International Chamber of Commerce

The world business organization

Policy statement

Jurisdiction and applicable law in electronic commerce

Prepared by the Electronic Commerce Project (ECP)'s Ad hoc Task Force on Jurisdiction and Applicable Law in Electronic Commerce

Executive summary

This paper sets out general business views on online transactions and consumer protection in the context of jurisdiction and applicable law.∗ It does not address issues of intellectual property protection, taxation or other aspects of electronic commerce.

Business is chiefly concerned about uncertainty and aggressive assertion of jurisdiction and applicable law in business-to-consumer (B2C) e-commerce, with emphasis on the distinction between the principles of "country-of-origin" and "country-of-destination".

ICC notes that the Internet provides significant consumer empowerment through increased competition, evolving business models and technology. Consistent with this empowerment, business recommends to governments a systematic approach to resolving online consumer disputes: and urges them to:

- make reasonable attempts to utilize a company's internal customer satisfaction mechanisms;
- utilize online alternative dispute resolution (ADR); and
- if the dispute persists, resort to legal action.

In addition, ICC urges governments to 1) avoid expansive jurisdictional claims by applying principles of "country-of-origin" and party autonomy, 2) allow self-regulation to demonstrate its efficacy, and 3) combat fraud and crime on the Internet.

∗ ICC defines "applicable law" in the context of this paper as any rule of law e.g. national or international law, regulation, ordinance, etc., that could be applied by any national or arbitral tribunal in the event of a dispute arising between a business and a consumer who interact online.

Introduction

Electronic commerce – business conducted over the Internet and other computer networks – is growing explosively. The Internet is a global medium that is open across all frontiers, and once posted, a website is global from the outset. Likewise, transactions, as well as commercial and promotional material on websites become global. More frequently and more directly, enterprises of all sizes trade with and advertise to suppliers and customers (both businesses and consumers) located abroad.

Inevitably, some of these dealings result in commercial disputes that must be resolved privately or at law. In addition, many e-commerce transactions raise questions of compliance with applicable public laws and sectoral regulations. Governments, judiciaries and legislatures are just beginning to grapple with the question of whose laws apply in cyberspace, and the parties themselves all too often exhibit no clear understanding as to whose rules govern the arrangement and what recourse is available in the event of a dispute.

Consequently, in many instances, courts are claiming jurisdiction over and applying their countries' laws to websites of companies located outside of their geographic boundaries. Such reach could subject companies to the courts and laws of virtually any country from which their website can be accessed. These laws may be contradictory. Consequently, the business community continues to be plagued by uncertainty as to the basic legal paradigm of consumer shopping on the Internet:

Has the merchant created a virtual storefront in the buyer's jurisdiction to make a sale, or has the purchaser virtually traveled to the seller's jurisdiction to make a purchase?

Jurisdictional uncertainty, and uncommonly aggressive assertions of jurisdiction, may result in circumstances such as the following:

1. Some enterprises may limit their markets and product offerings much more than they would if the resolution of disputes were more predictable. In such circumstances, consumers may be frustrated because attractive products or services, or more competitive prices for a given product or service are denied to them simply on the basis of their residence.
2. Some customers may be wary of "foreign", commercial websites, regardless of its selling limitations, because they do not feel assured that familiar rules and protections will apply or that they will have adequate remedies in the event of difficulties.

The inability to enforce foreign judgments is an additional complication. Current international laws and treaties do not routinely provide for effective enforcement options for judgments obtained in a consumer's country of residence against a merchant in a foreign jurisdiction.[1] Are consumers offered

1 It is important to note that the Hague Conference on Private International Law is currently negotiating a draft Convention on Jurisdiction and the Enforcement of Foreign Judgments in Civil and Commercial Matters. This draft Convention is discussed further below.

transparent and effective protection if they have the benefit of their laws and courts, but are still unable to enforce a judgement against a business located in a foreign jurisdiction? Consumers would typically incur significant costs to bring a legal action, without assurance that they could enforce an ultimate judgement in their favor. These realities were thoroughly demonstrated at the Geneva experts meeting in September 1999 held by the Hague Conference on Private International Law.

