

A Professional Services White Paper

e-Commerce Regulation and Compliance in Asia

What does the e-business need to know about legal and regulatory compliance issues when offering its information and products online in Asia? Whether a multinational company moving supply and consumer relationships online or a dot.com which may be international from its inception, companies need to adjust their Web site content and e-commerce strategies to comply with the laws of target countries in Asia.

April, 2000



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As companies migrate from purely "home country-centric" models to localized Web sites for target international markets, compliance issues are growing more urgent due to the enormous growth in Asia of e-commerce and other Internet-based activity. According to an International Data Corp. report, non-U.S. e-commerce will account for almost half of worldwide spending by 2003, growing from 26% of all e-commerce spending in 1998 to 46% by 2003. By that time, Asia is expected to account for 25% of global e-commerce.

We live in a world without a single international regulatory framework -- separate national rules confront an e-commerce operation with a tangle of complex and often conflicting compliance issues. While many countries believe that existing rules for traditional forms of business should apply to e-commerce with a minimum of additional interference, other countries in Asia and Europe are viewing e-commerce as a new form of business requiring separate and often restrictive rules. While such rules have limited bite unless countries and their citizens can assert jurisdiction and enforce judgments against those in violation, online businesses at the very least need to evaluate compliance issues and understand their risks. Even outside of the important areas of domain names, intellectual property and taxation, an overview of several key issues will help to alert the online operator of the types of issues which it will face throughout Asia.

WHAT TYPES OF ONLINE CONTENT CONTROLS AND SALES RESTRICTIONS CONFRONT THE ONLINE BUSINESS?

Content Controls

Content controls typically seek to regulate information which is deemed to be objectionable on societal grounds, such as due to its religious, political, racial or sexual content. While many online businesses may believe that their Web content would fall outside of such content controls, vague standards can make it difficult to determine whether such content could be said to "fabricate stories" (China), affect "national harmony" (Singapore) or contain "offensive" information (Malaysia).

China. As one of the more restrictive and complicated systems for regulating Internet activity in the region, China's Ministry of Information Industry ("MII") governs Internet service providers (ISPs), while Internet content providers (ICPs) are governed by other government agencies depending on the type of content that they will provide. Only then will the MII allow approved content to be distributed through public networks, including the Internet.

The much-discussed Tentative Provisions of the People's Republic of China Concerning Administration of International Linkups of Computer Information Networks, enacted on

February 1, 1996 (the "Tentative Provisions"), provide that individuals and entities shall not make use of the Internet to conduct certain activities (and also established China's rules requiring all Internet access in China to ultimately move through an international gateway controlled by MII.) Early 1998 detailed rules described a range of prohibited content that cannot be transmitted or retrieved through the Internet, seemingly applicable to virtually any type of Internet content, including that which (1) encourages "resistance to the enforcement of laws and regulations," (2) promotes "subversion of state power and the overthrow of the socialist system," (3) encourages "ethnic hatred or discrimination or undermines ethnic unity," (4) "fabricates stories, distorts facts, spreads rumors or disturbs the public order," (5) promotes "superstition, obscenity, pornography, gambling, violence, murder, terrorism or other crimes," (6) "humiliates or slanders others" or (7) "damages the reputation of state institutions."

News distribution is one major area of scrutiny. For example, at the end of 1999, the Chinese government circulated directives which provided that Web sites affiliated with traditional media are not allowed to post content from sites based outside of China, as well as from Hong Kong.

Announced on January 25, 2000 but effective since January 1, Computer Information System Internet Security Administration Regulations impose stringent state secrets confidentiality requirements. Information concerning state secrets shall not be stored, processed or transmitted through computer systems with Internet access. State secrets in China, which can encompass a broad range of information not officially approved for distribution, have been vaguely defined in China's Law on Protecting State Secrets as information affecting national security and interests which is restricted to certain categories of people for a given period of time. Though the Regulations state that those who provide or publish information through the Internet must have their security systems examined and the information approved, inquiries with the State Secrets Bureau suggest that the intent is to encourage all publishers of Internet content to seek approval in the event of uncertainty over whether information contains state secrets. For those who provide information services through the Internet (other than information already published by news media), prior consent from the relevant information providers must be obtained. Examination and approval by the relevant state secret authorities are required of those who establish electronic bulletin boards and chat rooms and provide network news.

