PANEL V: PARTY AUTONOMY: CHOICE OF LAW, JURISDICTION, AND MODEL AGREEMENTS

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William E. Boyd

A discussion of an ideal legal framework is helpful to focus the panel toward solutions. In this scheme, contract–defined broadly as to include custom and course of dealing–and freedom to contract are essential components. The only role of public law intervention is to facilitate private lawmaking and limit it only as is necessary to respond to legitimate, and widely shared, concerns about imbalances in bargaining power (especially those to consumers), privacy, intellectual property rights, and bargains that have illegal subjects or purposes.

This framework is readily recognizable as not being unique to electric commerce (e-commerce). However, this framework would be expanded to accommodate electronic dealing by removing impediments to contract attributable solely to the fact that the contract is electronically based, especially those tied to a paper-based and signature bound society. These impediments would be removed by finding electronic equivalents to writings and signatures so as to preserve the values served by writings and signatures.

While this proposal sounds similar to United Nations Commission of International Trade Law (UNCITRAL), this model framework would go further. UNCITRAL leaves the ultimate force and effect given to the content of electronic communications to applicable substantive law. As such, this situation leads to difficult choice of law and choice of forum issues. In an attempt to eradicate these choice of law and forum problems, nation states should enter into regional or hemispheric agreements that eliminate differences in substantive law (for example, when and where an offer or acceptance is made effective). Further, signatories to these agreements should develop uniform rules as to jurisdiction and remedies, which might include alternative dispute resolution.

Such action by nation states could minimize the need to worry about choice of law or forum, increase harmony, strengthen the ability of parties to deal electronically, and lessen concerns about the extra-territorial effect of certain laws. This framework could produce the certainty that is essential to commercial dealings while leaving room for negotiated expressions of individual state views of morality and public order. Much of this proposition is rooted in historical commercial law doctrine. But, it reflects an adaptation of that doctrine to the realities of the move to an electronic environment of an increasingly global scope

that demands cooperation and uniformity as well as sincere efforts to minimize differences.

Jeffrey B. Ritter

"The contract is everything." As such, there is no need for public law. Model agreements are the most effective way to facilitate and promote private law making because they promote certainty and trust.

Model agreements are contracts between states and eliminate most choice of law issues. Model agreements are based on volunteerism. No country is required to participate; yet these model agreements are essential to e-commerce, by creating an offer and acceptance mechanism. Model agreements accomplish three things. First, they provide uniformity, allowing states to transact business with each other. Second, if they are done well they promote the best practices, which is essential to good law. Finally, model agreements spark innovation, allowing different parties to communicate and share ideas with each other.

Building model agreements is the first step in their use. The American Bar Association's (ABA) process of creating model agreements is different than the United Nations' (UN). The ABA sessions usually occur in the home of a member and are known as "kitchen table" sessions. The participants share ideas, bounce them off of each other, and then produce a model agreement arising out of compromise. The UN process, on the other hand, requires the consensus of all members. This is obviously a much more onerous burden to overcome. Therefore, the UN requires a well-defined process that is not suited for the "kitchen table." It is essential to recognize that model agreements will always have differences. As such, the parties involved are required to provide commentary on the alternate views.

There are three goals of a model agreement. First, a model agreement is effective for making good law. Thus, a good first model is essential. Second, they recognize the need for multi-competency. Persons from all areas of commerce–business, technological, legal–are all required to contribute to an effective model agreement. The final goal is neutrality, eliminating the characterizations of states. Such as large versus small and developed versus developing. The Internet is the best example of neutrality, as it does not take large and small into account.

"Long live contract."

Amelia Boss

Contract is the starting and ending point. Unfortunately, there are a number of problems associated with solely relying on contracts. First, the contract advances the cause only if it is enforceable. The key to enforceability is

determining when one has the power to enter into a contract. This determination is subject to law and not to individuals.

