_2001.doc.

VO. The costs could for example be connected to logistics, to the uncertainty that follows with operating in an unknown environment and to the language used by the courts. Another threat or uncertainty is related to the fact that courts in principle use national rules on choice of law. This may again lead to a risk of losing lawsuits in certain jurisdictions because the contracts used give raise to unforeseen rights in accordance with the law applied by the court. Some of the above mentioned risks are depicted figure 3 below.

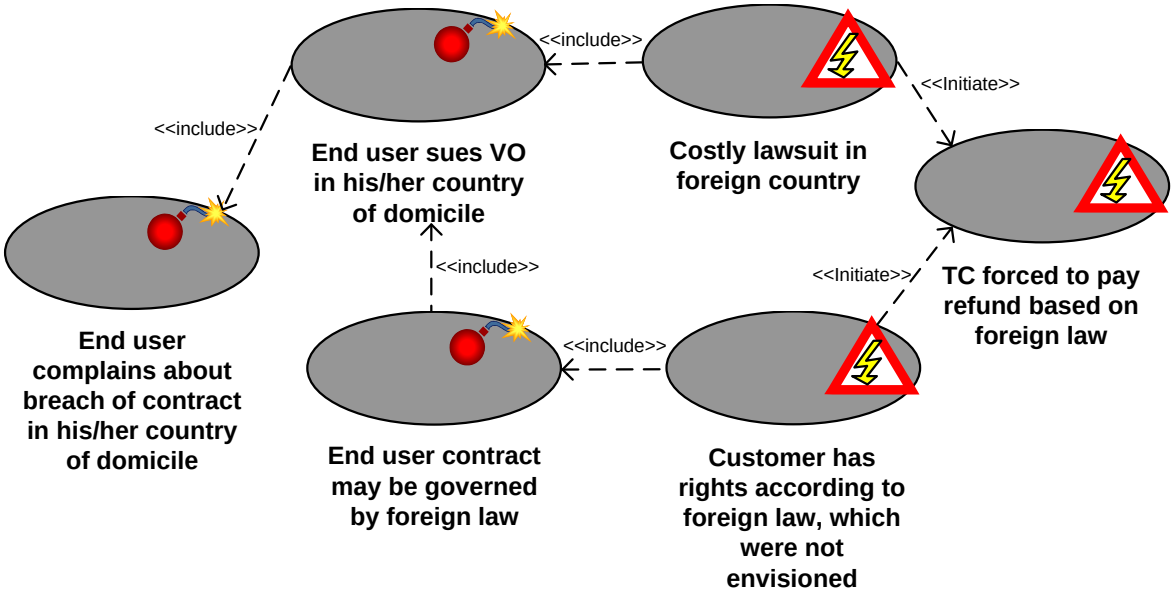

Figure 3 Threat diagram international issues

3.2 Jurisdiction and choice of law

When a legal dispute between persons or enterprises located in different states needs to find its solution in a court of law, it must be clarified which court has the competence to hear and decide the case. It will then be determined which country's rules apply to the dispute (as it is possible that the competent court will have to apply a foreign law during the proceedings).

Within the EU, the question of jurisdiction is determined by the Brussels I-Regulation.[7] The Regulation's predecessor, the Brussels Convention, had been adopted in 1968 by the states of the EEC with the aim of facilitating what was commonly referred to as the "free circulation of judgments" between the contracting states, that is enabling a simplified procedure for the recognition in country A of a court decision reached in country B. The idea was that as long as different courts apply the same criteria in determining the jurisdiction, the parties could be more certain that a similar conclusion will be reached no matter the court hearing the case. However, the Convention was not meant to apply in an on-line environment In order to cope with the realities of E-commerce, the Convention was replaced with a Community law instrument, i.e. the Brussels I-Regulation of 22 of December

[7] Supra, note 5.

2000. The purpose of the regulation was still the free circulation of judgements throughout the EU. The Regulation thus covers jurisdictional issues as well as recognition and enforcement of judgements in the EU. Between EFTA-countries the question of international jurisdiction is regulated by the Lugano Convention[8]. The two sets of rules are for all practical purposes overlapping. Reference will thus only be made to the Brussels I-Regulation.[9]

Each country has incorporated criteria in its national laws, which identify the applicable law in different sets of circumstances. However, due to the importance of the contractual relations for the international trade, the Rome Convention on the law applicable to contractual obligations provided for an unified regime in contractual matters arisen between EEC member states.