Singapore. Sharing some similarities with China's content controls but with an apparent intent to enforce with a "light touch," Singapore also regulates the content distributed by ISPs as well as ICPs. Under a Singapore Broadcasting Authority (Class License) Notification 1996 ("Class License Notification"), ICPs are defined to include corporations or groups of individuals which provide any program on the Web through the Internet (including any Web publisher and Web server administrator). Individuals are not considered ICPs (and are not subject to the Class License) unless they provide content for business, political or religious purposes. Despite being broadly defined, only those ICPs which are political parties, engaged in the discussion of political or religious issues, or which provide a for-pay online newspaper must register with the Singapore Broadcasting Authority (SBA). Certain organizations are exempted, such as providers of Internet access for their employees, providers of raw financial information and news-wire services (which may be subject to separate licensing), as well as personal communications such as e-mail.

All ICPs must follow an Internet Code of Practice (the "Internet Code") by using their best efforts to ensure that contributions to their sites conform to the regulations. An ICP complies

by denying access to prohibited material when told to do so by the SBA, choosing themes for private chat groups that are not prohibited and ensuring that its own programming content, and any third-party contributions, do not contain prohibited materials.

In determining what is "objectionable," the Internet Code falls prey (as does China's approach) to over-breadth – the SBA may object on the grounds of "public interest, public morality, public order, public security, national harmony or [because the material] is otherwise prohibited under Singapore laws." Objectionable material includes material showing nudity or genitalia, violent sex, explicit sex and child pornography. Material depicting extreme violence or cruelty, and material that incites or endorses ethnic, racial or religious hatred, strife or intolerance is also prohibited. The SBA may consider whether the material has potential medical, scientific, artistic or educational value in determining whether it makes the grade.

While ICPs (and ISPs) are not responsible for content beyond their control, an author of material is not relieved of liability under the Internet Code. Singapore common law defamation may also apply. If third-party content is distributed, access must be blocked only when demanded by the SBA. Apparently the SBA is not aggressively prohibiting access to sites, focusing in particular on pornographic materials and even on sites which provide "adult verification" keys to then allow access to pornographic materials. Only 100 "high-impact" pornography sites are said to be "blacklisted." Industry self-regulation is hoped for and encouraged.

Malaysia. Malaysia's Communication and Multimedia Act 1998 ("Multimedia Act") provides at Section 211 that a content applications service provider, or other person using a content applications service, shall not provide content which is "indecent, obscene, false, menacing, or offensive in character with intent to annoy, abuse, threaten or harass any person." According to 1999 Communications and Multimedia (Licensing) Regulations, a "content applications service" includes both traditional broadcasting service as well as an online publishing or information service. Violations, upon conviction, are subject to a fine not to exceed fifty thousand ringgit and/or imprisonment of up to one year. Section 213 of the Multimedia Act provides that a content code prepared by the Malaysian Communications and Multimedia Commission (or an industry body or other "content forum" designated by the Commission) shall include model procedures for dealing with offensive or indecent content, including restrictions on the provision of unsuitable content, means of classifying content and procedures for handling public complaints. Compliance with a registered voluntary industry code, one of which is currently being prepared, is a defense against any prosecution or action.

The Multimedia Act also provides at Section 205 that no person may provide a "content applications service" unless the person receives an individual license or is subject to a class license. Somewhat surprisingly, since a "content applications service" includes a service providing content through the Internet, a Web site owner offering content and engaging in e-commerce is required to be licensed. Malaysian regulators are in the process of issuing additional details on the licenses and exemptions. Exemptions include content which is limited to employees of a company or content which is incidental to the service provided or limited in scope.