Secondly, many times people transcend business with different contracts. There are three types of contract, the model agreement, the "click"-wrapped contract, and contracts arising through the dealings of parties over time. The model agreement presumes that all parties are dealing at arms length and that there is no unequal bargaining power. The "click"-wrapped contract contains issues of party freedom and is similar to a contract of adhesion. Contracts arising through dealings of parties over time involve issues of trade usage and system rules. Examples in an e-commerce situation are America Online (AOL) usage and recent cases dealing with "netiquette." All three kinds of contracts present different types of issues of party autonomy.

Thirdly, there are problems inherent in dealings involving different jurisdictions. Of course, this presents choice of law problems. In determining the party's choice, the contract is most important.

The importance of model agreements is substantial. They present a way to move forward as a society and provide a basis for building consensus. While model agreements are a good place to start, they must support the framework suggested by Professor Boyd. Different kinds of contracts and different contract situations must be balanced to achieve the ideal environment.

Hugo Gallegos

In order to facilitate e-commerce, the proper procedures must be put in place. The subject of jurisdiction is an important issue, yet it does not affect the Internet very much. As such, there are several jurisdictional and procedural issues that must be established to deal with e-commerce.

Peru recognizes contracts and the rights of parties to enter into them. Furthermore, Article 62 of the Constitution acknowledges parties' rights to select jurisdiction. However, e-commerce presents new issues that must be considered. For example, faxes are not accepted in Peruvian trials and emails are impractical for evidentiary purposes.

An important issue is determining how to incorporate the concept of notaries into e-commerce. There are many problems associated with this, including age limits and whether the contract actually exists. Required notaries are especially problematic. In order to deal with this problem, Peru must adopt UNCITRAL in order to speed up its electronic trade. Furthermore, Peru must be concerned with how to protect the weaker party. For example, a click of the mouse may accept a contract, and the party may be harmed.

It is important to institute a dual system of self-regulation and a legal framework. One approach would be to create consumer protection laws. These laws must include clear descriptions of the conditions necessary for the creation of contracts. The framework for these laws is already available in Peruvian case law

concerning deceptive advertising. Peru, in facilitating e-commerce, is concerned with many issues, such as capacity, legal subjects. bargaining power, formality, and finding a proper role for notaries.

Jorge Miguel Otero

In any discussion of e-commerce, it is essential to analyze e-commerce events. As Moore's law states, computers have advanced at an incredible pace. It has taken only four years to develop the Internet as it exists today. Internet sales are skyrocketing and as many as 150 million people use the Internet. For example, Amazon.com is one of the biggest websites on the Internet and it did not exist two years ago. In five years, the projected revenues created as a result of Internet purchases will exceed $3 billion. Is the new global village created by the Internet a new nation?

Contracts present difficult obstacles in the world of e-commerce. Providing notarized public documents is a big problem. Electronic contracts differ, due to their medium, from normal contracts. As such, it is imperative to set up a system capable of handling these differences.

There are also several problems associated with the lack of a notary system. First, it is not possible to prove the existence of the contract. Second, legislation is not progressing as fast as society changes. This is a concern common to all industries, but is accentuated due to the fast rate of development in the computer industry. Third, laws are subject to interpretation. Different judiciaries will interpret laws in different ways that often lack consistency. Finally, the judiciary themselves, as well as practitioners, legislators, and business persons, presently lack the necessary understanding of technology and e-commerce to understand the issues to accommodate change. Any agenda for the modernization of contractual procedures must include the training of all participants.

Octavio Rivera Farber

The intent of the parties is essential to the completion of a contract. The Internet presents substantial dangers involved in the execution of contracts. The present "telematic" environment leads to invisible contracts that may be unintentionally agreed to by unwitting parties. Cryptography presents the danger of parties entering into contracts through fraud. Furthermore, there are certification problems inherent in all e-commerce that must be considered.

Consent between parties in the execution of a contract is not enough. Contracts are serious business and formalities have important purposes and their writing or their equivalents serve to provide an essential record of the deal. In

order to be effective and acceptable as standard practice, a method must be developed that will provide a record of any electronic transactions.

Ramon Azpurúa

The basic elements of a contract are object, valid consent, capacity, and legal purpose or cause. Freedom of contract is the general rule of Venezuela. However, electronic retailing is subject to the provisions of the Venezuelan Consumer Protection Statute of May 17, 1995. This statute contains provisions on invoicing, warranties, and adhesion contracts.