The following section will illustrate types of risks related to choice of law and jurisdiction, relevant for the VO's activity. The risk assessment will be carried out from the perspective of the Training Consultant (TC). As mentioned above in section 2, it will be presumed that TC is the only party to the contract with the end-user and that TC subsequently sub-contracts with the Learning Content Providers (LCPs).

Many of the rules on jurisdiction and choice of law provide a particular protection for consumers. The eLearning scenario involves a number of contractual relations, some of which may involve consumers: The EN contract and the internal VO contract are B2B contracts, since all parties are professionals. The contract with the end-user might be either B2B, e.g. where a business is purchases learning services for employees, or B2C, where the end user is a private person interested in acquiring skills and competencies outside his trade or profession. In the latter case, as stated both in the Brussels I-Regulation[10] and the Rome Convention[11], the end user is considered to be a "consumer" and due to its weaker contractual position, will enjoy special protection.

Businesses can choose any country's law to be applied for a B2B relation; it does not need to be related with their operations. Moreover, once a dispute has arisen the contract parties in a B2B relation can subject that particular case to the law of another country than the one specified in the contract.[12] For the VO-internal relations it is therefore possible and advisable in order to avoid disturbance, to define both choice of law and jurisdiction in all internal contracts. Hence, for the purposes of the following analysis, it will be presumed that the relationship between

[8] CONVENTION of 16 September 1988 on jurisdiction and the enforcement of judgments in civil and commercial matters (Lugano Convention), available at http://www.curia.eu.int/common/recdoc/convention/en/c-textes/lug-idx.htm.

[9] Another set of jurisdictional rules that may become more relevant in the future is being produced by The Hague Conference on private international law (the HCCH). The HCCH is an intergovernmental organisation working for the progressive unification of the rules of private international law. The organisation just completed a convention on choice of court agreements, which however is not yet applicable. For further information see the HCCH homepage at: http://hcch.e-vision.nl/.

[10] Article 15.1 of the Brussels I-Regulation

[11] Article 5.1 of the Rome Convention

[12] Article 3 of the Rome Convention.

the parties in the VO is regulated by in the VO agreement through clauses explicitly choosing one country's law and exclusive jurisdiction. In the absence of such clauses in the VO agreements, similar issues as those discussed below, will also arise regarding the internal relations of the VO.

3.3 Jurisdictional Issues

As mentioned in the previous sections, the issue of jurisdiction relates to determining which country's court is competent to hear and decide a certain case. Since the choice of law depends to a certain extent on the chosen jurisdiction, the latter needs to be clarified first.

3.3.1 The domicile of the defendant

The general rule about jurisdictional issues in the EU/EFTA is that a person is to be sued at the place where he or she is domiciled.[13] According to Article 60 of the Brussels I-Regulation "a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

- statutory seat or
- central administration or
- principal place of business."[14]

Consequently, a consumer wanting to file a lawsuit against the TC, for example for delayed provision of the learning material, can do this in the court where TC is domiciled. In order to asses where the TC is domiciled, the court has to apply the law which is applicable to the contract. It may be difficult to establish where the TC has its seat, central administration or principal place of business. All of these criteria are linked to geographical factors. This would be even more complicated if the end-user wanted to sue the whole VO, which may not fulfil any of these criteria. The placement of servers may play a role, but the European Court of Justice (ECJ) has so far not decided whether or not servers of a company located in different jurisdictions are a sufficiently strong connecting factor.

Therefore, the information provided by the VO members is crucial. The VO and its members provide an eLearning "service […] for remuneration, at a distance[15], by

[14] The place of the domicile of a company according to Article 2 is to be interpreted according to the applicable law. Thus, Article 60 constitutes an exception from this rule and is to be interpreted according to an understanding that is common to all of the community.

[15] "At a distance" means that the service is provided without the parties being simultaneously present (in accordance with the DIRECTIVE 98/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, Official Journal of the European Communities, L 217/18 et seq).

electronic means[16] and at the individual request of a recipient of services[17]", so they are regarded as "information society service providers" by the EC E-Commerce Directive.[18] Among the obligations[19] under this Directive is also the duty to provide easy, direct, permanent access to, *inter alia* "its name and geographic address at which they are established". This information will help the end-user identify at least one place to sue, i.e. in the country where the TC claims to be established.

