Jurisdiction and Consumer Contract in E-Business

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ABSTRACT

The use of cyberspace increases tremendously in the past 20 years. An increasing number of businesses and consumers worldwide have accessed the Internet and there is few doubt on its growing significance for world trade. The unique features of E-business lead to the uncertainty and insecurity for the consumers as well as the companies, and incur great strikes to the traditional jurisdiction rules. It seems to be an exaggeration to argue that it would require totally new set of jurisdiction rules in E-business. It is, however, inevitable to reconsider appropriateness of the existing rules in some respects, including the reconstruction or reform of the resent rules.

This article will analyse the current jurisdiction doctrines to see how they work in the context of E-business and whether they advance the cause of consumers and the improvement of business. Specially, the article will study the Brussels Regulation as the recent most important and influential innovation trying to regulation jurisdiction on consumer contract in E-business. General suggestions will be given as to the future development to resolve this problem.

Keywords: Jurisdiction, Consumer Contract, E-Business, Brussels Regulation

1. INTRODUCTION

In the dawn of the new digital economy, "electronic business" shows its popularity in the wide world. Recent developments in the Internet communication technology have made it possible to sell goods and provide services through the Internet. The efficiency and convenience it provides encourage the consumers to take part in the new transaction model despite some concerns and doubts still remain. A non-bordered global market thus has been formed in the cyberspace, and an electronic business-to-consumer relationship has been built internationally, and at the same time, "inter-legally". Jurisdiction problems thus arise as to which court will have the jurisdiction over the dispute on business-to-consumer contract in E-business.

To try to regulate activities carried out on the Internet by using the existing private international law rules is to put new wine into old bottle. The specific characteristics of the Internet pose uncertainty and lack of predictability to both the businesses and the consumers. When the consumer surfs on the Internet, he might easily unaware that he goes "abroad" and has transaction with a foreign company. The business also cannot identify the real origin of the consumer, thus submit itself to a potential court he has never expected. The present international trend on this problem is trying to protect the consumers by providing the court of the consumer's domestic/resident country jurisdiction. This protective policy will subject the Internet businesses to the world-wide jurisdiction, which will greatly increase the cost and risk for doing E-business. The businesses may limit their markets much more than they would if the resolution of disputes were more predictable; correspondingly, the consumers may be frustrated because attractive products or services, or more competitive prices for certain goods or services are denied to them simply on the basis of their residence. The net result of the situations is to the detriment of both the consumers and the businesses, and the whole promotion of consumer-orientated E-business.

This article will try to study the jurisdiction issues on consumer contract in E-business. It focuses on answering the following question: why the traditional jurisdiction rules do not work perfectly in E-business? What is the new development in this problem, and how is the effect of these new innovations, especially the Brussels Regulation? What are the possible suggestions for the future development and legislation on jurisdiction on electronic consumer contract?

2. THE DILEMMA OF TRADITIONAL JURISDICTION RULES IN CONSUMER ORIENTATED E-BUSINESS

Non-territoriality, non-discrimination access, intermediary involvement, and non-identity are some basic features of the Internet – the carrier of electronic business, which bring dilemma to the old doctrines of jurisdiction. The most basic and important feature of the Internet is its non-territoriality. The Internet is "a network of networks", which is accessible from any computer locating anywhere in the world providing it is connected with the Internet Service Provider (ISP). The Internet communication thus breaks the territorial boundaries between the states in the physical world and makes distance disappear. As US District Court Judge Gertner stated that "The Internet has no territorial boundaries… as far as the Internet is concerned, not only is there perhaps 'no there there', the 'there' is everywhere there is Internet access". [1] Secondly, the Internet is a decentralised system. There is no central or hierarchic controller in this system, which means the business that intends to establish a website dealing with the consumers only in a limited area cannot prevent the consumers worldwide accessing this information.

Thirdly, the Internet cannot run without the participation of intermediaries, which are the organisations whose services are used to facilitate a transaction between communicating parties. The intermediaries are usually not liable for the activities carried out by the Internet users. The location of the server thus often has rare or fortuitous relations with the liable online activities. Finally, the Internet technology enables users to communicate through the Internet anonymously, which blurs the information about the user's identity and location. However, in the traditional jurisdiction doctrines, such information may be important or even essential for determine the jurisdiction. These features challenge the function of the traditional jurisdiction rules in E-business.

