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Common Practices in the Electronic Commerce and Their Legal Significance

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Abstract

The objective of this paper is to present the examples of common practices developed by Internet companies, which are so widespread in the international electronic commerce that they could serve as the basis for adjudicating disputes in the online world (e-customs). Customary norms played a very important role providing norms for solving commercial disputes in the Medieval times (Law Merchant) and continue to play an important role in modern international trade. Modern judges and arbiters refer to commercial customs to interpret legal acts or to settle disputes. And numerous legally relevant practices emerged in the electronic trade, particularly in the areas of online security, electronic contracting, data protection, handling of emails etc. Governments could utilise the knowledge of Internet practices to supplement national and international regulation of electronic commerce. The knowledge of electronic commerce customs could thus enhance Internet-related legislation and make it better adjusted to the needs of the knowledge-based economy. The article also outlines the concept of Internet Law Merchant as an autonomous from the national legal systems body of Internet commerce customary practices, which could be selected by parties to a transaction as the law governing their contract. The paper draws on the concept of electronic commerce custom (e-custom) as a potential remedy in removing legal uncertainty in the electronic environment.

Keywords: *electronic commerce law, e-Commerce, e-Government, e-Culture, e-Society, Internet regulation, alternative dispute resolution (ADR), custom, Law Merchant, Internet practices, security*

1. Introduction

The Internet community has created its own, distinctive culture. The uniqueness of the Internet culture is reflected in behavioural norms, which were developed by the Internet participants spontaneously, without the intervention of any governmental body. The norms were developed by cognisant or unconscious following of the behaviour of other

online participants. In this manner, a number of interesting customary practices had emerged.

However, despite the richness of behavioural norms functioning on the Internet, there is still a perception among online users that the Internet commerce functions outside the realm of law (Polanski and Johnston 7-10 January 2002). And this perception is correct with respect to the current level of maturity of international Internet commerce law. The international policymakers and the legal doctrine have failed to devise a legal framework for the global electronic commerce. One of the reasons for the failure has been the unnecessary focus on commenting attempts to regulate the Internet in a top-down manner. This has resulted in a failure to observe that the Internet community managed to develop its own, distinct norms. It is argued that these norms, by virtue of their international character could be used both to settle Internet related disputes and to develop a truly international system of Internet laws.

The focus on the top-down regulation by means of the written law has led to the propagation of the perception that the international electronic commerce is not a legally safe environment (Commission of the European Communities 21.11.2003). Online contracts are insufficient as a regulatory tool because they can only be treated as “a law between the parties” and hence cannot bind non-parties to a contract. Furthermore, contracts need a rich legal system that could recognise them, interpret them and enforce them. The situation would be much clearer had there been an international treaty that could be used to supply norms in the absence of contracts or to fill in gaps in the existing online contracts. However this is not the case. There is no international treaty that deals with the Internet based commerce. On the other hand, existing international treaties have not been designed for the Information Age. For instance, the Vienna Convention on Contracts for the International Sale of Goods (CISG) (UNCITRAL 1980) drafted before the emergence of the modern TCP/IP based Internet, applies only to the sale of goods, excluding auctions, trade in shares and other fundamental areas of e-commerce.

This is not to say however, that the international community has remained passive and has not produced any valuable outcomes. The United Nations Commission on the International Trade Law (UNCITRAL) has developed widely accepted model laws on electronic commerce and on electronic signatures. (UNCITRAL 1996; UNCITRAL 2001) Nevertheless, the Model laws are not binding and hence cannot be relied upon in case of legal disputes. UNCITRAL has also commenced working on an international treaty on electronic contracts (UNCITRAL Working Group IV (Electronic Commerce) 2002). This is undoubtedly a very desirable enterprise and it should be actively supported by the whole Internet community. However, the problem is that the Internet community cannot openly participate in the drafting stage as there is no forum for public consultation. This is a very serious issue as it makes it highly likely that such treaty will contain many gaps, improper regulations and outdated, old-fashioned provisions. In fact, the draft already contains many outdated provisions (Polanski 2002; Polanski July 2003). This paper makes a call to open consultation for all Internet-related legislation – this is the requirement of our times. The current approach carries a risk that the treaty will not be followed in practice by the Internet users.

