Jurisdiction & Electronic Commerce: Reality and Proposals

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The growth and development of E-Commerce merits increasingly more legal attention, specifically within Private International Law. The aim is to provide effective solutions to procedural questions and legal issues concerning cases resulting from the clash between the real world of established regulations and the virtual world where non-regulation seems to be the norm. Of primary importance in the drafting of an international protocol to govern E-Commerce ("the New Law") will be the rules of jurisdiction in the New Law that will facilitate the initial determination of which courts will be competent to hear disputes arising thereunder.

A law that promotes the development of E-Commerce, which at the same time respects our already established laws for consumer protection, would ideally do the following:

- Establish broad principles of judicial competence granting jurisdiction for the Resolution of E-Commerce conflicts to all courts to which any of the Parties can show a connection.
- Respect the choice of competent jurisdiction agreed on by the parties, provided that this agreement is not illegal under the mandatory rules of the consumer's country of residence nor should it imply that the consumer's rights are waived.
- Accept the validity of an exclusion clause, within the Originator's offer, for specified groups or countries, provided that this is not discriminatory, included by the Originator because he/she is the one who best knows the territory or public to which the offer should be made, as well as the opportunities for fulfilling the contracts. However, in the absence of an express restriction, it should be understood that the Originator offers goods or services globally and by the same token he/she might come under the jurisdiction of the country of the acceptant, if the rules of private international law of said country apply.

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Establish, for every Originator, the obligation to identify him/herself, particularly in terms of geographical location and domicile, to facilitate the fixing of a domicile for the Parties. This also grants, for greater security of the Addressee, the residual possibility of initiating a legal procedure within the jurisdiction of the defendant.

These are the conclusions to which it is possible to arrive after analyzing the rules set forth currently by the Argentine law to establish jurisdiction over a certain conflict.

Rules for establishing jurisdiction in Argentine International Private Contract Law:

An Argentine court has adjudicating authority when it is a proper court under the rules of judicial competence. Rules of personal jurisdiction are implied in rules of judicial competence, but there are no separate rules defining judicial adjudicating authority over the person.

Excluding the solutions provided by the various International Treaties to which Argentina is a signatory, particularly the Vienna Convention of 1980 on International Sale and Purchase of Goods, signed by many countries, the domestic legal regulations covering jurisdiction over a specific issue of a contractual nature establish that the following may be brought before a judge:

i) all contracts which must be fulfilled in the Republic, including when the debtor is not domiciled nor resident therein; and

ii) contracts in which the debtor is domiciled in or a resident of the Republic, and the Contract is to be fulfilled outside the country.

In the case of ii) Argentine law establishes a broad area of jurisdiction which also authorizes a claimant to claim before the judges of the country in which the contract is to be fulfilled.

To determine where the contract is to be fulfilled and, as a result, which country is recognized by Argentine law as having competency for claims related to the specific contract, reference must be made to Argentine law itself. According to Argentine law, place of fulfillment means:

1. The one stated by the parties signing the contract
2. The place indicated by the nature of the obligation
3. The place where the agreement was signed, if this is the same as the debtor’s domicile at that time.

Once these three criteria have been met, we conclude, firstly, that the law appears to respect, prima facie, without restrictions, the free determination by the parties as to which shall be the competent court to adjudicate over their activities.
Secondly, the law accepts an alternative method to establish the competent court: place of fulfillment is understood as the one indicated in the nature of the obligation.

Thirdly, the law accepts a method authorizing the claimant to claim before the courts of the State in which the contract was signed, if this coincides with the debtor’s domicile at the time of the signing of the contract, notwithstanding death or change of domicile of the debtor.

Lastly, the law sets out a fourth suggestion, broadly accepted in comparative law, which appears to facilitate the actual rights of self-defense of the defendant by accepting that the claimant initiates a claim before a judge in the debtor’s place of actual domicile.

What follows is an analysis of how these general principles established by Argentine law may be applied to E-Commerce, together with some specific aspects related to their application.

By “Originator” we mean the person by whom, or on whose behalf, the data message purports to have been sent or generated prior to storage, if any, but it does not include a person acting as an intermediary with respect to that data message.

By “Addressee” we mean the person who is intended by the Originator to receive the data message, but it does not include a person acting as an intermediary with respect to the data message.

1. Election of Competent Court by the Parties

Free Will

In general, international treaties have declared invalid those jurisdictional clauses improperly established by the Originator, although each particular case must be analyzed under the regulations of the applicable treaty to determine the validity of each clause and when it’s applicable. Among others, one of the notable exceptions to the principle of free election of jurisdiction by the parties, is contained in the Mercosur Protocols, mostly related to applicable law, that permit the free election by the parties, unless it has been abusively obtained by one of them in detriment of the other.

