Key Pitfalls in Conducting International Trade via The Internet

By Jacqueline Klosek

One of the Internet’s greatest strengths - the provision of the ability to communicate and engage in commerce with individuals all over the world with great ease and speed - is also one of its potential weaknesses. The Internet has made it much easier for enterprises in remote corners of the world to participate in trade with each other. At the same time, however, companies’ growing reliance on the Internet as an integral tool of commerce may be increasing the likelihood that such entities will find themselves exposed to a foreign jurisdiction as a result of their Internet related activities.

Throughout the world, nations and local jurisdictions are enacting laws and other rules to regulate certain aspects of the Internet. The difficulty with this is that the Internet is truly a global medium and many of the laws that are enacted end up having an extraterritorial reach. For companies engaging in e-commerce, this will often mean that it will not be enough to ensure that one’s Internet related activities comply with the legal requirements of the jurisdiction in which the company is physically based. Instead, efforts will need to be directed at ensuring compliance with the legal requirements of foreign jurisdictions in which marketing efforts are targeted and/or transactions are conducted.

Contract Formation And E-Signatures

When engaging in trade via the Internet, it will be important to acknowledge that jurisdictions tend to have different requirements regarding the formation of contracts electronically and the use of electronic signatures. This reality can impact many different aspects of e-business ventures. For instance, in the United States, many web site operators rely upon web site terms of use agreements. While the enforceability of agreements that are simply posted on the web site is not entirely settled in the United States, it may be subject to even greater legal uncertainty abroad.

Furthermore, web site terms of use agreements are but one example of the numerous online agreements that may be involved with entities’ e-commerce ventures. When concluding agreements online with consumers or businesses based in foreign jurisdictions it will be necessary to be cognizant of certain local requirements. In some foreign jurisdictions, such as the Netherlands, the
use of electronic means for concluding contracts is well established and tends to proceed without major complications. In other jurisdictions, however, concluding a valid contract electronically will require compliance with an intricate array of procedural requirements.

**Warranties, Limitations On Liability And Other Key Terms And Conditions**

When conducting business online, especially with consumers, it will also be necessary to consider the potential application of foreign law regarding certain contractual terms. Many jurisdictions provide that there are certain mandatory warranties that will apply regardless of what is stated in the contract. This is particularly the case when an entity is contracting with a consumer for the provision of certain goods and services.

Furthermore, jurisdictions tend to take different approaches with respect to limitation on liability. For instance, in the United States it is often quite commonplace to state that a party will not be responsible for the payment of any “indirect or consequential damages.” However, a number of jurisdictions, including Belgium and the Netherlands generally do not recognize the concept of “indirect or consequential damages.” Instead, in order for an exclusion of such damages to be valid, the agreement must specifically indicate which damages are being excluded. In addition, a number of jurisdictions place specific limitations on exclusions of damages in general, especially when the applicable transaction is being conducted with a consumer.

Other jurisdictions regulate the kinds of terms and conditions that can be included in standard contracts with consumers. In Germany, for instance, the German Act on Standard Terms and Conditions (the “Act on STC”) will apply to “standard” contractual terms that a company uses with more than one customer. While the focus of the Act on STC appears to be on protecting consumers, certain of its provisions will apply to agreements between commercial entities.

**Privacy And Data Protection**

Privacy is a very important issue when engaging in commerce online. A number of jurisdictions, including, Canada and the European Union have adopted a much more comprehensive and stringent approach to personal information privacy than is currently found in the United States. In certain cases, the laws of these jurisdictions can apply to U.S.-based entities that collect personally identifiable information via the Internet. It is also important to note that very stiff penalties, including the imposition of large fines and prison sentences, can accompany violations of these provisions.

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1. In Canada, the key national legislation applicable to the private sector is the Personal Information Protection and Electronic Documents Act, S.C.2000, c.5.