Exceptions to the above mentioned main rule (domicile of the defendant) are contained in Section II of the Brussels I-Regulation, which is titled "Special jurisdiction". The rules in this section will, in certain well-defined matters, provide the plaintiff with a choice regarding where he wants to sue. These exceptions, which will be discussed in the following subsections, allow the defendant to be sued in (i) the place of performance of the contract, (ii) the domicile of the consumer or (iii) the domicile of a co-defendant (e.g. a VO partner). In addition, we will address the jurisdictional issues related to tort, delict or quasi-delict, which are relevant e.g. in relation to copyright infringements.

3.3.2 Place of performance of the contract

The training consultant also faces the possibility of being sued for contractual breaches in the place where the breached contractual obligation was or should have been performed. According to Article 5.1 of the Brussels I-Regulation the term "place of performance" is to be determined in accordance with the nature of the obligation assumed, i.e. delivery of goods or provision of services. Regarding the sale of goods, the place of performance is the place where under the contract the goods were or should have been delivered. For contracts regarding services, the place of performance is the place where the services were or should have been provided.

However, in relation to the eLearning content provided in our scenario, the traditional dichotomy between material goods and services is more difficult to follow. In relation to digital content it has been suggested that one should examine

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[16] "by electronic means" signifies that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means(in accordance with the above mentioned Directive 98/48/EC)

[17] "at the individual request of a recipient of services" means that the service is provided through the transmission of data on individual request (in accordance with the above mentioned Directive 98/48/EC)

[18] DIRECTIVE 2000/31/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), Official Journal of the European Communities L 178/1-16.

[19] Other obligations are to provide information regarding (a) the name of the service provider; (c) the details of the service provider, including his electronic mail address, which allow him to be contacted rapidly and communicated with in a direct and effective manner; (d) where the service provider is registered in a trade or similar public register, the trade register in which the service provider is entered and his registration number, or equivalent means of identification in that register.

what rights that are actually transferred.[20] Where the user is only given the right to download a work on a physical medium, but not to make further copies, the contract resembles more to a license for a service, and not a sale. This could in our view be the case with the eLearning content provided by the VO to the end-user. Hence, it is conceivable that the place of performance of the obligation is the place of the download.

3.3.3 Domicile of the consumer

According to Article 16 of the Brussels I-Regulation, a consumer domiciled in a member state has the choice of filing a lawsuit based on contractual obligations either before the court in the place of his domicile or in the state where the other party is domiciled. The condition for this choice is that the defendant, in our case the TC, "pursues commercial or professional 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[21], and the contract falls within the scope of such activities". In the above mentioned example (see Figure 2) the domicile of the consumer was presumed to be Norway and as the domicile of the TC was Spain. Hence, since the eLearning services presumably will be directed to Norway (among other states), the consumer could choose between filing a case in Norway or in Spain.

In practice, this choice can not be departed from before a dispute has arisen, unless both parties are at least habitually resident in the same member state.[22] However, after the dispute has arisen, the TC could reach an agreement with the consumer and subject the dispute to a different jurisdiction.

3.3.4 Courts in the country of a VO partner

Article 6 of the Brussels I-Regulation permits a person to be sued as a co-defendant in the courts where another defendant is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings.[23]

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[20] E.g. Emily M. Weitzenböck*."Determining Applicable Law and Jurisdiction in contractual disputes regarding virtual enterprises"* In: Pawar, K. S.; Weber, F.; Thoben, K.-D. (Eds.): ICE 2002. Proceedings of the 8th Int. Conf. on Concurrent Enterprising: Ubiquitous Engineering in the Collaborative Economy. Rome, Italy, 17-19 June 2002, pp.27-34; Østergaard, Kim: Den virtuelle forhandler – "Nye" internationale privatretlige problestillinger? In Julebog 2000, Jurist-og Øknoomiforbundets forlag, Copenhagen 2000, p. 123-149.

