APPLICABLE LAW AND JURISDICTION IN ELECTRONIC CONTRACTS I

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Abstract

One of the main consequences of the ubiquitous usage of Internet as a means to conduct business has been the progressive internationalization of contracts created to support such transactions. As electronic commerce becomes International commerce, the reality is that commercial disputes will occur creating such questions as: "In which country do I bring proceedings?" and "Which law is to be applied to solve disputes?"

Associate Professor in Commercial Law at the Carlos III University of Madrid, Spain, Teresa Rodríguez de las Heras Ballell, has created a three-part series of articles to bring increased clarity to such issues. This is the first one, in which she explains the applicable jurisdiction to electronic contracts, general rules to apply, importance of defendant domicile and the concept of establishment in eCommerce.

Applicable law and jurisdiction

The decentralised and global structure of the Internet and its decentralised operation have given e-commerce a transnational element that affects two questions essential to any transaction: applicable law and jurisdiction in the event of dispute. The sharing of applicable law and jurisdiction among States in respect of international transactions traditionally has been based on the use of contact factors generally of a territorial nature (the place where real estate is located, customary residence, principal establishment, place of shipping goods). The characteristics of the Internet as a new space sometimes make it difficult to apply these rules, and may make them inoperative or lead to results that are surprising or totally foreign to the contracting parties and other elements and circumstances of the case.

For all of the foregoing reasons, the provision as to what law will apply to a contract and the judge having jurisdiction to resolve such disputes as may arise between the parties becomes an essential question regarding the security of and confidence placed in e-commerce, reducing transaction costs and assuring appropriate internal efficiency of the contract.

Jurisdiction, applicable rules

Determination of what judge has jurisdiction to resolve a possible dispute between the parties is a matter that is not only essential, but also is determinative of the later application by that judicial body of the rules determining the law applicable to the case.

As a general rule each domestic court resorts to its own (internal) procedural rules to identify those cases and circumstances in which it has jurisdiction to resolve a dispute. This situation from the outset makes jurisdiction highly uncertain for the parties and requires
them to deal with a multiplicity of domestic procedural rules. For this reason there is a clear international trend to unify these rules, in order to reach an agreement of worldwide scope regarding international jurisdiction and recognition and enforcement of judgments. Agreement is not yet universal, but there already are significant regional instruments regarding jurisdiction in civil and commercial matters, in particular in Europe. This means that if the court is in a State that is a party to any of the conventions to which we will refer below, it will determine its jurisdiction of the case by applying these common rules. But if it is in a State that is not a party (without prejudice to the application of other conventions), it will determine its jurisdiction in accordance with its internal rules.

Currently the following instruments must be considered:

- Regulation 44/2001 Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Official Journal L 12, 16 January 2001), which has replaced the Brussels Convention of 27 September 1968, and entered into force on 1 March 2002. This Regulation is to be applied by courts of the Member States of the European Union to determine their jurisdiction in civil and commercial disputes.


Domicile of defendant as key factor. Special and exclusive competences

As a general rule the factor determining jurisdiction is the domicile of the defendant, regardless of its nationality. This means that the plaintiff may sue its counterparty in the place of its domicile, a rule that, taking account of the reporting and transparency obligations in e-commerce, is reasonably secure and predictable in the context of transactions that by their nature are cross-border.

Together with this general principle, it must be borne in mind that there also are some special jurisdiction rules giving the plaintiff other options in addition to the defendant's domicile, among which it can choose when deciding to file the complaint. Some of the circumstances that are contemplated are particularly pertinent in the context of e-commerce:

a) Regarding performance of a contractual obligation, suit may be brought before the court of the place where the obligation underlying the complaint was or should have been performed;

1 Except, initially, in the case of Denmark, to which the provisions of the Brussels Convention continued to be applied until 19 October 2005, after which date the provisions of the Regulation also applied to Denmark.
b) for purposes of applying the foregoing rule, absent agreement to the contrary, that place will be:
- when dealing with a sale of goods, the place of the Member State in which, under the contract, the goods were or should have been delivered;
- when dealing with the performance of services, the place of the Member State in which, under the contract, the services were or should have been performed;

c) In a complaint for damages, suit may be brought before the court of the place where the damaging event occurred or could have occurred.