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2 Both Originator and Addressee definitions are extracted form UNCITRAL. Model Law on Electronic Commerce, as adopted in 1998 by the General Assembly of the United Nations.
Our Procedural Code does not contain a similar disposition, but our jurisprudence has provided some precedents in order to fill the gap, adjusting the ruling criteria to that adopted by the international treaties, and stating that an improper choice of jurisdiction is the one with no connection to the conflict. Currently, there is no test for what is considered "abusively" but, in our opinion, any clause in a contract by which an E-Commerce consumer has been deprived of its rights to seek recourse in his own jurisdiction, should be considered voidable.

In Internet’s current reality, the jurisdictional choice is usually made by the Originator and pre-written on a contract that the Addressee may only accept or reject.

The jurisdictional choice made by the Originator or Website Owner must be analyzed by the intervening Judge/Court, in order to avoid an improper choice, that is, of a jurisdiction with no connection whatsoever with the conflict.

The following are some ways to generally predetermine that a jurisdictional clause is improper:
- The Originator has no establishment or goods in the country of the chosen jurisdiction.
- The contract provides for a place of execution, other than that of the chosen jurisdiction.
- The Addressee (be it a person or a group of persons) of the offer (or message) has no goods or establishment in the country of the chosen jurisdiction.
- The goods to be delivered, given the case, are located at a country other than that of the chosen jurisdiction.
- The final place of transfer of the sold goods, given the case, is different to that of the chosen jurisdiction.

Consistent with Argentina’s legal tradition of establishing generous jurisdiction grounds, aimed at avoiding deprival of justice and uncertainties concerning which country should conduct the case for a specific conflict (with international or foreign elements), we are of the opinion that the same principle must rule Electronic Commerce. Thus, both the judges of the origin country and the destination country should be entitled to intervene, allowing the plaintiff to validly elect which of these two States shall intervene jurisdictionally in the decision of the dispute arising from the contract.

*The validity of jurisdictional clauses inserted into E-Commerce contracts:*

This is of extreme importance because of the issue of validity of
jurisdiction clauses when it comes to contracts electronically celebrated, which are usually prearranged by the originator (‘click wrap contracts’).

The validity of electronic documents has not yet been completely admitted in most countries. However if, consistent with the principle *Locus regit actum*, expressly included in our legal system through article 12 of the Civil Code, the validity of such documents were to be admitted when the applicable law is that of a country that admits electronic documents, the analysis of the jurisdictional clause could still be carried out.

Our position stated, we believe that the issue in question should be tackled through an internationally uniform regulation of the applicable laws to each case, as well as in respect to the message sender’s choice of jurisdiction for the terms of the relationship in which he/she is engaging (i.e. the publishing of a Website in the Internet or the use of E-Mail to convey an offer).

In view of the above, we think that an internationally uniform regulation must respect, primarily, the parties’ choice about jurisdiction, but always leaving open the possibility that the Judge/Court of the Origin Country as well as the Judge/Court of the Destination Country, may analyze whether such choice was improperly established by one of the parties.

2. The Nature of the Obligation

In the absence of a valid choice agreed by the parties, Argentine law attempted to attribute jurisdiction to the Judge/Court of the place indicated in the nature of the obligation.

The obvious lack of definition openness of such a regulation, particularly for bilateral or synallagmatic contracts, has meant that national jurisprudence has had to redefine said regulation establishing which of the obligations stipulated in the contract should be considered applicable under its terms.

At present the opinion is unanimous that the applicable criteria for the regulation refers to the inherent characterizing obligation of the contract.

To this effect we must analyze which inherent consideration applies to the business of E-Commerce, rejecting the view that said consideration should constitute payment of a specific price, in whatever manner, by which no contract may be defined in terms of payment of a price, because both a software license and a purchase of a CD contain payment of the price, so that both contracts may establish the same method of payment.
In this way the competent jurisdiction for relations between the Originator and the Addressee would be the court in the nation in which the characteristic inherent obligation of said contract have to be fulfilled. Therefore, said inherent obligation must be analyzed closely and carefully by the court, since it might determine whether the court itself has jurisdiction on that specific dispute.

However, the enforcement of this regulation in terms of offers made on the Internet, except in cases where the parties have chosen a valid competent jurisdiction, may be brought before the courts of a country under which the Originator, in the capacity of offerer, had no intention of being liable.

The intention to make an offer to the public of a specific country or group of countries:

As outlined above, the possibility exists that in the case of an offer without restriction made through the Web, once accepted by a recipient, the offerer of said product or service may be subject to the jurisdiction of a country under which he/she had no intention to be submitted.

An important analysis, related to the defendant’s intent towards engaging into contractual relationships with individuals of a specific country, has been developed by English and, particularly, US Law.