The only area where a specific international regime for electronic commerce has emerged is the European Union. One must acknowledge the importance of harmonised framework for electronic transactions within the European Union as it is the first such international framework in the world. The European directives, including the Directive on Electronic Commerce (Official Journal of the European Communities 2000), bind EU states but have only a regional scope of application. Although 25 EU countries did well with respect to ensuring greater legal certainty in the Information Age, the Internet community as a

whole still does not benefit from greater legal certainty. It needs intercontinental, transnational legal framework for e-commerce. (Polanski July 2003)

Such transnational framework could be provided by common practices of Internet users. In the first part, the paper will discuss the examples of common practices (customs) developed by the Internet community, which are so widespread in the international electronic commerce as to justify the expectation that they should be observed (electronic commerce customs). These common practices could form the basis for dispute resolution as well as for better Internet-related legislation. In the second part, the paper will discuss the concept of the Law Merchant or (*lex mercatoria*) as a more general legal framework, within which custom plays a crucial role. The Law Merchant viewed as an independent from national legal systems body of legal norms is an alternative to subjecting the Internet to national regulation.

Customary practices will be discussed in two distinct categories: online security and online contracting. Customary e-commerce practices will be presented from two perspectives:

- As a source of norms based on which judges and arbiters could settle disputes given the absence of globally binding laws and/or contracts
- As a source of knowledge to national and international legislators dealing with the international aspects of electronic commerce

The data about potential Internet practices was collected through the observation of Internet participants. The paper draws on earlier research on customary practices (Polanski and Johnston 7-10 January 2002; Polanski 2002; Polanski and Johnston 2002; Polanski July 2003). It is outside the scope of this paper to formally prove the existence of these customs. The scope of the paper will be limited to international electronic commerce, despite potential application to non-commercial sphere.

2. The Notion of Internet Custom

Customs are common practices that possess certain characteristics. “An international electronic commerce custom (e-custom) can be defined as a legally relevant practice of trading on the Internet, which is sufficiently widespread within a given timeframe as to justify the expectation that it should be observed.” (Polanski July 2003)

Based on the above definition one can identify several important elements of Internet customs, of which the most important one is the requirement of sufficiently widespread practice. The requirement means that a given practice is widely followed in space and time. The practice is widespread if it has a global, regional or even a local character (widespread in space) and if it is followed intensively in time (widespread in time). In e-commerce, the practice has a global character if it is observed by the Internet participants of all sizes across all or the majority of industries in the world. It can also exhibit a particular character if it is peculiar to a number of companies exhibiting some commonality e.g. companies that are confined to one or several industries or to one or several geographical regions as indicated by the country-level domain names. The practice has local scope if it occurs between two or only a few trading participants (Polanski July 2003).

Internet customs can also be categorised based on whether they exist in the offline world (universal legal customs) or not (Internet specific customs). Universal legal customs also apply to the Internet. In the international law they are known as the general principles of law, see e.g. (United Nations Conference on International Organization at San Francisco

26 June 1945; van Hoof 1983). As an example one could mention here the fundamental customary principles of freedom of contracting or the obligation to keep one's promise (also known as *pacta sunt servanda*). These customs, because of its universal character will not be discussed. Instead, the focus will be directed to obligations arising out of the Internet specific customary practices.

3. Examples of Internet Customary Practices

The objective of the first part of the article is to identify some of the most important Internet practices as the first step in the process of "uncovery" of Internet customs. No such list of potential customs has been offered yet. Although some customary practices have been identified in the earlier works on Internet customs (Polanski and Johnston 7-10 January 2002; Polanski 2002; Polanski and Johnston 2002; Polanski July 2003) most of the Internet practices have not been described yet.

It is important to stress that this paper does not attempt to attach to the norms embedded in these practices a legally binding force. Instead, the aim is to signal the emergence of potential practices that might turn out to be as widespread as to justify the expectation that they should be observed. But this can only be ascertained using empirical tests, described elsewhere (Polanski July 2003).

3.1 Online Security

The security of transactions is one of the most important areas of concern for both businesses and its customers alike. However, because of the highly technical nature of the field there are virtually no national or international laws that deal with this matter. Even laws on electronic signatures tend to be highly general, also because of the widely accepted principle of technological neutrality, which precludes the technological lock-in by law.

In this area one observes the proliferation of numerous interesting security practices. Some of them are widely followed, others continue to gain popularity. In the case of dispute, the reliance of commonly accepted standards may turn out to be of the turning point for a defendant. The field of online security is clearly is governed by the established practices and standards, which ought to be known and followed by all Internet merchants. Some of these practices sooner or later will probably become the provisions of relevant statutes.

