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Damian Sturzaker

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# Dispute resolution in the new millennium – international arbitration

*Damian Sturzaker*

'It will become increasingly important for companies to understand the implications of doing business in a large number of jurisdictions, what laws apply, and whether companies are at risk of being held liable for breach of either civil or criminal law in those jurisdictions.'

In the last decade of the previous millennium, information became a commodity that was more valuable, more changeable and more accessible than at any other time in history.

At the heart of this revolution has been the internet. Its stateless and chameleon-like quality has left traditional legal concepts and procedures for resolving disputes looking outdated and irrelevant. Under this new regime, notions of nationality, residence and place of business appear obsolete.

Increasingly, a single judge in one corner of the world is having to grapple with a situation where the offending party is located in one country, the injured in another and the internet service-provider in a third. The judge has to determine whether an infringement occurred, where the infringement took place, what law to apply and which court has jurisdiction over the matter.

The judge's position can be compared to that of an astronomer attempting to decipher radio signals from another corner of the solar system – when he or she finally manages to do so, the place that sent the messages has changed or ceased to exist and the conclusion is irrelevant.

## Where are you doing business?

The accessibility of the internet also means that a company may find itself 'doing business' in jurisdictions that it had no intention of entering. It will become increasingly important for companies to understand the implications of doing business in a large number of jurisdictions, what laws apply, and whether companies are at risk of being held liable for breach of either civil or criminal laws in those jurisdictions.

This is vital where a company has assets in various jurisdictions or has employees who are present in these jurisdictions. Conduct which is legal in one jurisdiction may be illegal in another, thus subjecting the company to potential fines, and its employees to criminal sanctions, in the foreign jurisdiction.

A case which demonstrates the extent to which the internet has changed the rules of play is *MecklerMedia v D C Congress* ([1997] 2 WLR 479; [1998] Ch 40; [1998] 1 All Er 148), in which the English High Court held it had jurisdiction to hear a passing off dispute where the plaintiff organised trade shows in the UK and the defendant organised trade shows in Germany. Both parties advertised their business on the internet. The plaintiffs alleged that the defendant's internet activities infringed their rights. The Court held that the defendant's activities had a potentially harmful effect on the plaintiff's goodwill in the UK and therefore the Court had jurisdiction.

In the US a Court held that a defendant was subject to the Court's jurisdiction despite having no physical assets in the jurisdiction, its only connection being the fact that its site was accessible in that state. In other US cases high levels of interactivity with users have been used to justify the assertion of jurisdiction by courts.

One might expect that the above decisions could have a somewhat chilling effect on the willingness of companies to advertise and enter into transactions over the internet via webpages. Not so. A webpage and the ability to transact over the internet is now seen as fundamental to most businesses, with those companies that are slow to adapt being regarded as Luddites. ➤



## What law?

➤ The first step in harmonising the conflicting approaches taken by different jurisdictions to what law should be applied to internet transactions and which court has jurisdiction is to establish a uniform body of law so that certain types of disputes in cyberspace are governed by the same law.

The establishment of the Convention on the International Sale of Goods (CISG) is a good example of an international convention applying to particular types of contracts. An attempt to do this in relation to e-commerce is the UNCITRAL Model Law on Electronic Commerce. The European Commission General Directive on Electronic Commerce addresses issues of electronic contracting, misleading advertising and the liability of electronic commerce service-providers and content providers.

The European Commission has expressed the view that there is a need for additional capacity in traditional private dispute resolution systems, as well as new kinds of alternative dispute resolution services. It hoped that various countries will adopt the UN Model law and the European Directive and that global commerce will be facilitated by generally consistent national regulation.

The other alternative is for parties doing business on the internet to ensure that they create their own self-contained system of law and jurisdiction. This can be established under contract between the parties. The parties can create a system of law, consent to that law applying and agree to resolve all disputes by way of arbitration.

Of course, there will be limitations on the ability of parties to establish a private legal regime, as some national laws prohibit certain contracts that are seen as contrary to public policy. Subject to these restrictions, however, most national laws allow parties a fair degree of autonomy in establishing the legal regime governing the contract.

## ADR goes online

If the internet has challenged traditional

methods of dispute resolution, it has also created opportunities to resolve those challenges. Some new organisations have emerged which utilise the internet as the forum for dispute resolution. One of the new organisations is the Virtual Law Firm, which comprises a network of arbitrators having specialised backgrounds in specific practice areas who can be reached by the internet to resolve disputes. Parties are referred to an arbitrator and, if they consent, the matter proceeds by way of arbitration.

More revolutionary is the Virtual Magistrate Project, which was established on a trial basis to offer arbitration for rapid, interim resolution of disputes involving:

- users of online systems;
- those who claim to be harmed by wrongful messages, postings and files; and
- system operators.

The project made available a pool of experts who have been highly trained in issues surrounding the law and online systems. The jurisdiction of the Virtual Magistrate was specifically limited to complaints about messages, postings or files allegedly involving copyright or trade mark infringement, misappropriation of trade secrets, defamation, fraud, deceptive trade practices, inappropriate materials, invasion of privacy and other wrongful content.

The Virtual Magistrate could also decide whether it was reasonable for an internet service provider to delete or restrict access to a challenged file. Other cases could involve decisions about the disclosure about the identity of an individual to a person other than the government or whether it was appropriate for a service provider to deny a person access to an online system.