In addition to these cases of special jurisdiction, which are alternative to the forum of the defendant's domicile, there are some cases of exclusive jurisdiction that do not supplement, but rather replace, the jurisdiction based on the defendant's domicile. In B2B e-commerce, the following rules may be particularly useful:

a). In contracts related to real estate (for example, leases²), only the courts of the country where the property is located will have jurisdiction.

b). Regarding registration or validity of patents, trademarks, industrial designs and similar rights the courts of the State of registration will have exclusive jurisdiction.

c). Under certain circumstances the parties may freely choose the court having jurisdiction to resolve their disputes, in that case being entitled to choose exclusive jurisdiction of that court.

The possibility of the parties agreeing that a court or courts of a State will have jurisdiction to hear any such dispute as arises or may arise between them is a very appropriate preventive strategy giving the legal relationship greater certainty and predictability. The choice of forum must be in writing, of course including digital formats and electronic means, it being required that there be a hard copy. The choice also must be made in accordance with the practices established between the parties and the general uses of trade.

Together with this express submission, based on prior agreement of the parties, it is possible that a court may have jurisdiction to hear a dispute by reason of a tacit submission. If the defendant appears to respond to a complaint filed by the plaintiff with a given court, provided that it is not a matter of exclusive jurisdiction and the purpose of the appearance is not specifically the challenge the court's jurisdiction, that court will have jurisdiction to resolve the dispute.

The parties (by the plaintiff's filing the complaint and the defendant's appearing) may even give international jurisdiction to a court other than the court expressly agreed in a prior express submission clause.

² Except in the case of lease agreements entered into for private use for a maximum term of six consecutive months, in which case the courts of the Member State where the defendant is domiciled will also have jurisdiction, provided that the lessee is a physical person and the owner and lessee are domiciled in the same Member State.
Concept of establishment in eCommerce

The location of the parties in any transaction is relevant to characterising the contract as international and applying many of the conflicts rules. The concept of establishment, nonetheless, has been particularly affected by the use of electronic resources in commercial transactions. The decentralisation phenomenon associated with the Internet means that the establishment may not be easily located, may be irrelevant for purposes of the contract, or may lead to the application of a law that has no tie whatever to the transaction. For this reason, some specific considerations regarding the location of an establishment must be added to the general ones in the case of e-contracts:

- The establishment of a legal person will be the place of its central administration, while in the case of individuals it will be its customary residence or principal establishment, if acting on a professional basis;
- The relevant establishment will be the one resulting from the information available at the time of entering into the contract;
- if there are multiple establishments the one taken into account, absent express specification of another one, will be the one having the closest ties to the contract based on the circumstances known to the parties;
- the establishment of a party will not be deemed to be the place where the technical devices or equipment used to support the contracting are located. This provision is a clear reference to e-commerce, and prevents consideration of the servers housing the website in or through which the contract is entered into as a permanent establishment, whether for tax purposes or for purposes of application of conflicts rules. That is, if a company the headquarters and central administration of which are located in the United States, to offer its products in Europe, houses its website on a server located in Spain, this does not imply that its principal establishment is located in Spain. Its headquarters in the United States continue to be deemed to be its principal establishment, the one relevant for purposes of application of conflicts rules. Nevertheless, it is interesting to ask whether we could consider the "agency, branch or principal establishment" to be the location of an electronic agent through which the company enters into its contracts.
- the use of a domain name or e-mail address tied to a given country (.es for Spain, .fr for France, .uk for the United Kingdom or .mx for Mexico) does not imply a presumption that its establishment is located in that country. This rule is also essential for e-commerce. It avoids adding new rules of contact related to matters that imply no effective or real ties to a country.

This article is the first of a three-part series about applicable law in electronic contracts. In the forthcoming article 2 Teresa will analyze the choice of law applicable to electronic contract, both general rules and specific cases such as in absence of agreement, to performance of information society services, etc.