[21] Article 15 (1) c) of the Brussels I Regulation. For a detailed analysis of the interpretation of the terms" pursues … in" and " directs …to", see Lorna Gillies, *A review of the new Jurisdiction Rules for electronic consumer contracts within the European Union*, in JILT Electronic Journal, 1/2001, pp.1-20, and especially Joakim S. Øren *International Jurisdiction over consumer contracts in e-Europe*, ICLQ vol. 52, July 2003 pp. 665- 696. In particular, it is unclear whether the term "directs … to" is to be understood merely as a positive direction, or if it also includes the avoidance of direction, see Georg Philip Krog *"The Brussels I Regulation Article 15.1C)"* in Yulex 2004, Oslo 2004.

[22] See Article 17 of the Brussels I Regulation.

[23] See case 189/87 Kalfelis v. Schröder, Münchmeyer, Hengst and others.

This rule is of particular relevance to VOs, where multiple partners could be sued together.

In the case Kalfelis v. Schröder, Münchmeyer, Hengst & Co., the ECJ held that there must be a link between the claims made against each of the defendants. This requirement seeks to avoid that a plaintiff can file a claim against a number of defendants with the sole object of ousting the jurisdiction of the courts of the State where one of the defendants is domiciled.[24]

As mentioned above in section 2, the end-user contract in the eLearning scenario is presumed to be set up between the TC and the customer. Hence, we assume that the customer does not have a direct contractual relation with the LCPs. However, in some states' legislation it is possible for a contracting party to sue subcontractors for breach of contract even though there is no direct contract between the two parties.[25] This could make it possible for the customer to sue the learning content provider directly, if the material provided by the LCP does not meet the standard agreed upon with the TC. The plaintiff may in such a case also want to sue the main-contractor (TC) for breach of contract. According to Article 6, the customer may sue the TC in the courts of the domicile of the LCP, if there is a close enough connection between the two claims. The TC can therefore theoretically be sued in all of the countries of domicile of the LCPs involved in the agreed learning path.

If one makes the contrary assumption, i.e. that the VO operates jointly as a contracting party, the threat of being sued in the courts of the LCPs domicile according to Article 6 increases. If the information provided by the VO is deficient, it may be difficult to identify the central administration or central place of business of a VO in order to sue the VO according to Article 2. In the absence of a central place of business or administration of the VO, the customer will have to find another competent court if he is to make a legal claim against the VO. If all of the VO members are partners to the contract with the customer, the customer can choose one of the members' domicile courts and file his claim there against all of the VO members according to Article 6.

3.3.5 Jurisdiction relating to tort, delict or quasi-delict

The eLearning scenario deals to a large extent with access to digital content, which may be copyright-protected. Hence, there is a certain risk of disputes about copyright breaches, either between VO members, or involving third parties, e.g. authors, intermediaries like publishers, or other right-holders. Matters relating to jurisdiction in cases of copyright infringements are regulated by the Brussels I-regulation Articles 2 and 5.3. The right holder can, according to Article 2, sue an alleged infringer in the courts of his domicile.

According to Article 5.3, the plaintiff can choose the court where the harmful event occurred in matters relating to tort, delict or quasi-delict. Thus, the holder of a

[24] See case 189/87. Judgment of 27/09/1988, Kalfelis / Schröder and others.

[25] See for example Norwegian Sale of Goods Act 1988, § 84, available at http://www.jus.uio.no/lm/norway.sog.act.1988/doc

copyright can choose to sue the alleged infringer in the courts of the place where the infringement occurred or may occur (Article5.3). However, the cause of damage often consists of a series of actions. If these actions are committed in different states, it can be difficult to define the relevant place of damage in terms of Article 5.3. The ECJ has interpreted the meaning of the phrase "the place where the harmful event occurred" in cases where

1. the place of the event giving rise to the damage is not the same as the place where the damage occurs, when it is a single instance of damage;[26]
2. the plaintiff has suffered indirect damage;[27]
3. it is difficult to define the place in which the damage occurred, because the event that caused the damage gave rise to more than one instance of damage.[28]

In the Bier-case, the ECJ held that the phrase encompassed both the place where the damage occurred and the event giving rise to the damage. In the later Dumez-case, the Court stated that Article 5.3 supported the need for a close connecting factor between the dispute and the court hearing the case. The Court held that the place where the harmful event occurred according to Article 5.3 was the place where the action that gave rise to the damage directly produced its harmful effects upon the person or the property.