The Virtual Magistrate currently has only one reported decision — *Tierney v Email America*. In that case Tierney, an America Online subscriber, filed a complaint with the Virtual Magistrate requesting the removal of a posting made to America Online's system by Email America. The posting contained an advertisement for the sale of a large listing of the names of subscribers and their email addresses,

indicating that users could anticipate a high rate of return on bulk emailing internet users with product endorsements. Tierney sought removal of the posting on the grounds that:

- the advertisement promoted bulk emailing, which was against public policy and not in the interests of internet users;
- bulk emailing was a violation of America Online's longstanding rules prohibiting such practices;
- the advertisement was an invasion of privacy and would discourage use of the internet; and
- the advertisement was deceptive and contained false advertising.

Tierney posted his request with the Virtual Magistrate and it was referred to the American Arbitration Association and a magistrate was selected. America Online was notified and after a short adjournment America Online submitted a detailed response in support of Tierney's complaint.

Thirteen days after submission of the request by Tierney, the magistrate posted his decision that America Online should remove the posting complained of by Tierney. In his decision, the magistrate referred to America Online's terms of service in which they reserve the right to remove the content which was deemed harmful, offensive or in violation of their terms of service, and which also provided that members may not post or transmit any unsolicited advertising.

Interestingly, America Online voluntarily submitted itself to the jurisdiction and agreed to be bound by its decision. Email America either never received service of the action or refused to submit itself to the jurisdiction. Accordingly, Email America was only bound by the decision indirectly, through its subscriber agreement with America Online.

The above case demonstrates that contractual obligations are the best means of binding parties to the online tribunal and that to enforce decisions, incorporation of online arbitration clauses must be widespread.

The advantages of using an online system for a dispute resolution ➤

➤ include:

- the ability to transfer large quantities of information to other parties and the arbitrator quickly and at a low cost;
- parties can communicate interactively without being present via email or electronic video conferencing;
- the reduction of delays; and
- documents can be accessed by parties at any time.

### Limitations of the new systems

However, there are limitations to such arbitrations, and resolution of disputes online cannot replace the need for face to face meetings and the examination of witnesses in person. This move into the Brave New World is hampered by the fact that decisions of the Virtual Magistrate are not yet regarded as enforceable.

To make such methods of dispute resolution enforceable national courts need to recognise the agreement to arbitrate as valid. Thus, to enforce the agreement, there needs to be a national court which will treat the agreement as valid, enforce the agreement to arbitrate and enjoin any litigation in violation of the agreement.

Furthermore, any award handed down by an arbitrator needs to be enforceable in a number of jurisdictions. As such, there must be co-ordinated enforcement among other national courts or amendments to the international conventions dealing with arbitration awards to recognise this new form of dispute resolution.

### De facto enforcement

As we are dealing with disputes that arise in cyberspace, there is an additional method of enforcement: disconnection. By making it a condition of use that users recognise a decision of a properly constituted arbitration body it is possible to enforce an arbitration award by simply disconnecting the offending party.

However, for conduct that results in loss or damage to other parties, it is important that national courts recognise and enforce the arbitrator's ruling. Enforcement would allow for the

execution of the ruling as a valid judgment against assets of the offending party.

There is some work to do to modify national laws to include dispute resolution in cyberspace. Similarly, international treaties need to be modified to apply to internet based arbitration. In particular, the requirement that arbitration agreements be in writing and entered into at a particular place would need to be modified.

### Strategies to manage internet liability

Although it is extremely difficult to restrict access to websites according to location, a company can take steps to make it clear that they do not intend to accept or fill orders from customers in particular countries. This will reduce the likelihood of a court asserting jurisdiction on the basis that the company was 'doing business' in a particular jurisdiction. Similarly, the interactive nature of the website can be minimised.

Furthermore, a website should have conditions of use agreements which set out the conditions on which the website may be accessed. The user may be required to take affirmative actions of clicking on 'I agree' or a similar term. Such agreement should establish the courts of the site operator's state (or any other preferred forum) as the only courts in which a suit may be brought. Even where the clause is not upheld, the agreement may have some influence on determining whether the website operator intended to avail themselves of the privilege of conducting business in the plaintiff's state.

While the internet permits companies to greatly expand their potential market, it also represents a legally challenging environment. Managing this risk through carefully drafted use of alternative dispute resolution techniques may be the key to succeeding in the Brave New World of the new millennium. ●

*Damian Sturzaker is a solicitor with Corrs Chambers Westgarth, Sydney and can be contacted at (02) 9210 6872 and <damian\_sturzaker@corrs.com.au>.*

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**PUBLISHING EDITOR:**  
Elizabeth McCrone

**MANAGING EDITOR:**  
Linda Barach

**PRODUCTION:**  
Kylie Pettitt

**PUBLISHER:**  
Oliver Freeman

**SYDNEY OFFICE:**  
Prospect Media Pty Ltd  
Level 1, 71-73 Lithgow Street  
St Leonards NSW 2065 AUSTRALIA  
DX 3302 St Leonards  
Telephone: (02) 9439 6077  
Facsimile: (02) 9439 4511  
www.prospectmedia.com.au  
prospect@prospectmedia.com.au

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