The following Internet specific practices, framed as obligations have already become or have the potential to become a supranational Internet customary law:

3.2 Obligation of a Website Operator to Support Strong Encryption of All Web Based Transactions

The architecture of applications running on the top of the Internet infrastructure such as the World Wide Web or email is based on the exchange of plain-text information. Since confidentiality is essential for online payments or sending other sensitive information, special encryption techniques were developed to disguise the content of messages.

One such technique is universally used the Secure Sockets Layer (SSL) protocol, developed by Netscape in order to provide confidentiality of web-based transactions. "Most all web-based online purchases and monetary transactions are now secured by SSL. When you submit your credit card to purchase a compact disk from CDNOW, for

example, the order form information is sent through this secure tunnel so that only the folks at CDNOW can view it.”(RSA Security) This practice extends not only to the actual purchases but also to other activities involving exchange of sensitive information like e.g. web-based email login or online registration.

However, SSL comes in many versions and provides both easy-to-break encryption (40-bit key), relatively easy-to-break 56-bit encryption and strong 128-bit and higher encryption of data. Since there is a choice of encryption level – some web-based systems may offer a weak confidentiality of communication.

As it was shown in the case study of online banks (Polanski July 2003), it is a universal custom in the banking industry to provide strong 128-bit encryption of transactions. This is in line with common expectation that banks should provide high security of transactions.

However, the question is whether this practice extends to the typical online businesses such as electronic shops or portals. It is important because these businesses also accept credit card payments, process personal information or provide access to free email. The observation shows that this is the case. It is common nowadays that electronic shops provide strong encryption of financial transactions. This observation is also true for webpages that contain forms for online users to fill in. Submission of such information for server processing is commonly done with the help of strong encryption.

If the research shows that this practice is so common as to justify that it will be observed, one can conclude that it is no longer a matter of choice for an online entrepreneur whether to provide strong encryption or not. In such case it is his obligation to support the strong encryption of any exchange of sensitive information between a client and a server. Failure to do so would constitute a breach of Internet custom, which could result in serious financial consequences for an online vendor in case of a loss suffered by a customer.

3.3 Obligation of an Online Business to Deny a Service If Client’s Web Browser Does Not Support Strong Encryption

The previous customary norm requires the service provider only to support the strong encryption of transactions. However, if a given web browser is an old one and does not support 128-bit encryption, then the SSL server will select the strongest of the remaining ciphers supported by the web browser in question. This will lead to the channel being encrypted using a shorter key, which may result in the security compromise.

To guard against this, only a denial of service by SSL server could actually enforce the usage of strong encryption on the Internet. The practice of denial amounts to the configuration of a web server in such a manner that it supports exclusively strong ciphers. A number of leading online banks including Credit Swiss and UBS bank, by ABN Amro, Barclays, Banco Bilbao Vizcaya Argentaria bank, Commerzbank, Westdeutsche Landesbank have already implemented this practice (Polanski July 2003).

However, the majority of online banks still do not follow this practice. In consequence, the practice of denial has not yet reached the stage where it could be considered as a customary norm. At most, it could be regarded as a custom in formation or custom *in statu nascendii*. This in turn, has an important consequence because the customer who suffered a loss due to a weakly encrypted channel could not rely on the breach of an already existing Internet custom. This is certainly “the best practice” however, and it should be quickly adopted by other online entrepreneurs. Time will tell whether this practice turns into the established customary principle or not.

3.4 Obligation of an Online Business to Use Valid Digital Certificates Issued by Trusted Authorities

This topic is related to the customary practice of supporting encryption of the Internet channel because SSL protocol requires server-side digital certificates to identify servers. Without a valid digital certificate then, the provision of the strong SSL-based encryption would not be possible. See e.g. (Burnett and Paine 2001)

The observation of the electronic trade shows that the significant majority of public institutions, banks, insurance companies use digital certificates issued by trusted authorities. For instance, nowadays, it is a customary practice in the banking industry to use digital certificates issued by trusted authorities such as Verisign. The prevailing format of digital certificate is X.509v3. However, despite the early attempts to regulate digital certificates by means of national legislation, not all web-based institutions have adopted them and other that adopted them, sometimes do not use them properly.

An important aspect of using digital certificates by website operators is the assurance that trusted authorities generate their certificates. It is important because nowadays operating systems like Windows 2000 enable auto-generation of digital certificates without the need for a third-party authorisation. Such certificates do not provide assurance as to the authenticity of a website operator in question and were meant mainly of inside-the-organisation secure transfer of data.

