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

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

BBA MCLE Program

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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
Developments in U.S. Jurisdictional Law

- **Zippo sliding scale**: passive website not sufficient
  - 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)
- Massachusetts Federal District Court decisions: generally, more than passive website required
Developments in U.S. Jurisdictional Law


Developments in U.S. Jurisdictional Law


- American Bar Association is trying to propose standardized guidelines
Canadian Case Law


European Commission Approach

• Different countries have different rules on jurisdiction

• Recent European Case Law
European Commission Approach


• 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
- 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 jurisdictions 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
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