Consumer Protection – “Distance Selling”

Consumer issues applicable to online businesses in Asia can include anti-fraud, advertising, usury, installment contracts and rebate standards. One of the better known Internet-related consumer rules is the European Union’s directive regarding “distance contracts,” which requires that consumers be given a minimum amount of information at the time that the contract is solicited and provides for a “cooling-off” period and other restrictions. The U.S. Federal Trade Commission may begin enforcing similar U.S. rules against eToys and other online retailers, including requirements that consumers be notified and given an opportunity to cancel in the event of shipping delays. Among similar consumer laws in Asia are the following:

Japan. Japan’s Direct Sales Law requires disclosures of delivery times, warranties, sales price, delivery fees, time and method of payment and other matters. At the time of taking the order, the seller must deliver in writing the terms of the transaction as specified in the Direct Sales Law both for sales involving a prepayment and for purchases of certain continuous services (such as foreign language training and private tutoring), for which a separate written notice is required at the conclusion of the services. For purchases of such continuous services, the seller must offer the consumer an 8-day “cooling-off period,” during which the consumer has the right to cancel the transaction and terminate the agreement. The failure of a seller to provide the consumer with the terms of the transaction is punishable by fines not exceeding one million yen or one year in prison.

Applying to a broad range of designated goods and services, the Direct Sales Law was enacted in 1976 and was targeted to deceptive practices used in sales transactions such as mail order and door-to-door sales. Through a Ministry of International Trade and Industry (MITI) ordinance, mail order-type sales are defined to include sales through communications facilities such as computers. In a survey of about 1,500 companies conducted by MITI in the spring of 1999, nearly 70 percent of Web sites failed to specify the required information. Although the law applies to sales to consumers located within Japan, it is not clear whether it would govern a seller not located in Japan which conducts no other activities there.

Korea. Korea also has its own version of a direct sales law that regulates telemarketing, direct sales and multi-level sales. Korea’s Law on Door-to-Door Sales, Etc., defines telemarketing very broadly to include all types of online transactions. According to this law, any business entity which wishes to engage in telemarketing activities must file a report with a local municipality. An advertisement by such a telemarketing entity must include the major terms of the sale such as price, delivery date and method. If part of the purchase price of the goods or services is paid before the receipt of such goods or services, the seller is required to take necessary measures for the delivery of such goods or services within 3 days of the payment. The goods or services must be delivered with a delivery receipt. The buyer is entitled to revoke the sale within 20 days after the delivery in certain situations, such as in the event of false advertising or a delivery of damaged goods.

On February 10, 2000, the Korean Fair Trade Commission (KFTC) approved consumer protection guidelines for e-commerce, including requirements relating to delays in delivery, permitting consumers to cancel purchases within 20 days if the products are not what was described in a Web site, requiring sellers to confirm orders and accept changes in orders or cancellations for a period after the initial order. The KFTC is to send the guidelines to e-commerce companies and monitor their observance. The guidelines are apparently voluntary and will entitle e-commerce sites to use a seal affirming compliance with the guidelines.

Korea's Basic Law on Electronic Commerce, effective as of July 1, 1999, provides at Article 15(2) that a "cyber mall" shall "indicate the trade name of the operator, including the name of the representative in case of a legal entity, address, telephone number, etc., in such a manner so as to enable easy recognition by users." A "cyber mall" is defined in Article 2(6) of the law as "a virtual shopping mall established to trade goods or services using information technology facilities as well as the information systems." More cryptically, Article 15(1) of the law provides that a "cyber mall operator" shall be "equipped with facilities necessary for the operation and management thereof." Also, those engaging in electronic commerce are to establish some means to receive consumer complaints and claims and provide compensation for damages.

Taiwan. Taiwan's Consumer Protection Law ("CPL"), enacted in early 1994, makes it easier for consumers to assert product liability claims and governs consumer "standard" contracts and information. While, like Korea and Japan, the CPL was made to apply to mail order and door-to-door sales, the CPL does not specifically provide that sales made over the Internet are similar to mail order purchases. However, due to similarities with mail order, including the fact that the consumer is unable to inspect the product prior to purchasing it, it is possible that the CPL would be applied to e-commerce. If so, consumers in an e-commerce transaction would have the right to terminate purchases within 7 days of receipt of the goods. (Such a refund right is less certain if the consumer is able to first test a digital product on-line prior to purchasing it, such as by downloading a game or other demo.) The CPL also provides for warranty standards which must be followed if a warranty is to be offered, and establishes penalties in the event of violations, including administrative fines of not less than NT \$20,000 and not more than NT \$1,500,000.