The general rule in copyright law is that both the manufacturer of the infringed copyrighted material and anyone who sells or deals with the property is qualified as infringers.

It may be that the VO is sued by an independent third party for the infringement of a copyright connected to the learning material. If the learning content provider through the publication of the learning material infringes a copyright, he can be sued in the court of the place from where the copyrighted material was unlawfully distributed (Article 5.3). If the material is used in the product that the TC delivers to the customer, the TC can also be sued in the court of the place from where he distributes the copyrighted material.

In cases involving more then one infringer, the Brussels I-Regulation enables the rightholder to sue both infringers in a court where one or a number of them are domiciled, (Article 6 above).The principal provision of Article 6.1 entitles the rightholder to start the lawsuit in the court of the infringer's domicile or before a court where the infringement allegedly took place, and then join other related defendants into the suit. As mentioned above, the cases must however be so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgements resulting from separate proceedings. Thus it may be that the TC may in a case involving a copyright infringement be sued in the

[26] C-21/76 Bier v. Mines de Potase d'Alsace SA

[27] C-220/88 Dumez France and Tracoba SA v. Hessiche Landesbank

[28] C-68/93 Shevill v. Presse Alliance S.A.

court where a LP allegedly caused damage, if the rightholder chooses to sue the LP first.

3.4 Choice of Law

Once the competence of the court has been established, the applicable law needs to be determined, that is to determine whose country's material laws will be examined to reach a decision on the facts of the case. In this context we need to distinguish between, on the one hand contractual matters and on the other hand non-contractual obligations and tort, e.g. copyright infringements.

3.4.1 Choice of law in relation to contracts

As mentioned above, different states may use different rules to determine the applicable law. Where a dispute involves litigants from EU states, the Rome Convention may be applicable. The Convention applies to all contractual obligations, except certain cases mentioned in Article 1. [29]

Consumer contracts

If the contract is with a consumer, the Rome Conventions Article 5.3 states that where no law is chosen in the contract, the applicable law is that of the state where the consumer has his habitual residence.

Article 5.2 provides that even if there is a choice of law clause in a consumer contract, this can not have the effect of depriving the consumer the protection "afforded to him by the mandatory rules of the country in which he has his habitual residence,

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the necessary steps on his part for the conclusion of the contract or
- if the other party or his agent received the consumers order in that country".[30]

[29] For the sale of goods from business to business the United Nations Convention on the International sale of goods may be relevant. The Convention does not in it self regulate the question of choice of law, but might be applicable as substantive law between parties situated in a state which is a member of the Convention. If only one of the contracting parties has his place of business in a contracting state the CISG will be applicable if it is determined through the choice of law rules see CISG Article 1. For example, Norway has made the Hague Convention on the applicable law on the international sale of goods applicable to consumer contracts. Norway is not a member of the EU a thus applies its own choice of law legislation, which is very similar to the rules in the Rome convention.

[30] Note that there is an ongoing discussion about whether Article 5 should be better targeted at distance-contracts e.g. concluded in an Internet environment. The discussion is based on a green paper issued by the Commission, cf. "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 final.

This rule is mandatory and can not be derogated from in contract.[31]

When offering learning material over the Internet, the VO will presumably be contracting with consumers in many EU member states, or even with third countries, which will result in some degree of uncertainty regarding the applicable law in those contracts.

Contractual choice of law and rule of closest connection

If the contract partner is not classified as a consumer, the choice of law can be based on the basic principle of the Rome Convention, stated in Article 4.1: It is up to the parties to choose the applicable law in a contract. Hence, it is advisable that parties setting up a VO choose a law to govern the VO contract(s).

In the absence of a choice of law clause, the main rule is stated in Article 4.1.

> *"To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country."*

In the legal doctrine this is referred to as the closest connection method. The court must assess all factors that are connected to the contract and thereby determine which country's law is most closely connected to the contract.