2.1 Presence

The traditional practice in common law countries is to base the jurisdiction on the presence of the parites. If the defendant is present in the territory of a state, this state will have power to exercise jurisdiction over this person. The reason for presence basis is jurisdiction depends on physical control.[2] If the forum country has, directly or indirectly, an effective hold over the parties, it is practical for the forum to assume jurisdiction. In traditional English common law, an English court is competent to try action provided only the defendant has been serviced with a claim form. As to a company defendant, the English court can claim jurisdiction if this company registered in England, or outside England but has a business presence in England. [3] Other countries influenced by English law, such as Australia, Canada, New Zealand, Israel, and the United States, etc., all adopt this theory and base jurisdiction on the service of a claim form on the defendant.

Jurisdiction based on presence has faced challenges in E-business. The concept of "presence" has been questioned in the Internet age. As for individuals, a person might have some activities through the Internet and have actual connection with certain countries, which would make these countries appropriate fora. However, the person can just carry on these activities through the Internet and never be physically present in these countries. In order to settle this problem, it has been claimed that an individual is virtually "present" in the territory of one country if he appears on one website located within this country's territory. However, in this case, without the knowledge of the location of the server, the Internet user will hardly predict which jurisdiction his online action might bring himself into. This theory has a backward effect for the consumer, that it will make the business' home country in which the business locates its website server a competent forum.

A company can only have business presence in one country, either by its agent, its branch, or its place of business. However, in E-business, a company can get benefit from a foreign market only by establishing a business website, without setting up any agent, branch, place of business or other physical establishment. Thus, no jurisdiction can be claimed based on presence principle. It has been suggested that the business website can be regarded as a business branch, or business establishment. If the website is accessible in one country, it can be regarded as a business presence in this country. The dilemma occurs that the business may thus be potentially subjected to all the jurisdictions in the world where the website can be accessed. Great uncertainty and unpredictability again exist. The presence principle thus turns more and more unpractical in the Internet age.

2.2 Residence/Habitual Residence And Domicile

Civil law tradition has based jurisdiction on residence/domicile of the parties. As the centre of the party's social activities, the domicile or resident country should be the most convenient forum for the concerned party. Subject one party to the judicial system of the party's habitual residence/domicile will satisfy the party's reasonable expectation in most cases. Further, a person will inevitably have close connect with his domicile/habitual residence, to subject a person to the close connected court will be appropriate and natural. However, it is not the case in E-business. Some activities carried out online may have very little connection with the businesses' residences/domiciles. For example, a business has established a website aiming at foreign markets only. In this case, for disputes arising over the business activities carried out through the website, it is unreasonable for the targeted court to decline its jurisdiction for the reason of the party has no residence/domicile in this country.

Another practical advantage of using residence/domicile to decide is certainty and predictability it provides. If the jurisdiction can be decided according to the parties involved, once the identities of the parties are settled, the probable jurisdictions are determined. However, in E-business, it is not the case. The Internet user is almost impossible to be identified. Without knowing anything about the true identity of the other party, the E-business participant cannot get any hint of where is the other party's domicile/habitual residence, and will not know in advance what is the probable jurisdiction this transaction may bring him into. Instead of certainty, residence and domicile bring unpredictability in E-business.

2.3 Nationality

Principle of nationality is another traditional doctrine to determine jurisdiction. The reason for this principle is based on personal bond between a party and a country. Use nationality as a basis for jurisdiction has been widely adopted by France and other Latin language countries influenced by France law.[4] However, this principle also cannot be efficient in E-business area.

Same as residence/domicile principle, when the Internet user is totally blind to the true identity of the other party, he will not know the other party's nationality, and will not have a sound prediction of the probable legal result of his activity. This principle has already lost its meaning in the virtual world.

2.4 Parties' Autonomy

Compared with the above doctrines, principle of parties' autonomy is a comparatively new principle in contractual area. Contractual parties can make agreement to determine which court may hear the dispute. This principle can help to protect parties' justified expectations and provide adequate certainty and predictability to foresee the legal result of a concerned transaction. These advantages make it a principle welcomed in the modern commercial world.

