

E-commerce and enforcement of foreign judgements – a solution or a nightmare

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The recently considered Hague Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters¹ ('Convention') has the ambitious aim of seeking to unify and streamline the rules for cross-border litigation between private parties on civil and commercial issues. The principle behind the Convention is to increase the effective enforcement of decisions of courts around the world where the parties are operating out of different jurisdictions. It is an undeniable feature of global e-commerce transactions that one of the principle blocks to enforcement of local laws against global e-commerce participants is the difficulty of enforcement of a local decision against a party outside the local jurisdiction.

The aims of the Convention are intended to be achieved by requiring the signatory countries to agree to enforce judgements handed down by the courts of the other signatory countries.² The concept is simple in theory but the issue for businesses worldwide will be whether the Convention can be successfully enforced and whether it creates more problems than the issue it may solve. To date, it is unsigned but reconvening of the participant countries is to occur again early next year.³ The consequences of the signing of the Convention could have far-reaching effects especially for internet and e-commerce transactions.

The usual test for jurisdiction of a court is either presence of the litigant parties or their submission to a particular jurisdiction.⁴ The Convention will work on the basis of submission.⁵ To be effective the signatory countries must adhere to the Convention regardless of the

decision of the court in question. Such unqualified submission to international jurisdiction is unlikely at best as it poses a fundamental challenge to the sovereignty of a country's legislative and jurisdictional powers. The Convention in fact provides for the principle of absolute submission to be avoided where the judgement is "manifestly incompatible with... public policy".⁶

There has been much discussion over the potential effects of ratification of the Convention.⁷ This has centred around the concept of being liable for actions on the internet in other jurisdictions where the penalties or liabilities may be more stringent. There has been talk that companies may refuse certain countries access to their internet sites to prevent such liabilities from arising. This type of arrangement could hinder significantly the use of e-commerce and provide road blocks to the effective global reach of e-commerce business models. There is also concern over countries having to enforce judgements against individuals or companies whose actions are entirely legal in their own jurisdiction. Telecommunication firms and ISPs have also expressed concern that under some countries' laws, they would be liable for content travelling over their networks and so would have to start monitoring and filtering such content to avoid potential liability.

Despite these arguments there are strong suggestions that the treaty will never in fact be ratified or if it is, that its effects will be minimal.⁸ The Convention's effective enforcement, like any international law, requires the submission of all participant countries.

With the increasing attention given to global e-commerce business, security and privacy standards, there is more potential today for an approach suggested by the Convention to have some success. Acceptance of submission to the decisions and laws of another jurisdiction is more likely for countries where their respective national laws serve similar purposes. It is also more likely that certain laws will be considered as deserving of such treatment (such as child protection and consumer protection laws). However, regardless of whether the Convention proceeds to acceptance and submission by participant countries, where differences in laws abound from country to country, the increased exposure to laws in other jurisdictions is likely to provide greater concern about the risk associated with the reach of international laws when participating in e-commerce transactions.

¹ The amended version of the Convention (the result of the Discussion in Commission II of the First Part of the Diplomatic Conference 6-20 June 2001) is available at:

<http://europa.eu.int/comm/justice_home/unit/civil/audition10_01/en/resume_jun_2001.pdf>

<ftp://hcch.net/doc/jdgm2001draft_e.doc>

The first draft version (draft of 30 October 1999) is available at:

<<http://www.hcch.net/e/conventions/draft36e.html>>

² See Article 25 of the Convention, 'Judgments to be recognised or enforced'.