Internet users can also expect that all online entrepreneurs will have valid digital certificates. The certificate that is no longer valid because of the time passage or its revocation should be timely replaced by a website operator. Failure to do so may result in the compromise of web security and hence in a financial loss to a customer.

3.5 Obligation of an Online Business to Automatically Sign a User Out If a Web Browser Is Not Used For Some Time (Timeout)

The online banking industry has developed several very important practices in order to provide a secure electronic banking. Online banks automatically sign a user off the online account after a set period of web inactivity. Once the window is opened for more than 5 to 15 minutes and a system does not receive any input from a user, a session should be cancelled. If the user wants to continue online banking he or she would have to re-login.

The purpose of this practice is to provide a better security of the Internet banking. The timeout practice ensures that the user will not forget to log out of the system. Had a user forgotten to do this, someone might have opened the window and gain access to all financial information of the user. He could also change the password, transfer funds etc.

Some banks explicitly force a user to sign-off manually. For instance, "Wells Fargo Online cannot be responsible for customer errors or negligent use of the service and will not cover losses due to: (...) Leaving a computer unattended during an Online session — click "Sign Off" to end your session." (Wells Fargo 2002) Nevertheless, Wells Fargo promises to sign the user off automatically after 10 minutes of inactivity (see Websites).

This transaction has a global scope in the banking industry. However, it also exists in other industries. Sometimes even freely available email websites allow specifying the timeout period. So it is possible that this practice has a global scope or is evolving in this direction. However, more research is needed in this respect. Failure to observe this custom may result in the financial loss to a customer, and consequently, in the legal proceedings against an online entrepreneur.

3.6 Online Contracting

Online contracting is another interesting area where numerous practices have been developed. They were created by the Internet community itself in order to allow Internet users to easier conclude transactions. By following these practices, the sellers provide assurance to the buyers that a transaction will take place without serious problems. Therefore, the customs described below provide important mechanisms for ensuring the proper conclusion of web-based contracts. The practices will be described in the order akin to the sequence of a typical transaction.

3.7 Obligation of an Online Business to Display Steps That Follow to Conclude an Electronic Contract

Most of the electronic businesses that earn their revenue from selling products or information over the Internet provide a clear indication to the end-user of all the steps that follow to conclude an online contract. Often a picture with a number of steps on it that highlight the stage of the transaction is displayed. Other sellers provide textual clues as to the stage of the transaction. Thanks to this information, users can better assess what stage of the transaction they are at.

This practice is common to all businesses dealing with the sale of goods or information. The graphical clues were popularised with the introduction of shopping cart technology. (Nielsen 2000). Auction sites in turn, usually provide textual indicators.

The practice has a purely informative character. However, it is difficult to say, what happens if online business does not provide such an indicator. According to the European Union Directive on Electronic Commerce, every website operator should include such a facility, but the regulation is silent on potential sanctions for non-conformance. It is likely that a user will be entitled to claim that he or she made a mistake, and hence that a contract was not validly concluded.

3.8 Obligation of an Online Vendor to Provide Means of Identifying and Correcting Input Errors

The peculiar characteristic of Internet transactions is that they take place very rapidly and in the absence of parties to the transaction. Therefore, it is of paramount importance to enable buyers to easily spot and correct input errors. The current state of technology enables implementation of such mechanisms.

The mechanisms of identifying input errors include the automatic check of email addresses for presence of the @ symbol, the double typing of email addresses, the verification of postal codes or credit card numbers. Furthermore, missing information is customarily signalled with a coloured textual information next to the required field or an appropriate message box.

On the other hand, the mechanisms that allow correction of input error usually take the form of the "Edit" button displayed next to all of the important sections of the webpage. This allows a buyer to change the details of the transaction prior to its conclusion. Finally, very often (particularly in the electronic banking) a customer is given a double confirmation screen, which allows him or her to check the transaction once again.

The aforementioned Directive has codified this principle. However, as it can be seen this requirement can be fulfilled in a number of ways. The sanction for failure to adhere to this principle could be a loss of a contract or in some circumstances financial liability.

3.9 Obligation of an Online Vendor to Summarise the Transaction before Accepting Payment

The practice of summarising electronic transactions is especially popular in the electronic shops. It allows a customer to read once again the details of the transaction and to correct errors prior to placing of the order. Failure to include this functionality may result in an annulment of a contract. This and the following customary obligation have been extensively discussed elsewhere (Polanski 2002; Polanski July 2003).