However, this principle has its limitations especially in E-business. The click-wrap contract is widely used in E-business. In this contract, the website provider, always the business, will display the terms and conditions of the agreement on the computer screen, and ask the other party, always the consumer, to click the button "I agree", in order to access this website or continue the purchase procedure. In a click-wrap contract, choice-of-court clauses are usually provided.[5] Although the click-wrap contract might be sound in efficiency, it is questionable whether it is also sound in fairness and justice. Without negotiating about the relevant rights and obligation, the consumer has to accept all the terms of the contract in order to make a purchase. The businesses thus have the advantage to choose the most convenient court to them, which might be vexatious or oppressive to the consumers. The result is unjust and unfair to one party with the benefit of another. This disadvantage might be detriment to the consumer's confidence to participate online transaction. Thus, the application of principle of parties' autonomy in E-business is also limited.

2.5 Place Of Performance

Place of performance has also been accepted as a basis to determine jurisdiction in commercial transactions.[6] However, it is quite difficult to determine where is the place of performance in E-business. Suppose an English company established a website based on the server in Japan, a Chinese consumer purchase an E-book through the website and directly download it to his computer. The consumer's ISP is located in Texas. The procedure of delivery is that: the product has been sent from the server, to the consumer's ISP, which will send it to the consumer's personal computer. Which country, Japan, China, or Texas, should be the place of performance? By holding the place of the performance is where the product is sent from, Japan will be the place of performance. However, Japan has little relation with both the parties and the transactions. Further, it is also possible for the company to move the website into other server. The place of performance will change accordingly. If we take the place where the product has been received by the consumer as the place of performance, the remained question is whether the place of the consumer's ISP or the place of the consumer's computer can be the place of performance. Uncertainty still exists in this case.

2.6 Effect Has Been Caused In The State

Some country also bases their jurisdictions on the effect caused in their territories. Even if the party is outside the state's territory and has done actions elsewhere, if these actions cause effect in the state, this state will have jurisdiction.[7] Problem here is that by recognising this principle, a state greatly broadens its jurisdiction, and this broadness may cause uncertainty to the parties. Especially in E-business, a website accessible in one country will more or less cause some effect in this country. For example, an English company many just establishes a website to sell certain digital products to the consumers within Europe. The consumers in Texas who can access this website try to purchase some products online. It is reasonable to say the action of establishing website and uploading it has caused effect in Texas. However, is it fair enough to subject the company to the government of the Texas court? If so, an Internet company may be subjected to the jurisdiction all over the world. Criteria as to what kind of effect it must be have to be set up to take use of this principle.

3. BRUSSELS INNOVATION – DOSE IT WORK?

As mentioned above, the traditional jurisdiction rules have been questioned in E-business. It is an urgent problem to establish new approaches for the further development of consumer-orientated E-business. Many important international organisations have carried out certain work on this issue. EU Brussels Regulation might be the most influential and important innovation at present. Brussels Regulation re-organises and reforms some of the traditional jurisdiction rules and tries to make the variation efficient for the development of E-business.

Brussels Regulation has adopted domicile principle as the basic jurisdiction rule. It provides consumers the right of home forum action both as claimants and as defendants against the businesses. Parties' autonomy, as a general principle in private international law in contract, has been greatly limited in its efficiency and enforceability for consumer protection purpose. Brussels Regulation has also set up some conditions to keep balance between consumer protection and business promotion. It requires the businesses to pursue commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member in order to trigger the consumer protective jurisdiction provisions.[8] The

requirement in the Brussels Regulation is different from its previous precedent Brussels Convention, which requires the conclusion of the contract was preceded by a specific invitation addressed to the consumer or by advertising carried out in the consumer's domicile country and provided that the consumer took in that state the steps necessary for the conclusion of the contract itself.[9] The Brussels Regulation broadens the concept of "targeting" and removes the requirement of concluding contract in the consumer's home country. However, it is questionable whether the reform will achieve the goal of providing certainty and promoting E-business.

3.1 Targeting

First, is it required for the business to "target" or "aim specifically at" the jurisdiction in question in order to trigger the protective provisions? If we accept the requirement of targeting, problems will arise as to how to determine "targeting", especially in E-business. Brussels Convention has adopted the requirement of "targeting" by asking for "the conclusion of the contract was preceded by a specific invitation addressed to him (consumer) or by advertising" in the consumer's domicile.[10] This requirement has been criticized for it precludes where business can reasonably foresee the advertisement will reach consumer habitual resident/domicile in certain countries and will gladly accept the benefit thereof although the business may have had no specific intention to do business in such countries.[11] This difficulty is more obvious in E-business, for E-business brings worldwide consumers to the transactions without the necessary intentions of the businesses.