³ The decision concerning continuation of the negotiations about the Convention has been deferred to January 2002. See <http://europa.eu.int/comm/justice_home/unit/civil/audition10_01/index_en.htm>

⁴ OzNetLaw, 'Jurisdiction fact sheet', 23 May 2001, *OzNetLaw* <<http://www.oznetlaw.net/facts.asp?action=content&categoryid=227>>

⁵ Convention Article 2 and Chapter II -- Jurisdiction

⁶ Convention Article 28 (1) (f)

⁷ See the following articles:

Fiona Buffini, 'Policing e-commerce', *The Australian Financial Review* (Sydney), 5 July 2001, 53

Kingshuk Nag, 'And now a Net dispute redressal system', *Times of India* (Delhi, India), 25 June 2001

'Regulating the internet: Tied up in knots', *The Economist* (London, UK), 7 June 2001

Patrick Thibodeau, 'Pending deal alarms E-commerce experts', *Computerworld* (Framingham, United States), 28 May 2001

Christopher Stern, 'Copyright holders vs. Telecoms – interests clash in debate on regulating global commerce', *Washington Post* (Washington, United States), 16 May 2001, E4

⁸ 'Regulating the internet: Tied up in knots', *The Economist* (London, UK), 7 June 2001

A school's duty of care to its students in cyberspace

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1. Introduction

Each week millions of school students catch a bus to cyberspace in the form of a browser, some for a few hours, some for total immersion.¹ Unlike their atom-world school, cyberspace is a "total interconnectedness of human beings through computers and telecommunication without regard to physical geography."² In cyberspace they do not deal with atoms, be they books, bubblers or bullying boys. They deal with "informational products"³ reduced to one single medium, a 'world of bits'.⁴

Justice Penfield Jackson found ninety-five per cent⁵ of internet users utilise the browser of one company. Consequently, the bulk of students board a bus called Microsoft Internet Explorer. Unlike travel to traditional schools, students remain on this bus, as they learn in cyberspace. Its architecture determines their modes of learning.

The authentication mode is "unauthenticated pseudonymity"⁶ - student gender, and, more particularly their age, is unknown. So the student who logs onto the Revs "Dealer Network" system to simulate buying a car in a cyberspatial lesson⁷ is advantaged by anonymity and treated as seriously as the query of any adult. Paradoxically the sense of liberty in such anonymity is tempered by

internet surveillance methods such as I.P. addresses⁸ and cookies.⁹ In contrast, the student entering a sex shop of the atom-world does not have the advantage of anonymity and therefore has self-authenticating difficulty getting around the norms and laws that regulate access to such products.

Yet to cyberspace we take our atom-world personalities, laws and values. Schools have a duty of care to their students in the atom-world. This paper examines this duty in cyberspace.

2. The Legal definition of a 'school'

Atom-world definitions of a school are steeped in notions of physicality and see them as command-driven places of unidirectional instruction. Knowledge is "imparted...instruction is given..."¹⁰ On the other hand, schooling in cyberspace is interactive and promotes the exchange of ideas beyond the walls of the school. This clash was tested in *Ford and Net Grammar School Pty Ltd v Board of Studies*.¹¹

In this decision, Net Grammar School applied to NSW Administrative Tribunal to review the decision of the Board of Studies ('the Board') to reject its application for initial registration of a proposed school and

allow it to represent candidates for the Higher School Certificate ('HSC'). Net Grammar sought to educate via the internet¹² enabling qualification to anyone anywhere in the world¹³, through interactivity that includes "group discussions through Microsoft NetMeeting and a dedicated chat room, talking to his or her tutor using ICQ E-mail service, and self-managed learning..."¹⁴

The Board of Studies argued that they were not competent to deal with the application because it proposed a 'school' that did not fall within the meaning of the *Education Act 1990* (NSW) ('the Act')¹⁵, expressing monitoring and control concerns.¹⁶ The Board relied on several sections of the Act which states registrants must have satisfactory premises¹⁷, mandates compulsory attendance¹⁸ and states alternatives such as home schooling be in a defined physical setting.¹⁹

The term 'school' is not defined by the Act but both parties accepted that it was to have its natural meaning. However Net Grammar argued for a wider interpretation than that put forward by the board to encompass "a modern interpretation reflective of changes in the wider social environment of learning" in the meaning of the term 'school'.²⁰ The school also argued that a school is not only "a fixed educational location"²¹