Factual situations that relate to foreign legal systems are governed by the provisions of international public law on the subject, in particular, by the provisions contained in treaties currently in effect. If a treaty is not in effect within a given jurisdiction, then the Venezuelan Conflicts of Laws provisions govern. If no such Venezuelan provisions exist, then analogy, followed by application of the generally accepted conflicts of laws principles, apply.

The Venezuelan Conflicts of Laws Statute of August 6, 1998, generally provides that the law of the jurisdiction chosen by the parties governs contractual obligations. However, if the parties do not validly indicate the law that will govern the contract, contractual obligations shall be construed in accordance with the law of the jurisdiction to which such obligations are most directly related.

Furthermore, Venezuelan jurisdiction cannot be repealed to benefit a foreign jurisdiction or of arbitrators deciding from abroad in certain situations. Those situations include controversies involving real property located in Venezuela and controversies on matters where Venezuelan "public order" or "good customs" are involved. The Venezuelan Commercial Arbitration Statute of April 7, 1998, provides that any controversy that is susceptible of being subject to settlement may be submitted to arbitration.

There are several problems associated with the enforceability of electronic contracts in Venezuela. For example, Venezuela lacks special legislation to deal with electronic contracts. There are several sources that Venezuela can look to for guidance, including the FEDECAMARAS Project of Joint Resolution on Electronic Invoices to be issued by the Treasury Department and the Department of Industry and Commerce, the UNCITRAL Project, and the use of model contracts. There are also evidentiary problems as to the admissibility of electronic contracts. Finally, the judiciary lacks the training and knowledge of electronic contracts to deal with the problems. There is clearly a need to strike an appropriate balance between freedom to contract and public order. The Venezuelan situation makes clear the need for transnational agreements to deal with substantive law differences and that the challenges are great with no easy or obvious solutions.

Mariana Silveira

I. INTRODUCTION

The other panelists have referred to the role of model agreements in e-commerce. In the United States, most of these agreements are used in closed systems, not in the open Internet environment, but in industries or business sectors that have a close, and in most instances, long-standing relationship, which guarantees a high degree of trust in the rules and standards that govern those closed systems. At this point, it cannot be said that model agreements are widely used in Latin America. Thus their enforceability in a judicial proceeding has not been tested.

It is important to point out that some countries, and specifically, organizations like the chambers of commerce, have expressed an interest in structuring model agreements or guidelines, as a type of self-regulation for transactions amongst their members (consensus building tools).

II. FORMALITIES–VALIDITY–ENFORCEABILITY

As to the formalities required by these agreements and the fact that their subject matter are electronic transactions, as many panelists have stressed, although formalities are a very significant requirement for many transactions, many times the main issue underlying the distinction between written and electronic agreements is not one of validity but one of enforceability, that is to say, ensuring compliance with the agreement in the event of a conflict or court proceeding.

International regulations usually establish that enforceability depends on the laws of the individual jurisdictions and on compliance with public policy principles in those jurisdictions. Thus, it is essential to establish what the competent law and jurisdiction are.

III. CASE-STUDY: URUGUAY

In Uruguay, as in other Latin American countries, choice of law is a complex issue. Generally speaking, it has been established that in the absence of a specific treaty, our internal conflict of laws rules apply, which are included in the appendix to the Civil Code and do not admit party autonomy regarding forum or applicable law shopping.

For instance, and with certain exceptions, the Uruguayan doctrine understands that it is not possible to choose applicable law in international arbitration clauses. Although the fact that Uruguay has ratified the 1958 UN Convention as well as the Inter-American Convention on Arbitral Awards (1975)

should lead to a different conclusion, the practical application of these international legal instruments has been extremely limited. Some courts, based on the 1994 Organization of American States Convention on the Law Applicable to International Contracts, have defended the applicability of arbitration clauses in all matters, including choice of law and forum shopping. However, the existence of dissenting opinions brings about a high degree of legal uncertainty.