More problems will arise in E-business as to what the "special invitation" or "advertising" may be, and whether they can show the businesses' predict. The businesses generally will adopt the promotion method through email or website. The Email can be regarded as a special invitation sent to the consumers, and according to Brussels Convention, if the special invitation has been addressed to the consumer, it is enough to trigger the protective provision. The problem here is that it is not sure whether this "special invitation" by email is directed to the consumer's domicile/habitual residence.[12] For example, the business might send the consumer promotion email without knowing the actual residence of the consumer and it is hard to say the email can show his expectation to be governed by certain jurisdiction. Further, an Email is usually received and stored in the server, and then downloaded by the consumer. It is also possible to regard the place of the server as where the special invitation has been sent, and where the business is targeting. Even if we regard the place where the consumer accesses this email as the place being "targeted at", problem will arise when the consumer download and read the email in the place other than his residence.

More difficulties will arise about "advertising". Products promotion in the website can be regarded as advertising. According to Brussels Convention, the advertising in a website which is not really designed for the consumers in a particular jurisdiction is excluded from the scope of the consumer protection provision.[13] However, as the Internet is an open regime and accessible everywhere, the consumers outside the scope of the targeted countries have the equal opportunity to access the website and perform online purchase. The consumers online will not clearly know where this advertisement aims at, even if the business does give notice in the website that the products provided are for certain territories only, the consumers might be totally unaware of this announcement. In this case, is it fair to deprive these consumers protection from foreign litigation?

However, if we abolish the requirement of "targeting", it is also questionable. Since a website is accessible worldwide, and presently people have no truly efficient technologies to regulate its extension, a website with advertising "aiming at" a particular country will inevitably be viewed by the consumers from territories beyond the expected country. The potential result of refusing the requirement of "targeting" will subject the business to the actions in the unpredicted jurisdictions all over the world. For example, Brussels Regulation has made a somewhat radical reform in this point by providing "… the contract has been concluded with a person who *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".[14] It is quite unclear what is the precise and authorized meaning of "pursue" and "direct". However, at least two points are certain. One is that the provision has been reformed purposely to include E-business, for "any means" will necessarily contain the means of Internet.[15] The other is the provision gets rid of the requirement that the concerned business activities must "aiming specifically at the country", which broadens the nature and scope of activity which can fall in the scope of the protective provision. Although the Commission in proposal for Brussels Regulation has stated that "a consumer simply had knowledge of a service or possibility of buying goods via a passive website accessible in his country of domicile will not trigger the protective jurisdiction",[16] it does not exclude the consumers who had more than simple knowledge of products information, to trigger the protective jurisdiction. For example, this provision enables the consumers to take action in their domiciles against foreign businesses, if they conclude contract via the active or interactive website which has been designed for special area outside the consumers domiciles. Suppose an English consumer accessed a French company's website, which was designed to sell music to the French consumers only. Although the French company made the statement to limit the service

area within France, the consumer did not notice it and purchased some music by providing credit card information and downloaded the music. Since present technology cannot efficiently prohibit this download, the company could do nothing to terminate the transaction but had to be potentially subject to the forum without previous expectation. That is the reason why many scholars and legal professionals hold the idea that this change goes too far to the development of online business.[17]

3.2 Necessary Steps To Conclude The Contract In The Consumer's Home Country

Secondly, is it required the contract must be concluded within the state of consumer's domicile/habitual residence? Brussels Convention has considered this issue and required that the consumer must have taken in the country of his domicile "the steps necessary for the conclusion of the contracts". However, in E-Commerce, it is clear the place of conclusion of contract becomes somewhat irrelevant to the matter. Without requirement of personal presence, a consumer can conclude contracts everywhere in the world. To the business, an English consumer concluding the contract online in his home country will have no difference if he concluding the contract in Japan. On the other hand, the business concluding contract online is not necessary to have a sound knowledge about the consumer's *concurrent* location, for it is quite often to be fortuitous without any connection with the consumer's domicile/habitual residence. In the above example, is it just to exclude the English consumer from the protective jurisdiction regime for the necessary steps to conclude the contract has been taken in Japan instead of England? If the invitation was sent individually to the consumer, or the advertising was designed aiming at the English market, is it reasonable to treat the consumer differently just because he happened to make this purchase outside England? Further, how about the business company has already known the domicile of the consumer before concluding contract? The fact that the consumer did not take necessary steps in his domicile will not damage businesses' reasonable expectation.

