

Jurisdiction, Choice of Law and Dispute Resolution in International e-Commerce

e-Commerce Worldwide: Unique Aspects
of Conducting International e-Business

BBA MCLE Program

Richard Johnston and Ken Slade

Hale and Dorr LLP

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HALE AND DORR LLP

Why are these problems greater for e-commerce than for offline commerce?

- Likely to be a far greater number of international e-commerce transactions, now that Internet has created a single world market, at least for some products
 - resolves many communications problems
 - resolves time-zone differences
- Likely to be a far greater number of international transactions involving consumers

Why are these problems greater for e-commerce than for offline commerce?

- Less likely to be negotiated contracts
 - parties reacting only remotely
 - emphasis on automated, mass market solutions on the Internet
- Sellers won't necessarily know where their customers are located
- Buyers face greater risks, dealing with potentially invisible sellers

e-Commerce Jurisdictional Issues

- General issues in Internet jurisdiction
- Developments in U.S. jurisdictional law
- Canadian case law
- European Commission approach
- International Chamber of Commerce Task Force on Jurisdiction

General Issues in Internet Jurisdiction

- Assertion of jurisdiction by more countries as e-commerce spreads
- What is enough to create jurisdiction in another country:
 - website only?
 - website plus interactive component?
 - clear effort to do business there?
- Problems beyond commerce: national laws against pornography, political content, etc.

Developments in U.S. Jurisdictional Law

- Each state and federal district may have different rules
- Case law attempts to follow traditional “due process” principles
- Some initial decisions held that a website alone justifies jurisdiction, but the trend has been to require more contact with forum

Developments in U.S. Jurisdictional Law

- Early cases: passive website sufficient
 - Inset Systems, Inc. v. Instruction Set, Inc., 937 F.Supp. 161 (D. Conn. 1996)
 - Maritz, Inc. v. Cybergold, Inc., 947 F.Supp. 1328 (E.D. Mo. 1996)
 - American Network, Inc. v. Access America/Connect Atlanta, Inc., 975 F.Supp. 494 (S.D.N.Y. 1997)

Developments in U.S. Jurisdictional Law

- Zippo sliding scale: passive website not sufficient
 - Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F.Supp. 1119 (W.D.PA. 1997)
 - Trend seems to be in direction of requiring more than passive website
 - Representative Federal Court of Appeals cases requiring more than passive website

Developments in U.S. Jurisdictional Law

- Mink v. AAAA Development LLC, 190 F.3d 333 (5th Cir. 1999)
- Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414 (9th Cir. 1997)
- Soma Medical International v. Standard Chartered Bank, 196 F.3d 1292 (10th Cir. 1999)
- GTE New Media Services Inc. v. BellSouth Corp., 199 F.3d 1343 (D.C. Cir. 2000)

Developments in U.S. Jurisdictional Law

- Graphic Controls Corp. v. Utah Medical Products, Inc., 149 F.3d 1382 (Fed. Cir. 1998)
- 3D Systems, Inc. v. Aarotech Laboratories, Inc., 160 F.3d 1373 (Fed. Cir. 1998)
- Massachusetts Federal District Court decisions:
generally, more than passive website required
 - Northern Light Technology, Inc. v. Northern Lights Club, 2000 WL 525553, No. Civ. A 99-1164-DPW, (D. Mass. Mar. 31, 2000)

Developments in U.S. Jurisdictional Law

- Brill v. Alliedsignal, Inc., No.'s 98-11789-DPW, 98-11843-DPW, 98-11844-DPW, 98-11845-DPW, and 98-11846-DPW, (D. Mass. July 2, 1999) (order granting and denying motions to dismiss) *available at Lawyer's Weekly*
- Figawi, Inc. v. Horan, 16 F.Supp 2d. 74 (D. Mass. 1998)
- Gary Scott International, Inc. v. Baroudi, 981 F.Supp. 714 (D. Mass. 1997)

Developments in U.S. Jurisdictional Law

- Hasbro, Inc. v. Clue Computing, Inc., 994 F.Supp. 34 (D. Mass. 1997)
- Digital Equipment Corp. v. Altavista Technology, Inc., 960 F.Supp. 456 (D. Mass. 1997)
- American Bar Association is trying to propose standardized guidelines

Canadian Case Law

- Pro-C LTD. V. Computer City, Inc., 2000 CarswellOnt 2696, Kitchener 929/98 (Ont. Superior Ct. June 30, 2000)
- Braintech Inc. v. Kostiuk, B.C.J. No. 622 (1999)

European Commission Approach

- Different countries have different rules on jurisdiction
- Recent European Case Law
 - Regina v. Graham Waddon, 2000 WL 491456, No. 99/5233/Z3 (Eng. C.A. April 6, 2000)
 - VNU Business Publications BV v. The Monster Board BV, 1999 WL 1400064, Case KG 99/642, District Court of the Hague, (Den Haag June 29, 1999)

European Commission Approach

- Goodfrey v. Demon Internet Limited, 1999 WL 477647, (Eng. QBD. March 26, 1999)
- Council of Ministers working group is in process of revising 1968 Brussels Convention on Jurisdiction
 - Article 15 would say that a company which directs its activities to another EU country can be sued in that country