Advertising Standards -- Misleading Advertising

Legal systems typically require advertising and marketing materials to be truthful, and not false, misleading or deceptive. Such requirements may form part of local laws or may be specified in advertising and marketing codes of conduct. Though such codes may be voluntary, a failure to comply may result in negative publicity or other forms of compliance pressure. In general, while these may not impact an online business to the extent that Web site claims are accurate, "decency" standards may also apply. Restrictions in Asia include the following:

Japan. Advertising codes and practices in Japan's Law for the Prevention of Unreasonable Premiums and Misleading Representations Concerning Products and Services prohibit representations which would mislead consumers to consider that a product is substantially better in quality, or substantially more competitive in price or other contractual terms, than those of competitors.

Philippines. The Consumer Act of the Philippines prohibits false, deceptive or misleading advertisements. In addition, all advertising materials are to comply with the Code of Ethics of the Advertising Board of the Philippines. One of advertising's sensitive areas in the Philippines involves the regulation of comparison advertising. Certain guidelines must be followed if a competitor's price is noted, such as (1) the specified competitor's price must be related to consumer products sold or advertised within 90-days of the date of the advertising, and (2) the comparison is to be representative of the prices of similar products sold or advertised in the locality where the price comparison is made. Claims made are to be substantiated.

Thailand. Thailand's Consumer Protection Act 1979, as amended in 1998, provides that advertisements must not contain any statement taking unjust advantage of consumers, or

any statement which may cause harmful effects to society as a whole, regardless of whether such statement is on the origin, condition, quality, or appearance of the goods or services through their delivery, procurement or application. While such matters include a prohibition on exaggerated or false or misleading statements, the prohibition also extends to offensive statements or statements which could create "disunity" or cause harm to the national culture. (The Act even broadly prohibits advertising methods which may "damage physical and mental health.") If an advertisement does not comply with the law, a committee empowered by the Act may take actions ranging from banning the advertisement or methods used, imposing amendments to its statements or methods or requiring separate ads to correct consumer misunderstandings. Ads may also be submitted to the committee for advance screening. Since advertising agencies must bear half the penalty for ads that violate the guidelines, such rules may also apply to Web site developers. Persons in violation may be subject to one or both of fines and jail sentences.

Taiwan. Taiwan's Fair Trade Law, effective as of 1992, governs the description of a commodity and its advertisement. If such is untrue or misleading to consumers, civil and administrative fines may be imposed of between NT \$50,000 to NT\$25,000,000 (or between NT \$100,000 and NT \$50,000,000 for any continuous violation.) The advertiser is also liable for damages suffered by the competitor or the consumer, as well as potential punitive damages. Consumer damage liability may be joint and several with an advertising medium which knowingly broadcasts a misleading advertisement.

Marketing Techniques

Some countries have also adopted laws which restrict or prohibit the use of certain sales promotion techniques, such as offers requiring proof of purchase, lotteries, sweepstakes and games of chance and skill. According to the market research firm Jupiter Communications, 93% of all e-commerce sites employ promotions of some type, with the most prevalent being sweepstakes, limited-time discounts, coupons, free gifts with purchase and free shipping.

Japan. Japan's Law for the Prevention of Unreasonable Premiums and Misleading Representations concerning Products and Services limits the extent of "buy one, get one free" type premiums and premiums based on lottery. The value of a premium or "free" product must not exceed 10% of the price of the product for sale (or ¥100 when 10% of such price is below ¥100). As for premiums based on lottery, the value of each premium must not exceed an amount equivalent to 20 times the aggregate amount of the transactions, and the total value of the premium must not exceed 2% of the aggregate amount of the transactions.

Philippines. The Consumer Act of the Philippines also requires anyone who intends to conduct a sales promotion to obtain a permit from the Department of Trade and Industry at least 30 days prior to the start of the promotion. Sales promotions include promotions which promise prizes as a reward for the purchase of a product or service, as well as contests, games and other similar competitions which pick a winner and disseminate information on the competitions through communications media such as the Internet.

Taiwan. Similar to Japanese law, Taiwan's FTC has adopted sales promotion regulations which restrict the price and the total value of the gift according to the price of the goods and the revenue of the business.