Furthermore, doubts might arise as to how to determine the places where the consumer has carried out the steps leading to the conclusion of the contract in E-Commerce. The character of the Internet makes it possible for "the steps necessary for the conclusion of the contract" to be take in different States. For example, the consumer might begin the order in one country, continue negotiation in another, and complete it in the third country. Further, from the technical point of view, in a click-wrap contract, the contract is concluded in the server, instead of the place of consumer's location even if the consumer does click the bottom indicating his agreement in his domicile/habitual residence. In this case, the business can easily escape the protective provision by choosing the server located outside the consumer's home countries. Even if we take the view that the contract is concluded in the consumer's location at the time of conclusion, it is for the consumer to prove that he has taken necessary steps to conclude the contract in his domicile in order to trigger the protective provision. The problem is how can the consumer prove the contract is concluded in his home other than in a foreign country?

By noticing these difficulties, Brussels Regulation has abandoned this requirement, but the reform has also been taken into question. It is claimed if the contract has been concluded totally outside the consumer's domicile/habitual residence, how can it be for the contract to have sufficient connection with the consumer's domicile/habitual residence? And how can it be just and fair for a court does not have sufficient connection with the contract to assert special jurisdiction over the case? Further, if the contract is concluded outside the consumer's home, the business will have no reason to expect the possible result of the transaction will subject himself to the unpredicted jurisdiction. For example, if the consumer performs the purchase in the business' domestic country, as to the particular contract, it is not clear from doubt that the consumer's unilateral behaviour is sufficient to bring the business to a foreign jurisdiction.[18] The language in the Brussels Regulation is so broad that it even can subject defendant company to the protective provision even if the contract were not concluded via the Internet but that nevertheless are related to and fall in the scope of the foreign defendant's website.[19] For example, a French company established active website with attractive advertisement in it to sell wine in France. This wine has never been put into the market outside France. An English consumer accessed this website and purchased the products in France during his one week travel. According to the provision, the company did direct "commercial or professional activities" to England "by any means", for the advertisement is accessible in England. However, is it reasonable and fair to subject the France Company to the English forum concerning lawsuit brought relevant to this wine?

4. CONCLUSION

Generally speaking, present jurisdiction rules, including some innovation tailoring the traditional jurisdiction rules to suit the development of E-business, are considered not satisfactory enough. The Brussels Regulation provides more certainty and security for the consumers, but may discourage the promotion of the business. Some undefined concepts, such as "direct to", "pursue" have been questioned and creates unpredictability to the parties. More work has to be done in this question. Although no systematic and detailed resolution recently, some general suggestions can be made to make this issue more clear:

First of all, certainty and predictability has to be guaranteed to both the businesses and the consumers. In this sense, if the traditional jurisdiction doctrines are adopted, further work has to be done to give precise definitions to some basic concepts in E-business.

Secondly, as unequal bargain power exists between the consumers and the businesses, more concerns have to be given for consumer protection. Restrictions should be set to regulation the effect of choice of forum clause in click-wrap contract.

Thirdly, in order to promote E-business, reasonable expectation of the businesses has to be protected. It is not sound to subject business to the jurisdiction of consumer's home country in any case. Some conditions have to be established to prevent over-protective solution for consumers.

Fourthly, as the technology is continuing growing, E-business in the future might rely on some technique other than the Internet. Thus, the resolution must be technology neutral so that it does not discriminate between different technologies.

REFERENCE

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[7] For example, see Restatement of Conflict of Laws, Chapter 3, § 37, § 50
[8] Brussels Regulation, art 15.1(c)
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[17] See generally, Joakim ST Qren, "International Jurisdiction Over Consumer Contracts In E-Europe", ICLQ vol 52, July 2003, 665-696; Hague Conference, Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, art 7(1)(a) has adopted a similar approach
[18] For example, in several states of USA, in cases where the contract was unilaterally brought by the consumer to the consumer's forum, the court might deny the jurisdiction. *See World-Wide Volkswagen Corp. v Woodson*, 444 U.S. 286 (1980*); West Am. Ins. Co. v. Westin, Inc., 337 N.W.2d 676 (Minn. 1983); Markby v. St. Anthony Hosp. Sys.*, 647 P. 2d 1068 (Wyo. 1982)
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