European Commission Approach

- since e-commerce could be considered to be directed at all 15 EU countries, in theory an e-commerce company could be sued in all 15 countries
- Counterarguments to being directed to other countries
 - passive website only
 - certain languages only
 - disclaimers that products not offered in particular countries

European Commission Approach

- European Commission is also considering changes to Rome Convention on Non-Contractual Obligations, which governs such things as defamation and unfair competition
 - jurisdiction would exist where impact is felt
 - could subject an e-commerce company to jurisdiction of all EU countries
- Business community concerned because European Commission approach seems heavily pro-consumer

International Chamber of Commerce Task Force on Jurisdiction

- Business organization which seeks to harmonize rules and minimize barriers to expansion of e-commerce
- Task Force includes members from North America and Europe
- Will propose recommendations to governments and courts at a time when jurisdictional issues are still in their infancy -- so as to maximize opportunity for impact
- Emphasizes creation of efficient dispute resolution mechanisms on-line to mitigate consumer and governmental concerns

Traditional Approach to Choice of Law and Dispute Resolution in Offline Transactions

- Executed agreement between the parties
- choice of law provision, typically choosing Seller's home jurisdiction and excluding United Nations Convention on Contracts for the International Sale of Goods
- dispute resolution provision
 - arbitration or litigation
 - location of chosen forum

Website Forum Selection Clause May Be Enforced In Some Jurisdictions

- Decker v. Circus Circus Hotel, 49 F.Supp. 2d 743 (DNJ 1999) (declining to exercise jurisdiction over defendant in New Jersey where otherwise proper to do so because defendants' website contained forum selection clause stating that by using site to reserve hotel room customers agreed to have disputes litigated in Nevada)

Why Traditional Approaches on Choice of Law and Dispute Resolution Do Not Always Work for e-Commerce Transactions

- Is a valid contract formed between the parties?
- Are there grounds for resisting the choice of law?
- Are there grounds for resisting the dispute resolution provision?

Is a valid contract formed between the parties?

- Are formalities followed?
 - China: must be in writing
 - France, Germany and Italy: advisable to require double click, in order to confirm buyer wants to enter into contract on stated terms
 - European Union Distant Selling Directive (Articles 5 and 6): buyer must receive written confirmation or confirmation “in another durable medium”; at least a 7-day right of return runs from receipt of confirmation
- Has there really been a meeting of the minds?
 - Legal counsel in non-English speaking countries recommend that terms be shown in local language

Is a valid contract formed between the parties?

- Have adequate procedures been followed with respect to buyer's click and accept?
- (1) Terms shown in full in advance of click and accept
- (2) Acceptance necessary step to download and again to installation/use
- (3) Reminders that use subject to license
- (4) Electronic copy of license readily accessible

Are there grounds for resisting the choice of law?

- Most consumer protection laws will ignore consumer's acceptance of choice of law provision which chooses a foreign law
 - Japan, Norway and the United Kingdom are possible exceptions
- Many jurisdictions will ignore choice of law provision if it leads to a result that is contrary to that jurisdiction's public policy
- Even if choice of foreign law is respected, local laws still apply to seller (e.g., tax, antitrust, tort law, regulatory regimes)

Are there grounds for resisting the dispute resolution provision?

- Once again, many consumer protection laws will ignore consumer's acceptance of choice of forum provision which chooses a foreign forum
- Some jurisdictions apply special formalities to arbitration clauses (e.g., Germany, Norway)
- Gateway decision: ICC arbitration too expensive in consumer context
- ICANN's new Uniform Domain Name Dispute Resolution Policy requires on-line arbitration for domain name disputes, but not e-commerce disputes

Recommended Approach by e-Commerce Companies on Choice of Law and Dispute Resolution Provisions - #1

- As much as we might like to think the contrary, concede that it is, under current law, impossible to apply a single set of contractual choice of law and dispute resolution provisions worldwide
- Develop a U.S./Canadian contract that serves as an “international default” agreement
- Have foreign counsel review that agreement for key markets

Recommended Approach by e-Commerce Companies on Choice of Law and Dispute Resolution Provisions - #2

- Many foreign counsel advise that choice of law and dispute resolution provisions might not be enforceable
 - Don't concede issue -- leave choice of law and dispute resolution provisions as is
 - no harm in trying to impose those provisions
 - those provisions still might be enforceable vs. pirates and with respect to IP issues
 - as a precaution, make changes in substantive provisions, so that agreement will still be enforced if local law is applied before local courts

Recommended Approach by e-Commerce Companies on Choice of Law and Dispute Resolution Provisions - #3

- A smaller group of foreign counsel advise that choice of law and dispute resolution provisions will not be enforceable, and must be changed
 - for limitations on liability to apply, must submit to local law (France)
 - attempt to choose foreign law and foreign dispute resolution may invalidate entire agreement, including substantive provisions (e.g., Sweden and Denmark)
 - stipulating a prohibited governing jurisdiction and forum for arbitration is a false or misleading representation (Quebec)
 - special case -- Germany: choice of U.S. law and forum will not invalidate agreement, but may lead to order that company cease using these provisions
- In those countries, choose local law, local courts and make substantive changes recommended by foreign counsel

For further questions:

- Richard Johnston 617-526-6282
richard.johnston@haledorr.com
- Ken Slade 617-526-6184
kenneth.slade@haledorr.com