Business-to-business vs. business-to-consumer transactions – Why is the distinction important to this discussion?

In the case of business-to-business (B2B) transactions across borders, there exist established conventions and solutions, which help guide such transactions. For example, the sequence of contractual documents is generally standardized, and courts in most countries have addressed issues of form requirements. Contracting parties are usually more sophisticated and often incorporate choice of law and choice of forum clauses in their agreements. There are also well established arbitration and mediation options to avoid litigation in the courts of one party's country.

But such customs and practices are not familiar to transborder contracting between businesses and consumers, and many of the business practices and traditional ADR techniques are simply too costly – in terms of legal hire, correspondence, logistics, and the use of expert third parties – to be utilized by most consumers.

With business-to-consumer e-commerce "jurisdiction anywhere" is a real possibility. But, for many online activities, it is very difficult or even impossible to comply with the laws of every potentially relevant jurisdiction. Once a website is posted, it is instantly available worldwide to anyone with a computer or other information appliance and a telecommunications (wired or wireless) or other form of network connection. Thus, it is virtually impossible to prevent "advertising" in jurisdictions where such advertising would not be permitted. And although in most cases states and countries have not imposed sanctions for advertising where it was not clearly targeted (by language, currency, local distributors, etc.) to their jurisdiction, a business that accepts orders and deals with customers from that jurisdiction could nonetheless find itself subject to the whole range of applicable laws and regulations there.

What consequences are suffered by business as a result of confused jurisdiction or applicable law when applied to business-to-consumer online transactions?

From discussions in ICC and articles in the general and trade press, it appears that many companies today simply are not willing to subject themselves to the costs of investigation and compliance with a myriad of rules in each country, or the risk of sanctions, unenforceable contracts, and adverse publicity in hundreds of countries, states, and provinces. Consequently, as stated above, companies are limiting the use of their websites in terms of both products and geography, and they engage in e-commerce, if at all, largely through closed systems with established partners or sales to residents of the territories where the companies are already well established.

The negative result of jurisdictional ambiguity in e-commerce, or of aggressive insistence on compliance with detailed local rules when dealing across borders with local residents, is twofold. First, many goods and services are held back entirely from the global electronic marketplace. Second, other goods and services are offered only in a limited number of jurisdictions, and consumers in other places are denied access to competitive products and prices through the online marketplace.

Of particular importance is the stifling effect that this would have on SMEs and the severe limitations it would place on emerging entrepreneurial ventures in developing economies. Clearly the costs and complexities of compliance for these players could preclude their participation in a digital economy.

Some governments and regional bodies have adopted application of the "country-of-destination" principle, which states that the applicable law and court with jurisdiction are those where the consumer resides in the event of a B2C cross-border dispute. Application of this principle will severely limit greater consumer choice and more favorable prices. Compliance with the laws of many different countries would impose tremendous costs on business and would be prohibitively expensive for SMEs.

The complexity of applying the "country-of-destination" principle is exacerbated when it is applied where consumers use "infomediaries" or other interposing technologies to purchase goods or services that are digitally transmitted, and pay with digital cash or any other payment mechanism that does not identify the purchaser. In this situation, a business would never know the law and forum to which it subjects itself as the "infomediary" prevents a company from knowing the identity and location of an individual consumer.

Under these circumstances, companies are most likely to forego cross-border online sales entirely, thereby reducing significantly the Internet's benefit to consumers.

Recommendations

While the issues of jurisdiction and choice of law will continue to be studied at national and international levels, ICC believes that there are some principles and strategies that would help legislatures, regulatory bodies, and courts in making determinations regarding these complex issues.

It is therefore that ICC provides the following recommendations on the most appropriate way forward in dealing with jurisdiction and applicable law issues in online, cross-border business-to-consumer disputes.