Privacy

Data protection laws may control direct e-mail marketing as well as information collected through the Internet such as e-mail addresses, names and credit card numbers. Privacy actions faced by advertising company DoubleClick, Inc. in the U.S. are an example of growing concerns over the use of such data. A 1999 Georgetown University survey of Web sites suggests that many sites would not be in compliance with many existing rules - about one-third failed to post a privacy disclosure statement and more than 20% did not indicate how collected data would be used. Asia includes examples of systems legally requiring information protection (Malaysia and Korea) as well as voluntary systems (Japan and Singapore).

Malaysia. Privacy matters are covered by the Communication and Multimedia Act 1998, which prohibits under Section 234 the interception of any Internet communications and the disclosure or use of the intercepted contents. Conviction for such an offense may result in one or both of a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year. Section 234 also provides that service and content providers shall not use their facilities or services for observing or random monitoring unless it is for mechanical or service quality control checks. In addition, under Section 240 of the Multimedia Act, a person who sends in commerce or advertises any equipment or device which is used for the surreptitious interception of any communication commits an offence and shall be liable for one or both of a fine not exceeding one hundred thousand ringgit or imprisonment for a term not exceeding two years. As another example of the Act's scope, if a corporate entity commits an offense under the Act, its directors and senior officers may be also be severally or jointly charged unless the acts were committed without their knowledge and they took precautions and exercised due diligence to prevent the commission of the offence.

Korea. The Basic Law on Electronic Commerce at Article 13(1) (Chapter III) provides that "electronic traders" shall describe the purpose of any information collection to persons whose information is collected. Article 13(2) requires that electronic traders shall not use, nor provide to any third party, the personal information collected through electronic commerce beyond the alleged purpose for collection thereof without the prior consent of the person whose information was collected or except as specifically provided in any other law. Electronic traders must also take security measures to prevent improper access, use or leakage of information which they have processed, sent or stored. Users may also demand correction and deletion of erroneous information.

Japan. In contrast to countries such as Malaysia and Korea, Japan does not have a law which governs the handling of personal information in an e-commerce context but instead relies on a system of government-led voluntary guidelines. The hope is that market forces will encourage companies to comply and seek to obtain a "privacy mark." In 1997, MITI issued voluntary Guidelines Concerning the Protection of Computer Processed Personal Data in the Private Sector, which provide that a person using personal data in e-commerce must specify the purpose of collecting the data and obtain the consent of the person whose data is being collected (such as through clicking a consent button). With limited exceptions, data must be used only for the specified purposes. Except when express consent is obtained or when permitted by law, the following information shall not be collected or disclosed: specific personal data on race or ethnicity, family origin or legal domicile, beliefs, political views, trade union membership, health, medical treatment or sex life.

To improve upon the voluntary actions taken by companies under the Guidelines, MITI in 1998 established a system of granting "privacy marks" to businesses which comply, administered by the Japan Information Processing Development Center (JIPDEC). In response to a company's application, JIPDEC will investigate the applying company's

compliance efforts and must conclude that the company appropriately manages such personal information. This includes the establishment of an internal structure for handling personal information, education and training for those handling the information, security measures to prevent the theft or leakage of the information and measures to protect the information if it is provided to an external organization. Companies that do not comply with the Guidelines will lose the privacy mark.

Singapore. Like Japan, Singapore has encouraged industry self-regulation but has not imposed overall data protection regulations on consumer information obtained through the Internet. The National Internet Advisory Committee (NIAC), made-up of government, university and industry representatives, published an E-Commerce Code for the Protection of Personal Information and Communications of Consumer of Internet Commerce. The E-Commerce Code, though voluntary, provides at Clause 4.1 that ICPs are to "take reasonable steps to ensure the confidentiality of business records and personal particulars of each user including details of usage or transactions carried out by the user." The E-Commerce Code at Clause 4.2 also prohibits the sale or exchange of such information other than as part of the sale of the ICPs business. Disclosure is permitted with the consent of the user, as required by law or as necessary to perform a contract between the ICP and user. Further, the Code requires ICPs not to intercept communications unless required by law, limits the collection and prohibits disclosure of personal information without informing the consumer (giving it an option to stop the transfer), ensures accuracy of records and provides a right to correct or delete data. The E-Commerce Code is to be enforced by an industry-designated Compliance Authority, with ICPs in compliance permitted to use a "Privacy Code Compliance Symbol."