According to our legal system, we are quite certain that the right way to go does not involve intent. The jurisdiction, recognized to judges or courts, over the Originator or the owner of a Website must not depend upon these persons’ intent.

From the moment the Originator includes his offer on the Internet, restriction free, he/she and/or the Website Owner are offering their products/services globally (and this is one of Internet’s major appeals). Given the aforesaid it would be almost impossible to prove the lack of intent to engage with users of a determined country, when the offer was effected restriction free. Thus, jurisdiction could be validly established on the Originator by the courts of the State in which the characteristic obligation should be executed. This is a sort of Treaty of Rome approach to ap-

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3 In the United States, two criteria must be met to assert jurisdiction over a nonresident. First, the nonresident must be amenable to process under the long-arm jurisdiction of the State. Second, the assertion of jurisdiction must fall within the parameters of the Fourteenth Amendment due process clause.

The Due Process Test has traditionally been held to three questions:
1. Did the defendant “purposefully avail” himself of the laws of the forum State?
2. Is there a nexus between the contacts with the forum and the suit at issue? (for Specific Jurisdiction). Is the conduct “related” to the claim?
3. Is it “reasonably foreseeable” that the defendant would be expected to defend himself in that forum?
applicable law, as applied to jurisdiction, in the absence of the will of the parties. Therefore, using this ruling principle, it will be Originator's own interest to establish a specific public or territory to which the offer is addressed.

In the event the offer were to have any restriction stated by the Originator, through which a given country or group were excluded, and such restriction were to be reasonable (as opposed to discriminating), the Judge/Court of the excluded country/group whose jurisdiction were to be activated, should restrain from analyzing or getting involved with the international case.

However, this statement is not absolute and has to bend if mandatory rules or specific matters attributed to the exclusive jurisdiction of the excluded country (or the country to which the excluded group belongs) are affected.

Consequently we must say that, as the Originator is the only one who definitely knows the Addressees to whom he directs his offer, it is he/she who can most appropriately evaluate the legal regulations for his/her business.

A future internationally uniform regulation destined to encourage the development of E-Commerce should allow the Originator to validly exclude from or limit his/her offer to specific countries, States and/or groups to which the Originator does not intend to offer his/her services or goods. However, if the Originator does not exclude from his/her offer such country, States or groups, it must be understood that the offer was made globally, and therefore, that the courts of the State to which the acceptant belongs can validly intervene in the resolution of the dispute.

3. Domicile of the Defendant

In the last analysis, without written agreement, or if it is impossible to establish which characteristic obligation inherent in the contract is applicable, Argentine law accepts the principle by which it is possible to initiate legal proceedings for the claim before a judge from the domicile of the defendant.

Our law accepts that judges from the following also have jurisdiction:

a) From the domicile of the defendant at the time of signing the agreement, if this coincides with the place in which the agreement is signed, regardless of subsequent change of domicile or death of the defendant.

b) From the current domicile of the defendant.

When goods and services are offered via Internet, and relationships are entered into on acceptance of these offers, if the offerer then fails to
fulfill its obligations, determining the precise geographical location of the Originator is not a simple matter.

In cases where the Originator is personally identified in the offer, specifying geographical location, or in any other case in which the offerer may be positively identified, it will not be difficult to initiate legal proceedings before a judge from said offerer’s domicile.

However, we are increasingly aware that not all title holders of Web pages or Originators are expressly identified, nor do they provide domicile or geographical location on the page or site through which the goods or services are offered, which makes it difficult to determine, without resorting to technical help (often unavailable to consumers), exactly where they reside or are domiciled.

Domicile does not mean the FTP location of the server who maintains the Web page on line, but it does mean the domicile of the title holder of said page, i.e., the offerer or Originator, because the latter, being simply a virtual address, may be changed within a matter of hours, resulting in uncertainty over the exact location, and thereby facilitating fraud.

This supposition could be avoided if a regulation is established whereby the Originator or offerer is obliged to show positive identification on the Web page or site through which the goods or services are being offered.

This obligation benefits the Addressee in that it would identify, in principle, the person with whom the contract is being entered into, and therefore the competent jurisdiction in case of subsequent litigation. Furthermore, it would also benefit the Originator who would then be able to establish a legal framework within a favorable jurisdiction. This would also bring security (an increasingly important issue when establishing commercial relationships via Internet) to the Addressee concerning the legitimacy with which the goods and services are being offered.

In order to reduce eventual litigation costs, jurisdictional capacity should be granted to the Judge/Court in the country or State under whose authority all the defendant’s assets are held. It must always be taken into account that this last possibility (i.e. intervention of the State of location of the defendant’s assets) should be denied if it prevents the defendant from effective defense.