A systematic approach to resolving consumer disputes:

For B2C e-commerce to reach its full potential, certainty and confidence is essential for both business and consumers when disputes arise between them on-line. Therefore, business seeks a predictable and stable framework for resolving these disputes. Such a framework should allow business to calculate cost, risk, competition, and prices. It should also guarantee that consumers have an easy and cost effective means of resolving disputes.

To achieve both of these objectives, ICC proposes a three-step process to the resolution of B2C disputes resulting from online transactions:

1. When a consumer complaint arises, parties should first make reasonable attempts to utilize a company's internal mechanism, such as its customer satisfaction service;
2. If the complaint remains unresolved, parties should utilize an online alternative dispute resolution -- a cost-effective solution that can bridge both geographic and cultural barriers (Please see ICC strategy paper on online ADR for more detailed views of ICC on this issue); and
3. If the complaint still remains unresolved, the parties can resort to legal action.

ICC believes that the greatest majority of consumer complaints will be resolved either by a company's internal customer service or similar mechanism, or ADR. However, this does not preclude the need for a predictable legal framework in which to address the few disputes that persist. The remainder of this paper will set forth international business' views on how choice of law and forum decisions should be resolved in those instances.

Avoid expansive jurisdictional claims

Governments should take care to avoid creating unpredictable grounds for asserting jurisdiction over e-commerce activities. Several examples of expansive jurisdictional claims are:

- Article 4(1) of the EU Data Protection Directive has been interpreted as requiring foreign website operators who automatically collect information over their websites, but who are not established for business in Europe, to comply routinely with the data privacy rules of each EU country and appoint legal representatives in those countries. This is likely to prove unworkable and unenforceable, and it is inconsistent with jurisdictional doctrines in national law and in private international law.
- The recently amended EU Brussels Convention in effect subjects any dispute relating to an online contract with a consumer to the jurisdiction of the courts of the consumer's place of domicile.
- Certain proposals to amend the EU Rome Convention would apply the laws of the consumer's residence to an online transaction with a consumer.
- The Hague Conference on Private International Law's draft Convention on Jurisdiction and the Enforcement of Foreign Judgements in Civil and Commercial Matters currently adopts the country-of-destination approach to jurisdiction, with very limited exceptions, over sellers who conclude contracts with consumers, thereby subjecting companies to the jurisdiction of the courts of all countries from which its website may be accessed.

These examples threaten to create an inflexible rule of reference to the jurisdiction or laws of the consumer's residence, regardless of choice or effective alternatives. ICC encourages the relevant governments and administrations to reconsider the policies of the existing or proposed rules set forth in the preceding examples consistent with these recommendations. To that effect, ICC urges the adoption of the following fundamental principles in order to avoid expansive jurisdictional claims.

1. Party autonomy

A primary goal of commercial law is to develop legal certainty for transacting parties. ICC supports freedom of contract as a general principle that should drive decisions regarding choice of law and forum. As the basis for all commercial law, contracts embody private agreements between parties, formalizing their intent to be bound by the terms of the contract as if these were the law between them.

For reasons of compelling public policy, however, in the context of B2C disputes, governments typically place limits or conditions on private agreements in heavily regulated sectors, such as banking and investments. Courts and regulators may also override the terms of private agreements that appear to result from fraud or deceptive practices. ICC encourages governments to keep these limits on the applicability of party autonomy to a minimum. However, where a compelling and well-defined public policy objective dictates such a limitation, ICC urges governments to indicate the circumstances in which they intend to apply local regulations to cross-border e-commerce, and to work toward a common approach to defining fraudulent practices in B2C transactions.

ICC believes that it is business's responsibility to provide rules of best practice that will enable contracting parties to make the right choices as to applicable law and competent forum in the domain of legal B2B and B2C transactions. In this context, "transactions" must be understood to encompass transactions conducted between or among legal persons. Regardless of size and other factors, legal persons - as opposed to natural persons - should be subject to the same rules in the same circumstances. This is particularly important in online transactions, where the parties may not know each other and cannot practicably make distinctions as to applicable law based on the size and character of the legal entity with which they are dealing.