Article 4.2 contains some presumptions to clarify how to apply the closest connection method:

> *"Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated."*

In the preparatory Giuliano-Lagarde Report[32] the term *"characteristic performance"* is explained as

> *"the performance for which the payment is due, i.e. depending on the type of contract, the delivery of goods, the granting of the right to make use of an item of property, the provision of a service, transport, insurance, banking operations, security, etc., which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction."*

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[31] See Article 5.2 of the Rome Convention

[32] Report on the Convention on the law applicable to contractual obligations by Mario Giuliano Professor, University of Milan and Paul Lagarde, Professor, University of Paris I, O.J. 1980, C282/p. 1 – 50. This is a preparatory work for the Rome Convention and consequently a relevant source of law.

The geographical location of the characteristic performance is the country in which the party liable for the performance is habitually resident or has his central administration or any other relevant place of performance.

The characteristic performance in the scenario will be the delivery of the learning material. The applicable law, according to Article 4.2, is the law of the principal place of business of the TC.

A VO as a contracting party

The use of the presumption in Article 4.2 becomes more difficult, if the VO operates as the contracting party and is not set up as a legal entity and the VOs members are situated in different countries. One would then have to assess whether the contract or any part of it is more closely connected to any other country.[33] One would have to find other factors that connect the contract to a certain country. The court has a margin of appreciation and has to make an individual assessment of the circumstances of the case. One should look at how the VO is set up and where it, from the customer's point of view, appears to be situated. For example, if the website of the VO is in German, the site has a .de web-address, the TC is located in Germany and the contracts between the members of the VO was entered into in Germany, then the contract will probably have a close connection to Germany.

3.4.2 Choice of law relating to copyright infringements

As mentioned above, the issue of applicable law is individually regulated in each state. Unlike the choice of law rules in contractual matters, the choice of law rules for tort and non-contractual obligations are not harmonised within the EU. However, the European Commission has issued a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations commonly known as "Rome II".[34] The Regulation is intended to apply to every litigant in European courts. Thus it is highly uncertain for the TC which law will apply to a dispute over a copyright infringement.

[33] See Article 4.5 of the Rome Convention

[34] Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations Brussels, 22.7.2003 COM (2003) 427 final. For further information see http://europa.eu.int/eur-lex/en/com/pdf/2003/com2003_0427en01.pdf

4 Treatments

As explained above, the provision of eLearning content by an enterprise network or a virtual organisation implies a number of uncertainties with respect to choice of law and jurisdiction. This section will present some treatments or measures, which may be used in order to reduce these uncertainties. These methods include information provision, geo-identification techniques, self-identification of the contract partner and, contractual clauses, in particular those choosing the applicable law and jurisdiction and a clause that defines the place of performance. Available treatments are illustrated in Figure 4 below.