Restricting Types of Online Businesses

A company may be restricted in conducting a particular type of online business, such as sales of prescription drugs or pornography or running an online gambling service. Some countries may prohibit such an activity entirely, whether or not online. Banking, securities trading and insurance are examples of activities which may be permitted but regulated, and the provision of legal, medical or financial services may be permitted but require licensing.

Even if the conduct of the online business is permitted, the marketing and advertising of the product or service may be restricted or prohibited, not based on whether it is misleading but based on the product or service itself. These restrictions may include prohibited or restricted advertising for tobacco products, pharmaceutical products, alcohol, lotteries and securities. By way of example, **Korea** regulates the advertising of cigarettes and pharmaceuticals. Doctor endorsements of pharmaceuticals are not permitted, and the regulation of pharmaceutical advertising may be prohibited, limited to specified media or may require specific disclosures, such as warnings.

Requirements Applying to Products Sold By Online Businesses

Apart from prohibiting certain types of products, including illegal drugs and types of weapons, products may face labeling requirements, such as nutritional content of foods, language requirements and country of origin. The Taiwan Product Labeling Law, for example, requires that products sold in **Taiwan** must have labels in Chinese specifying certain information.

Export and import licensing requirements may also apply. The U.S., for example, may require export licenses for certain computer hardware and software, including types of encryption technology. While weak forms encryption with key lengths of 40 bits or less can be exported, export licensing for more secure forms of encryption has been liberalized but

may continue to present an issue. As for import licenses, **Hong Kong** for example may require a license prior to the import of encryption products.

HOW ARE ONLINE CONTRACTS ENFORCED AND COUNTRY LAWS IMPOSED?

Enforcing Online Contracts – “Clickwraps” and Digital Signatures

If a person in one country purchases merchandise from another country through an online transaction, are the terms and conditions set forth in a Web site enforceable against a purchaser? Achieving enforceability through the “clickwrap” agreement and digital signatures are important issues in the online world.

The “Clickwrap” Agreement - Online Offer/Acceptance. Web sites generally include terms and conditions which are meant to apply to transactions and the use of information. Ideally, a customer scrolls through these and confirms that they are read and accepted, a device known as a “clickwrap” or “Webwrap” agreement. The absence of such a forced scrolling may lessen chances of enforceability, especially if the terms contain unusual or very one-sided provisions.

Due to the relative lack of formalities in **Japan** for offers and acceptances, there are unlikely to be significant issues with clickwrap agreements – clicking an “I accept” after scrolling through terms and conditions may be sufficient, particularly given the availability of electronic records which record the affirmative “clicking” action. Other countries may deem a clickwrap agreement to be a “standard form” or “adhesion” contract, requiring that the consumer have a reasonable opportunity to understand the contract and be bound by it. For example, **Taiwan’s** Consumer Protection Act (CPL) provisions which govern “standard” contracts most likely apply to “clickwrap” agreements. The CPL attempts to define terms which are “unconscionable” to consumers, such as terms which “violate the principle of equality and reciprocity.” Vague provisions are to be interpreted in favor of the consumer.

Digital Signatures. Given the possibility of assuming the identity of another person through an electronic communication, some form of authentication of the identity of the parties is desirable. One such form of authentication is through a digital signature. (A digital signature is developed by marking a document with a unique sequence of digits, typically through technology which operates through a private key known only to the sending party and a public key.) The digital signature also helps to assure that the document has not been altered from the time of transmission and satisfies the requirement under some laws of a written contract. While U.S. “statute of frauds” rules may require a signed writing for certain sales of goods transactions, **Japan**, for example, does not share a strict requirement of a formal writing for certain kinds of contracts. If it can be shown through electronic records that a customer intended to buy a product online, the online action is enforceable.

While digital signatures can be given legal validity by the parties themselves through a contract which states that future use of digital signatures between them is valid, legal validity of the digital signature can also derive from legislation. In the U.S., many states have enacted digital signature legislation but often limit the functions for which such a signature will be recognized (Utah and Washington recognize its use for virtually all forms of public and private transactions). Within Asia, Malaysia, Singapore and Korea are among the countries which have enacted digital signature legislation. For example, **Malaysia’s** Digital Signature Act 1997 provides that a digital signature in compliance with the Act is as legally binding as a “handwritten signature, an affixed thumbprint or any other mark.” Article 62 of the Act provides that the digital signature must be verified through a valid certificate issued

by a licensed certification authority and must be affixed by the signer with the intention of signing the message.