2. "Country-of-origin"

Application of the "country-of-origin" principle is a preferable and most workable solution. However, ICC recognizes that there is a subset of consumer transactions in heavily regulated industries where, due to compelling public policy reasons, regulations have been developed to provide that specific redress and information be made available to the consumer in his or her country of residence. As a commitment to consumer protection and empowerment is shared by business and governments, application of the "country-of-origin" principle should not be read to undermine such regulations. Nevertheless, ICC encourages governments to reassess such regulations so as to identify their utility in a global marketplace.

ICC and the international business community wish to assure consumers and government representatives that where choice, self regulation and country of origin are espoused as the preferable or only workable solution, it is with the conviction that mechanisms proposed must be trustworthy, user-friendly and able to provide effective redress to the consumer. Effective consumer protection cannot be achieved by applying traditional consumer protection concepts. Interactive technology, and in particular the Internet, provides a unique opportunity for creating solutions that are effective and that preserve the flexibility that underpins many of the emerging e-business models. ICC and the business community are committed to engage in an open dialogue with consumers and governments on how these goals can be attained.

Coordinated and flexible market-based solutions may provide all players with a general set of practices that allow participation in the networked economy while providing reasonable assurances that such participation is not at the expense of appropriate disclosure to and fair treatment of the consumer.

Allow self-regulation to demonstrate its efficacy

Given the complexity of the issues of jurisdiction and applicable law, thorough conceptual review is essential before governments make definitive pronouncements. Premature conclusions that do not address practical realities and the unique circumstances of electronic commerce could create significant obstacles to the continued growth of electronic commerce, and would therefore disadvantage business as well as consumers.

The online medium is particularly conducive to increased consumer empowerment. We believe that increased competition will result in a global "race to the top" as companies develop their online brands in order to ensure consumer confidence. The inherent empowering qualities of the Internet are enhancing the very significant incentive that business has to provide and implement technologies and practices that offer consumers choice through informed decision-making. Informed consumers are good customers. A rule of thumb in the Internet industry is that it costs five times as much to recruit a new customer as to maintain an existing one.

Simultaneously, the private sector should be given adequate time to assess the market and to develop self-regulatory initiatives, including dispute resolution mechanisms, to resolve these problems. Such initiatives are flourishing as was highlighted at the joint ICC, OECD, and Hague Conference on Private International Law conference on B2C ADR held at The Hague in December 2000. These initiatives are taking into consideration the demands of the market and the unique circumstances of electronic commerce. With this notion in mind, and recognizing the need to ensure a minimum level of effectiveness of ADR providers, ICC is currently undertaking devising a mechanism to facilitate effective global online B2C ADR (please see the ICC Strategy Paper on B2C ADR.)

Consumer policies for the online medium have been and continue to be developed and implemented by both business and governments. Self-regulatory solutions provide the flexibility to respond to the dynamic nature of the online environment. Any policies must accommodate and promote this highly dynamic environment, which is a significant engine of economic growth and social development.

Combat fraud and crime on the Internet

Lastly, ICC would like to express business's continued support and encouragement for enforcement of criminal law against fraudulent and otherwise illegal behavior on the Internet. Business is investing significant resources to assist law enforcement in reducing cybercrime, because it is in the interest of business as well as the consumer to make cyberspace a safe place to shop.

Although non-legitimate businesses on the Internet cannot be effectively "regulated" by self-regulation as such, and will try to evade government regulation, increased consumer empowerment based on easy recognition of brands and trustmarks and the increased availability and use of filtering and rating technologies – coupled with international cooperation within law enforcement

and effective cooperation with the private sector – offer practical means of protecting consumers against fraud and crime on the Internet.

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Conclusion

ICC believes that while problems surrounding jurisdiction and applicable law will continue to be studied at national and international levels, the above principles and strategies will assist legislatures, regulatory bodies, and courts to make sound determinations regarding these complex issues.

To that end, coordinated and flexible market-based solutions may provide all online merchants with a general set of practices that allow participation in the networked economy at all levels while providing reasonable assurances that such participation is not at the expense of appropriate disclosure to and fair treatment of the consumer.

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