2. In Europe, the key legislation is Directive 96/46/EC of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals With Regard to the Processing of Personal Data and the Free Movement of Such Data. However, this Directive, is directed toward fifteen member states of the European Union, which must then enact their own legislation implementing the Directive. According, attention will also need to be directed towards relevant national privacy laws.
While European lawmakers and regulators have been the subject of a significant amount of criticism as a result of the European approach to data privacy and numerous allegations that such an approach involves the exercise of extraterritorial jurisdiction, certain U.S. privacy requirements also extend outside of U.S. borders. For example, the Federal Trade Commission has made it clear that the requirements of the Children’s Online Privacy Protection Act of 1998 ("COPPA") will apply to foreign-operated web sites if such sites "are directed to children in the U.S. or knowingly collect information from children in the U.S."\(^3\)

Local Requirements

Significantly, a number of jurisdictions also have local language requirements that must be considered. In France, for instance, the law of August 4, 1994 imposes the use of the French language within the French territory in a number of documents destined to the information of the public such as offers, presentations, instructions for use, conditions of warranty, invoices and receipts. Similar rules exist in Quebec.

Other jurisdictions enforce restrictions against certain types of content and, often, such restrictions will be accompanied by severe penalties, including possible imprisonment, for violators. Consider, for instance, the experiences of Yahoo!, which was found to have run afoul of Article R. 645-1 of the French Penal Code which prohibits the exhibition or sale of racist materials after the company made Nazi memorabilia through its online auction service. The company was fined and ordered to take measures to make it impossible for web surfers in France to reach any Nazi memorabilia through the Yahoo! web site. Furthermore, the legal battle in this case is continuing and the company may face additional penalties including the imprisonment of responsible company officials.

Advertising Requirements

Web site operators must also consider local requirements applicable to advertising and other promotional activities. In Europe, for instance, there are a number of directives that govern different aspects of advertising, including the use of comparative advertising and engaging in misleading advertising. While such directives call for a certain level of harmonization among the laws of the different European Union member states, there still continues to be significant divergences among the legal requirements from country to country. In France, for instance, strict rules applicable to the use of comparative advertising are still enforced. Such rules are generally much more stringent than those found in other jurisdictions including, notably, the United Kingdom. In addition, many jurisdictions have imposed different rules and requirements applicable to the promotion of regulated professions, such as the legal profession, and regulated products and services, such as alcohol, tobacco and pharmaceutical products.

\(^3\) See, Federal Trade Commission, Frequently Asked Questions about the Children’s Online Privacy Protection Rule, available on the Internet at: <http://www.ftc.gov/privacy/ccoppafaqs.htm>. See, also, the COPRA Rule’s definition of an “operator”, which includes foreign websites that are involved in commerce in the United States or its territories. FTC Final Rule, Children’s Online Privacy Protection Rule, 16 C.F.R. Part 313.
Another important issue closely related to advertising via the Internet is the transmission of unsolicited commercial email. Many companies rely upon the use of email to notify existing and potential consumers about products and services. In the United States, there is no federal law that regulates the distribution of unsolicited commercial email. However, a number of commercial email. In some jurisdictions, such as the United States, Australia and Canada, Internet service providers play a significant role in enforcing their own policies that generally place limitations on the transmission of unsolicited commercial email. In other jurisdictions, such as the European Union and Japan, both of which recently passed new laws concerning this issue, the regulation of unsolicited commercial email is governed, to a significant extent, by statute.

Accordingly, if a company intends on promoting its products and services via the Internet and/or desires to send commercial email in order to promote its products and services, it will be advisable to examine the specific requirements of key jurisdictions that will be targeted by the marketing campaign.

### Jurisdictional Issues

Before closing, it will be necessary to include a few words about jurisdiction. The determination of applicable jurisdiction for Internet-based transactions is far from a well-settled area of the law. Even in the United States, when e-transactions are concluded between entities in two different jurisdictions, there are often protracted disputes concerning jurisdiction. The situation is much more complicated at the international level and the inclusion of a choice of law provision in the applicable agreement may not always be sufficient to escape the potential applicability of foreign laws to certain aspects of the transaction, especially in instances in which consumer contracts are involved.

### Conclusion

Clearly, the use of the Internet has led to lucrative new opportunities for international commerce. At the same time, however the use of the Internet for conducting transactions with individuals or entities in other countries raises the possibility that the laws of another country will apply to one’s online business activities. While in most cases, it will not be practical to examine each and every national and local requirement that applies to e-business initiatives, it is certainly advisable to analyze and comply with the laws of jurisdictions in which marketing campaigns will be targeted and from which new customers will be accepted. Doing so may help to minimize the risks that can be associated with conducting commerce online.

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