Imposing Country Laws -- Jurisdiction and Choice of Law Issues

Even if a country's laws appear to prohibit or restrict an online business, a critical question is whether that country has the actual authority and ability to impose its rules on the business. While parties to an online contract can agree upon the applicable law and jurisdiction of their disputes, examples of issues outside of party control include content restrictions, prohibitions on conducting certain forms of online business, advertising restrictions and rights of third parties outside of the contract, such in claims of defamation or intellectual property violations.

Jurisdiction. In the absence of a controlling contract, jurisdiction is usually based upon a physical presence in a country, though various levels of contact and activities with a country may cause the country to assert jurisdiction even without a physical presence there.

United States. In the U.S., most states have a "long arm" statute which grants jurisdiction to local courts over persons who, while not present in the state, conduct business or commit a tort there (provided that a constitutional level of "minimum contacts" exist between the person and the state). Based on such statutes, jurisdiction has been granted by U.S. courts based upon advertising a sports betting service over the Internet which was accessible by state residents (*Minnesota v. Granite Gate Resorts, Inc.*, 568 N.W. 2d 715 (Minn. Ct. App. Sept. 5, 1997) *aff'd on appeal*) and based upon posting defamatory remarks on an online forum by a resident of one state that was accessible over the Internet in another state (*Edias Software International v. Basis International, Ltd.*, 947 F. Supp. 413 (D. Ariz. 1996)).

Japan. Without an agreement on jurisdiction or arbitration or recognition of such agreement by the Japanese courts, if a defendant is a foreign entity with a principal office outside of Japan, the Japanese courts may not assume jurisdiction. However, jurisdiction may be taken if the foreign entity has a relationship with Japan, as "reasonably" determined by the Japanese courts. Maintaining an office in Japan may be sufficient to constitute a relationship, even if the principal office is in a foreign country. A contract concluded in Japan or governed by Japanese law may also constitute enough of a "reasonable" basis for a court to conclude that a sufficient relationship exists.

Choice of Law. Without a choice of law provision in an agreement between private parties, what law will govern?

United States. In the U.S. states, a court will generally choose the law of the jurisdiction that has the "most significant relationship to the transaction and the parties." Courts will look to such factors as the place where the contract was executed, negotiated and performed, as well as the physical location of the subject matter and the domicile of parties. A good example in a Web context is the case of *United States v. Thomas*, 74 F. 3d 701 (6th Cir. 1996), *cert denied* 117 S. Ct. 74 (1996), which found that the obscenity standards of Tennessee, where individuals browsing a Web site were located, would take precedence over the more relaxed obscenity standards of California, where the Web site owner was based.

Japan. Without a choice of law provision, the governing law of the place from which the offer was made would generally be the governing law between the parties. This is provided for in Article 9(2) of Japan's Act Concerning Application of Law (Horei). If the offeree at the time of acceptance does not know from where the offer is made, the place of the offerors' domicile is deemed to be the place from which the offer was made. Since offering products for sale on a Web site would probably be treated as an offer in Japan, the law of the Web

site owner's country would probably apply if a law is not specified and if such application is not against Japanese public policy.

Hong Kong. Without a choice of law provision, a Hong Kong court will apply the law of the place which has the closest connection to the transaction. Such factors as the place where the contract was made and where the contract is to be performed will be considered.

Agreeing to Jurisdiction and Choice of Law - Enforceable? If an enforceable online or offline contract contains jurisdiction and governing law provisions, will the courts of particular countries uphold such provisions? Such an issue is critical for a large online e-commerce entity which sells into multiple countries and will wish to be governed by a single set of laws in a single country.

Japan. In Japan, as in most countries, the laws of the country chosen by the parties in their contract will generally be accepted as the governing law under Article 7(1) of Japan's Act Concerning Application of Law (Horei). In general, the parties' choice of a forum court will also be generally recognized, as will an agreement to arbitrate (Japan is a member of the New York Convention on the recognition of foreign arbitral awards).