Because no choice of law can be made, which law will apply under existing Uruguayan regulations needs to be analyzed on a case-by-case basis. An example of a case that might very well be subject to electronic dealings between the relevant parties is a distribution agreement between a manufacturer located in the United States and a distributor in Uruguay. Since there is no treaty between these countries, if a conflict arises, Uruguayan courts would resort to the principles established in the Appendix of the Civil Code. In the case of services contracts, these principles in turn resort to other international conventions signed by the country, which establish that the law that applies is that of the place where the main contractual obligation is to be performed. In the case of a distribution agreement, the main obligation is that of the distributor, and in our case it is performed in Uruguay. Consequently, Uruguayan law will apply. Additionally, it is established that the competent court is the one of the country whose law is being is applied. In the event that the agreement establishes an arbitration clause, arbitrators should likewise apply Uruguayan law.

IV. VALIDITY VS. ENFORCEABILITY

The distinction between validity and enforceability needs to be stressed one more time. The analysis so far does not mean that in practice there are no distribution agreements signed by a United States manufacturer and a Uruguayan distributor (paper-based or electronic agreements), and that there are clauses under such agreements that establish that the parties have agreed to submit their disputes to arbitration, and that the applicable law will be the law of the state of New York. That type of agreement may exist and they may be applied by the parties on a regular basis. In the event of a conflict, the arbitrators will decide based on New York law. If the award is against the distributor and the distributor accepts the award, then there is no problem. The problem arises when the distributor does not comply with his or her obligation or with the ruling of one or more arbitrators, and the other party needs to enforce the award in Uruguay, which is normally the place where the distributor's assets will be located.

V. ELECTRONIC TRADING OF SECURITIES

Another example that is also becoming more and more common in the electronic world is electronic securities trading. Investment securities are often

dematerialized and held indirectly (that is, as electronic book-keeping entries) at depository entities. In other words, they constitute fungible assets. Uruguayan conflict of law provisions establish that when an agreement refers to fungible assets, the applicable law would be that of the place where the debtor is domiciled at the time of the execution of the agreement. However, once again, this will be a matter of interpretation by the court, following the evidence submitted by the parties. If from the evidence it can be determined, that although securities are fungible they can be clearly located within the clearing system of the custodian, then it may be possible for courts to rule that the securities are located in the home jurisdiction of the custodian and that law of the custodian's jurisdiction applies. That might be Uruguayan law, or it might be another country's, and in the latter case it would be possible to respect the choice of foreign law as governing law. As it can be seen, this is an extremely gray area.

VI. *EXEQUATUR*

Finally, when a foreign judgment or award needs to be enforced in Uruguay, an *exequatur* procedure must to be followed. The courts of Uruguay will not re-examine or re-litigate the merits of the actions *provided* that such judgment or award is ratified by the Uruguayan Supreme Court. Such ratification will occur (1) if there exists a treaty with the country where such judgment was issued, pursuant to the provisions of such treaty, and (2) in the absence of such treaty, if such judgment (a) complies with all formalities required for the enforceability thereof under the laws of the country where the same was issued, (b) together with related documents, has been translated into Spanish and satisfies the authentication requirements of Uruguayan law, (c) was issued by a competent court after valid service of process was validly made in the country where the judgment was rendered, upon the parties to the action, (d) was issued after an opportunity was given to the defendant to present its defense, (e) is not subject to appeal, and (f) is not against Uruguayan public policy (*orden público*).

This latter requirement–compliance with public policy–is where it might be established that the judgment or award does not comply with Uruguayan conflict-of-law provisions, if it was issued under the laws of a country other than that which would result from the application of the relevant Uruguayan conflict-of-law rules.

VII. A COMPARATIVE ANALYSIS OF SITUATIONS IN OTHER COUNTRIES

A. Brazil

In Brazil, special Civil Code provisions also apply as conflict-of-law rules. Relevant provisions establish that in the case of contractual obligations, "the applicable law is that of the country in which they were contracted," and "contractual obligations are regarded to have been executed in the place where the offeror is located." Since the applicable law is expressly determined in this case, the will of the parties could not override such choice of law. It should be pointed out that, as in the case of Uruguay, the matter of choice of law has not been uniformly decided by courts and is still regarded as a gray area in the Brazilian legal system. Additionally, foreign decisions are also enforceable in Brazil insofar as they do not contradict the Brazilian public order.