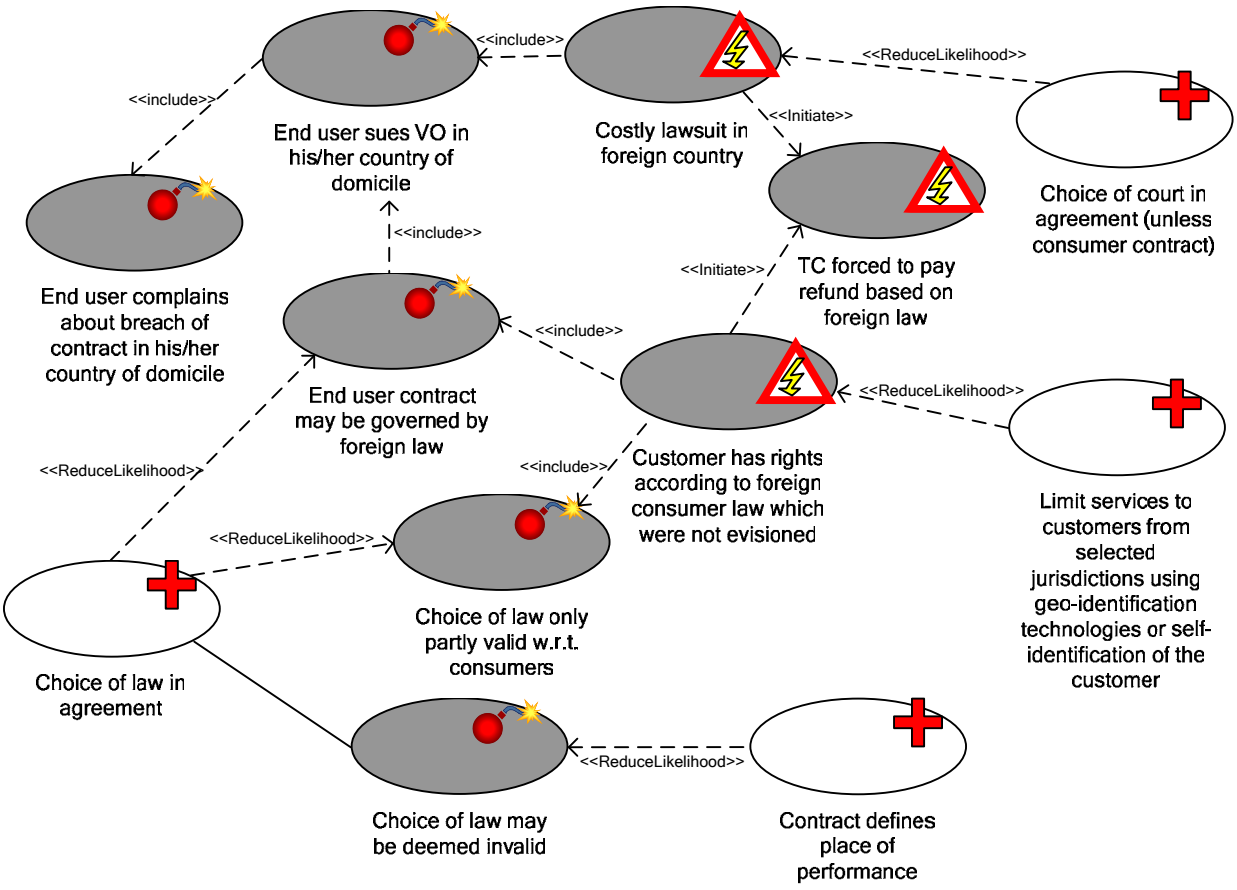

Figure 4 Treatments related to choice of law and jurisdiction

4.1 Information to be provided

As mentioned above in Section 3.3.1, any provider of information society services is obliged to provide certain information, according to national rules implementing the E-Commerce directive. This required information will at the same time allow the

customer to identify the domicile of the party he wants to sue, which again may reduce the number of lawsuits in other countries.

4.2 Geo-identification

There are many instruments that make it possible to locate the user of a website either with or without this persons consent. These instruments are usually referred to as geo-identification instruments. There is however not at the present time a standardised method for such identification. The collection and use of such information has to be in accordance with the applicable law, either based on the consent of the costumer or on legislation. If these geo-identification instruments are combined with a program that blocks the access from certain territories, the VO members can choose which territories they want to interact with, and at the same time block out all other territories.[35] Thus, the VO will be able to limit the possible number of jurisdictions and laws.

4.3 Self-identification

Geo-identification instruments do not have the ability to determine in what pretext the customer has entered the website. Is he acting as a consumer or is he a professional, is he under-aged? The question of legal age and whether the person is a consumer may effect the questions of jurisdiction and choice of law. Many countries protect consumers and under-aged from having to accept jurisdiction- and choice-of-law clauses. If the person accessing a web-site needs to provide certain information, e.g. about being a consumer or a professional, about the domicile and the place from where the web-site is accessed, this information can be used by a VO member to accept or decline the interaction. The VO can thereby accept or decline certain jurisdictions and laws.

4.4 Choice of law and court agreements

The threat of being sued in another country under an unexpected foreign law may also be reduced through an agreement on choice of law and exclusive jurisdiction. It may be important that the these agreements are subject to an individual agreement separated from the rest of the contractual relationship, as it is possible that some jurisdictions will assess a choice of law or court clause in the material contract according to the law which is applicable after the local choice of law rules (lex causae).[36]

The possibility of mitigating the legal risks related to international private law will depend upon whether the person with whom the VO interacts is a consumer or a professional. In cases where the VO is not dealing with a consumer, it is possible to

[35] See Krog, Georg Philip. Internett, jurisdiksjon og territoriell avgrensning. In: *Lov og Data* 2005;81(1):24-27.

[36] Ibid.

regulate the choice of jurisdiction and applicable law in the contract, if certain requirements as to form and clarity are met, in particular those requirements contained in Article 23 of the Brussels I-Regulation and Article 3 of the Rome Convention. Thus, the VO should regulate the questions in all contracts formed with customers who are not consumers.