Hong Kong. Hong Kong will generally respect an agreement by the parties on the choice of law and the choice of forum, such as to exclude Hong Kong courts in favor of foreign courts. Hong Kong, like China, is a member of the New York Convention on the recognition of foreign arbitral awards. Since they are one country, the New York Convention does not apply between them (though since February 1, 2000 there is reciprocal recognition and enforcement of arbitral awards between Hong Kong and China).

As a related issue, even if another country asserts jurisdiction and applies its laws, will a foreign court order be enforced in your home country? If an action is unlikely to be enforceable since the party is not present in the country, it may not even be prosecuted. Even if it is prosecuted, a Web site owner may be able to challenge the enforcement.

Conclusion

Considering these examples of compliance issues facing the online business, and the fast pace of legal and regulatory change for such issues, how is it possible to comply and stay current? Part of the answer depends on the size and vulnerability of the Web site owner. The large and visible, with assets and activities in several countries, will be more vulnerable to jurisdiction and have a greater incentive to invest in compliance. As laws and enforcement activities evolve in the e-business realm, even the smaller and less visible may come under increasing pressure to develop compliance strategies.

A version of this white paper is being published in the U.S. by Cyberspace Lawyer, a Glasser LegalWorks publication, and in Hong Kong by e-Law Asia, a Pacific Business Press Ltd. publication.

David A. Lavery, the author of this White Paper, is a principal attorney with InternationalCounsel. InternationalCounsel and iAsiaWorks, Inc. have entered into an alliance to offer Asia legal and regulatory compliance services as part of the iAsiaWorks one-stop package of Internet solutions.

About iAsiaWorks

iAsiaWorks, an Asia-focused Internet solutions enabler, offers one-stop Internet solutions, directly and through partners, to companies in Asia, multinational corporations and dot.coms. The company intends to establish a footprint of eight data centers across Asia and in Silicon Valley to offer customers world-class hosting, co-location services and technical support, a suite of turnkey Internet solutions and localized, country-specific applications and services.

iAsiaWorks is headquartered in the Silicon Valley (San Mateo, Calif.), with operations in Hong Kong, Korea, Taiwan and the United States. It currently provides Internet solutions in China, Hong Kong, Korea, Taiwan, New Zealand, Singapore, Australia, Japan, Thailand, the Philippines, and the United States. Investors include Bechtel Enterprises; BT/Alex Brown; Enterprise Partners; Generation Partners; Hambrecht and Quist; Institutional Venture Partners; Korea Technology Banking Corporation; Morgan Stanley Dean Witter; Newbridge Asia; New Enterprise Associates; Salomon Brothers; Samsung Corporation; the Sprout Group; Walden Group of Funds; Zesiger Capital; and Internet Elite Limited (a subsidiary of Pacific Century CyberWorks, a Hong Kong-listed company which is controlled by Richard Li). Partners include Cisco Systems (Nasdaq:CSCO), eTranslate, iPass and Portal (Nasdaq:PRSF). For more information, please visit the company's Web site at www.iasiaworks.com.

About InternationalCounsel

InternationalCounsel offers legal and regulatory compliance solutions to assist its clients in engaging in international cross-border transactions, with a focus on Asia. The firm's Internet and e-commerce focus includes expertise in structuring, negotiating and documenting international transactions such as joint ventures, strategic alliances and arrangements for the worldwide distribution of products.

InternationalCounsel monitors and advises on Internet and e-commerce developments in all of the major centers of commercial activity in Asia. Legal and regulatory solutions include such issues as the enforceability of contracts, required consumer disclosures, sales and advertising standards, privacy requirements, content controls and conduct of business controls. The firm's services include packages of "Web Site Scrubbing" services for such basic "Level I" compliance issues to ensure that a company's Web site content and e-commerce offerings are in compliance with the laws of target countries in Asia and elsewhere. Additional "Level II" compliance issues can be separately addressed and priced, including defamation and slander, intellectual property, import/export controls (including encryption issues), taxation and trading partner agreements.

The firm's client services are built on the principals' experience as in-house international counsel to major multinational companies. Modeling itself on the best of such in-house counsel, the practice emphasizes one-on-one relationships with an experienced and efficient senior legal advisor, assimilation with a company's existing business and legal team, practical and cost-effective solutions and fee arrangements which can offer the predictability of an "in-house equivalent" legal counsel. For more information, please visit the firm's Web site at www.internationalcounsel.com.