B. Chile

In Chile, choice of law and of jurisdiction is possible, provided minimum linkage rules are respected–such as that at least one of the parties to it be a local party or have its domicile within the State of the courts to which the parties subject themselves. In the previous example, a manufacturer located in the United States and a distributor in Uruguay applying New York law–if the distributor happened to have assets in Chile and an award was to be enforced in that country–the choice of New York law as the applicable law would only be enforceable if the manufacturer had a certain link (business operations, place, or residence) with the state of New York. Consumer laws also need to be respected in Chile, as in other Latin American countries, so that the weaker parties to the transaction are protected.

The general principle for contracts in Chile is that the applicable legislation is the one that corresponds to the domicile of the person who accepts the offer. This clearly differs from the provision that is applied in Brazil, as established above. So in the case of an offer sent from a Brazilian company to a Chilean company, both countries would apply their own conflict-of-law rules, and hence both would consider that their regulations are the applicable ones.

C. Colombia

Colombia has provisions similar to those analyzed, in the specific sense that it requires an *exequatur* procedure, which will determine whether Colombian public policy regulations have not been affected, and whether the subject matter

does not include an issue that is within the exclusive jurisdiction of Colombian courts.

D. Spain

Spanish law does not allow the parties to choose the applicable law when there is not a nexus between the legal jurisdiction and the transaction.

VII. E-COMMERCE

These are just a few examples, and there is another side to the problem. Existing regulations, regardless of whether or not they allow for a choice of law and jurisdiction or both, generally refer to traditional, paper-based contracts. To a great extent, newly enacted or proposed regulations on e-commerce have not addressed the issue of jurisdiction and applicable law as they relate to e-commerce.

A possible choice is that performance of the obligations, as analyzed above in the case of the distribution agreement, in our example would result in the application of Uruguayan laws. However, sometimes it will be hard to determine where a service is provided on the Internet (distribution of software and professional services), and in that case existing regulations need to be modified in order to include references to electronic transactions.

IX. INTERNATIONAL RULES AND ALTERNATIVES

When parties have not stipulated the applicable law, or when as seen before, existing rules cannot be applied to the electronic environment, international rules have established certain general guidelines. The International Chamber of Commerce's draft Uniform Rules on Electronic Trade and Settlement (URETS) establish that in the absence of a determination by the parties, the electronic agreement will be "subject to the law of the country where the supplier of the goods and services has its principal place of business."

It has also been suggested that the plaintiff should have the right to opt between the law of the supplier or the law in force in the place where the debtor is located–in the latter case, it will be easier for the plaintiff to enforce performance of the relevant obligations after an award or judgment has been obtained.

All possible approaches have advantages and disadvantages. For instance, when the plaintiff can have the unilateral right to determine the applicable legislation, this leads to uncertainty, because it is impossible to establish beforehand which will be the rights and obligations resulting from a

particular case. On the other hand, the determination of an exclusive and rigid solution may also lead to unfair results.

X. CONCLUSIONS

As previously mentioned, most national and international rules have not addressed these issues or have only done so in a limited manner. Our proposal at this point is to have general guidelines in matters of jurisdiction and applicable law. As Professor Kozolchyk has stressed on several occasions, the purpose of this conference is to define the principles that should be adopted as a framework for electronic transactions. In the specific field of jurisdiction and applicable law, this would lead to determining which should be the basic principle to apply: place of performance or place of execution of the contract. Furthermore, where is performance or execution deemed to have taken place? Or should alternatives like the one established under URETS be the principle and if so, what possible exceptions could it be subject to? It is important to remember that many Latin American countries that are represented at this meeting are signatories of the Inter-American Convention on General Rules of Private International Law, which under Article 9 establishes that when there are conflicting regulations, consideration must be given to the goals sought by said regulations and to the equity of specific cases. Once again, this refers not to the non-advisability of establishing rigid rules, but rather guiding principles.

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