3.10 Obligation of an Online Vendor to Instantly and by Electronic Means Confirm the Online Order

The instant confirmation of online orders is one of the most fundamental principles of online contracting. Without it a buyer would not be certain whether a transaction took place or not. The confirmation usually takes the form of web confirmation and/or email confirmation. The confirmation customarily includes an order tracking number together with other details of the transaction.

This is a custom as to the formation of a contract. Therefore, it is a necessary step in order to validly conclude an agreement. The lack of order confirmation provides strong justification for rescinding the online contract. This customary practice has been codified in the European law, although very imprecisely. The aforementioned directive on electronic commerce is silent as to the content of such confirmation, which should be established with a reference to the customary practices of online merchants. Other countries and international organisations should include this principle as one of the fundamentals of the online contract laws.

4. Internet Law Merchant (*Internet Lex Mercatoria*)

The above discussed Internet customary practices clearly show that an extensive body of unwritten norms have been developed. These norms self-developed by the Internet community have an international, cross-cultural character and prove the thesis that the Internet requires an autonomous legal system – only to be supported by the national legislation. It is argued that the body of customary norms could be utilised for this purpose similarly to how in the ancient times, the Romans had to resort to the unwritten commercial customs of other nations (*ius gentium*), despite their so well-developed legal system (Goldman 1983). In fact, it is thanks to this outside influence that the Roman law introduced numerous changes that let it thrive and inspire future generations (van Caenegem 1992).

History gives us other examples. In the Middle Ages, the international trade took place mainly on marketplaces where the law was dictated by common practices or customs of merchants (Trakman 1983; Schmitthoff 1988; Greif June 1993; Milgrom, North et al. March 1990). These common customary norms formed the basis of the medieval *lex mercatoria* or Law Merchant (Goldman 1983). *Lex mercatoria* was a set of transnational commercial customs, to a large extent uniform and developed by the mercantile community to avoid application of various local legal systems. The self-regulatory system was administered and enforced by experienced traders themselves at market fairs, harbours and guilds located in various cities across the Mediterranean basin and northern Europe (Polanski 2003).

In the same way, modern commercial transactions conform to the well established mercantile customs. For instance, it is mandatory for any international trader to be familiar with such customary principles as e.g. International Commercial Terms

INCOTERMS or Uniform Customs and Practice for Documentary Credits, which for nearly a century have been published by and continuously revised by the International Chamber of Commerce (ICC) (Goldstajn 1964; De Ly 1992). ICC is currently working eTerms 2004, which could soon become customary principles of the Internet based commerce. (UNCITRAL 12 August 2004)

The Internet commerce then, could be regarded as another example of an environment where in the absence of an agreement or written law, rights and obligations could be inferred from the common practices or customs of e-merchants (Polanski July 2003). And these customs could be regarded as the foundation of another reincarnation of the idea of the Law Merchant - the modern *Internet lex mercatoria*. This is so, because in principle, there is no difference between the early trade, modern international commerce and the electronic commerce (Polanski July 2003).

Uncovered, described and systematised electronic commerce customs could transform our thinking about the Internet as a law-less sphere and provide the Internet community with several important benefits. Firstly, as a basis for solving Internet disputes in cases where contract parties either failed to choose national legal system governing the interpretation of their contract or explicitly chose *lex mercatoria* as a law governing it. In such case scenario, the national courts hearing a dispute or more likely arbiters, would solve the dispute with a reference to the body of international commercial customs and other common trade principles that ought to be known to all merchants. This is a very popular form of solving international commerce disputes in the paper-based international trade.

Internet customs could also serve as the building blocks for the future international and domestic regulation of electronic commerce by means of statutes and treaties thus helping to harmonise existing Internet laws. The detailed knowledge of commercial practices is essential to draft a reasonable legislation. But what is necessary is a continuous research into the common practices of the Internet users.

5. Conclusion

This paper has presented eight examples of Internet customs that have emerged in the field of online security and web based contracting. The knowledge of Internet common practices could help in the global harmonisation of the Internet commerce law. It may also turn out to be a viable alternative to national legal systems with respect to contractual disputes, in which parties refer to national legal systems such as *lex mercatoria*. Similarly to how contemporary international businessman rely on arbitration, so Internet traders could resort to such online courts and ask to resolve their dispute according to the customary Internet Law Merchant that has been introduced in the second part of the paper.

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