For contracts with non-consumers, both the jurisdiction and the applicable law can and should be chosen in the respective contracts.

On the topic of jurisdiction, the Brussels I-Regulation demands in Article 23 that a choice of jurisdiction clause regards “a particular legal relationship”. In order to protect the weaker party in a contract, the clause must thus be specific enough to make it clear to both parties in which legal disputes a jurisdictional clause applies. Such clause can either be included in the enterprise network contract or in the contract formed between the members of the VO. In any case, clause must clearly specify in which legal relationships the clause will apply.

Regarding applicable law the Rome Convention states in Article 3, that the clause indicating a choice of law must be “expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case”. Thus, if the question of choice of law is to be governed by the enterprise network contract, the legal relationships to which it applies should be clearly specified.

This choice of applicable law may have huge consequences for the contract, and should be carefully considered. In particular, care needs to be taken when using definitions, as they can mean entirely different things in different jurisdictions. E.g. software licence agreements in the US use similar definitions to those under UK law but mean entirely different things. Moreover, the provisions in the contract should be analysed with respect to their validity under the applicable law.

As the possibility of regulating the choice of law and jurisdiction in consumer contracts is limited (see above), it is more difficult to mitigate the risks related to the international nature of such contracts. The VO can however, through a combination of geo-localisation and self-identification tools, to a certain extent, limit the interaction to certain countries groups of persons, and thus limit the number of possibly applicable laws and jurisdictions.

However, regarding torts and delict, the VO has no possibility of efficiently mitigating the risks related to international private law.

4.5 Definition of the place of performance

There may be a risk that the choice of court agreement is found to be invalid. According to the Brussels I-Regulation Article 5.1, the place of performance of a contract will define the competence of the court. It is possible in contract to agree upon the place of performance and thus also regulating the competent court.

5 Concluding Remarks

In this appendix, we have (i) discussed and clarified some of the contractual relations between the different VO partners in the TrustCoM AS (eLearning) scenario and (ii) analysed legal risks relating to private international law with respect to this scenario.

A number of contracts should be put in place for the scenario to be operable: The Enterprise Network (EN) should regulate the general co-operation among all EN members. For those involved in a specific co-operation, there will be an internal contract defining how the aggregated services will be performed. The third contract level will be an end-user contract. The latter could either be concluded by only one VO member in its' own name, or it could involve all VO members, e.g. represented by one VO member who acts as an agent. This description of contractual relations was used as a basis for the legal risk analysis, which focused on choice of law and jurisdiction.

From a risk analysis point of view, a discussion of choice of law and jurisdiction does enable us to identify only very few unwanted incidents, e.g. the possibility of being subjected to a costly law suit in a foreign country, or the risk of a less favourable decision based on an applicable foreign law. It became clearer through the analysis that the bunch of (normative) unwanted incidents can not be found in the body of law regulating choice of law and jurisdiction. In a risk analysis perspective we look for negative consequences, and these normative consequences are to be found in the material law that regulates e.g. liability issues. Hence, addressing issues related to jurisdiction and choice of law in a risk analysis is merely an intermediary step, which may be necessary to determine where to find the normative unwanted incident. Hence, the perspective of risk analysis is useful in the context of choice of law and jurisdiction, both to identify and highlight the unwanted incidents that directly relate to this body of law, and to provide the necessary step towards the body of law that may concern further details about possible unwanted incidents.

Most of the identified legal risks related to choice of law and jurisdiction can be managed by a VO: First, for the internal relations of the VO members, the general agreement establishing the VO or the Enterprise Network should contain clauses defining that all internal contracts and relations exclusively be governed by one law and one jurisdiction. Safe for matters relating to tort, delict and quasi-delict, this should effectively reduce the insecurity in VO-internal matters. Second, for the external relations of the VO, jurisdiction and choice of law can only be chosen freely if the contract partner is not a consumer. If however the contract is or may be concluded with a consumer, then the choice of law and jurisdiction is limited as described in sections 3.3.3 and 3.4.1. If a VO wishes to further reduce the applicability of foreign laws and the competence of foreign courts, it may utilize some of the mechanisms discussed in section 4.