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Written by: Jeffrey Kahn

Whose law applies to disputes arising from electronic contracts formed over the Internet? This article tackles the pressing choice of law issues in electronic contracting. The current state of law in this arena remains unsettled despite several newly enacted laws, both international and national, that attempt some regulation of electronic contracts. These issues become more important every day because, as the author notes, over $300 billion will be spent in e-commerce transactions over the next several years, and while some transactions may occur between parties that have a prior working relationship, many will be one-time customers visiting a commercial website. As boundaries fall in electronic transactions worldwide courts are forced to deal with complicated determinations of the proper law to apply to each transaction.

To aid readers in understanding the typical e-commerce transaction, the author describes a hypothetical company that sells virus-detection software through a website. The website is the only available method to purchase the software, but the online ordering page contains no choice of law provision. In the hypothetical, the retailer lives in California, transactions are processed in Ohio, and the website is available to anyone with access to the Internet anywhere in the world. Each transaction occurring through this website forms an electronic contract containing all the essential elements of a paper contract, including offer and acceptance, consideration, and mutual assent.

This hypothetical depicts several interesting aspects and questions about electronic contracting that undoubtedly affect jurisdictional issues: (1) internet transactions are routed through many locations, often passing through multiple national (and international) jurisdictions before being completed; (2) internet retailers are not always located in the same location where the actual transactions actually occur (in this case, Ohio); and, (3) given a situation such as this where there is no choice of law provision in the electronic contract, whose law should control should a dispute arise over an internet transaction.

CURRENT LAW GOVERNING ELECTRONIC TRANSACTIONS

Under the auspices of maintaining a model set of rules for all member countries, the United Nations has adopted the Model Law devised by the United Nations Commission on International Trade Law ("UNCITRAL"). The Model Law attempts to set up a comprehensive set of rules for addressing various aspects of electronic contracting, including provisions that deal with choice of law in electronic commerce. Most importantly, the Model Law provides criteria for determining the "when" and "where" issue that affect jurisdictional and conflict of law issues that will undoubtedly arise in cyberspace.

The Model Law provides that an electronic contract is deemed received either when sent by an agreed upon information system, or, in the case where there is no agreed upon information system, the contract will be deemed received the instant it is retrieved by the offeror. With respect to the question of "where" an electronic contract is executed, the Model Law provides that the location is where the

offeror has their principal place of business, or in the event that there are several places of business, the "where" is the location having the closest relationship to the transaction in question. In a situation such as the hypothetical given by the author, where the offeror does not have an established place of business, the offeror's place of residence functions as the "where" for the transaction.

Similarly designed is Singapore's Electronic Transactions Act of 1998 ("ETA"). Seeking to address four major concerns of electronic contracting, the ETA attempts to create a global framework for electronic commerce, while addressing concerns of over-regulation, and flexibility of laws to maintain pace with the growth of technology. The ETA mirrors many provision of the Model Law designed by UNCITRAL, including the provisions addressed above, as well as provisions in the Uniform Commercial Code ("UCC").

IS THERE A GOVERNING PRINCIPLE?

The author then describes five principles that he feels govern international jurisdictional questions. The territoriality principle, when applied under the guise of international law, allows for states (or nations) to be held responsible for allowing their territory to be used for unlawful activities against other states. The nationality principle is the theory that states have the right to regulate conduct of their citizen's, even when that citizen's acts take place outside of the state. The effects principle allows for jurisdiction when a person commits an act in one state that causes injury, or an effect, in another. This is likely to be the most important principle for invoking jurisdiction when interpreting electronic contract disputes. The final principles discussed are the universality principle, allowing extraterritorial assertions of jurisdiction where a defendant has committed a criminal and universally condemned act against a state, and the protective principle, allowing a court to assert jurisdiction over defendants who commit crimes which threaten the national security of a state.

CONCLUSION

While this article provides a good general background of several modes of asserting jurisdiction, it fails to answer the crucial question: what law, if any, should govern international disputes over Internet transactions that involve multiple forums?