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POTENTIAL OF CUSTOM IN OVERCOMING LEGAL UNCERTAINTY IN GLOBAL ELECTRONIC COMMERCE

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ABSTRACT

The law has failed to keep apace with the rapid rise in e-commerce. This is particularly so when e-commerce spans national boundaries. There exists a regulatory gap that may result in unexpected outcomes for e-commerce companies involved in litigation. This paper investigates the possibility and feasibility of employing the concept of international commercial custom (hereinafter referred to as "e-custom") as a source of law, as a potential solution to legal disputes in contractual global electronic commerce. The paper sets out the issues that need to be addressed to make this proposal work and analyses them using developments from neighbouring fields of legal knowledge, mainly international public law and international trade law.

INTRODUCTION

The electronic commerce era has brought unprecedented benefits to the companies that have connected their resources to the Internet in order to better link their enterprises with their national and international customers and suppliers. However, these radical new business practices have not yet found recognition in law, which has traditionally lagged behind new developments. As a result international electronic trade functions to a large extent in a legal vacuum. Given the current state of computer technology and the legal regulation pertaining to that phenomenon, it is obvious there is a large regulatory gap that needs to be filled. To remedy this situation, the international community has several times expressed its interest in defining legal policy in relation to an Internet commercial environment e.g. (White House 1997; European Commission 1997; Australia Electronic Commerce Expert

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Group 31 March 1998; UNCITRAL 1996; OECD 1997; UNCITRAL 2001).

However, both international as well as national legislatures have problems with regulating global electronic commerce mainly because it is changing too fast. So far, the international community has managed to propose only a very basic framework for global digital trade, aiming at recognition of electronic documents, signatures and contracts. Specific parties' rights and obligations in relation to each other are left to merchants to set out in a contract. If however a formal contract does not exist or the contract proves inadequate to regulate the disputed matter, both parties may find themselves in the state of impasse.

The aim of this paper is to investigate the possibility and feasibility of employing the concept of international e-commerce custom (hereinafter termed "e-custom") as a source of law (Polanski and Johnston 2002) in order to supplement global electronic commerce law with a new way of establishing electronic merchants' rights and obligations. It is argued, that certain digital mercantile practices, which are, widespread, of legal importance, but not necessarily immemorial, (van Caenegem 1992) might (under circumstances described later) attain a status of law in international electronic commerce.

CONTRIBUTION

This paper makes several important contributions to both information systems and legal science.

In regards to the information systems discipline, this paper discusses the potential of widely known and accepted Internet community practices as a new way of overcoming legal uncertainty of an Internet environment. A regulatory gap exists due to the lack of international electronic commerce treaties in force at the moment. This study also shows the potential impact of a lack of awareness and observance of established Internet community practices on potential business disputes that may arise. Ignorance of widely followed e-commerce customs may lead to potentially substantial financial losses.

Regarding legal science, this paper provides the first treatment of international Internet law from the customary law perspective. The concept of custom as a source of law, although known in legal studies, has not previously been discussed in the context of electronic commerce. Also, this paper contributes extensively to the established theory of international custom as known in international law by pointing to the weaknesses of the existing customary law theory and practice and proposes solutions appropriate to the electronic commerce environment.

This research will be useful to researchers focusing on legal and technical aspects of international electronic commerce especially those interested in Internet governance, organization and process management, design of web-based systems, security of transactions, electronic contracts and arbitration. Information systems managers and software designers can benefit from this research by realising the potential value of e-commerce common trade practices and adverse effects of an ignorance of them in case of a disagreement.

The most important benefit of the proposed concept is e-custom's ability to adapt to the fast changing digital world without government intervention. As a result, the community of Internet merchants can be provided with a set of norms as to how to deal on the Net without complex and long lasting political debate. Governments can benefit from the incorporation of commonly recognised practices into their national legislation thus providing the Internet community with norms deeply rooted in their everyday practice and already known to majority of its members.

Another advantage of e-custom is that it is the best filler of gaps left by mercantile contracts and prospective governmental regulation of electronic commerce. It is not hard to notice that current developments in the area of electronic commerce law are very general, in accordance with legislative policy established by 1996 UNCITRAL Model Law on Electronic Commerce and unanimously accepted by international community. In

addition, contracts dealing with digital trade seem to be very general thus yielding many gaps that can be filled by e-custom.

Moreover, the idea of e-custom will not contradict any future developments in the global e-commerce law area. International or municipal legislation is a separate source of law to custom. Legislation provides norms that are more general whereas custom provides norms that are more detailed. As a result, custom will provide an interpretative function to future Internet legislation.

Finally, custom can be more easily evidenced in an electronic environment compared to that of traditional trade. Having access to international Internet resources, a human being can observe practices of distant e-companies from his or her desk in an unobtrusive way. If we add to this a capability of recording the practices of companies by automated software agents that travel on the Net and can observe and document how companies trade with one another, the power of the idea of e-custom as an excellent solution in establishing legal norms on the Internet can be appreciated.

The scope of the paper will be limited to international business-to-business electronic commerce despite its great potential business-to-consumer and business-to-administration digital trade. In addition, the concept of custom will be discussed in the context of international contracts only, despite its potential in other areas of Internet transnational private law like torts or IP law. This paper will not cover issues associated with evidencing customary practices on the web nor formation of custom.

Also outside the scope of the present paper is the issue of enforcement of custom or contract where no state organisation is present. For an interesting economical analysis of this phenomenon in a historical context, see (Greif, Milgrom et al. 1994; Greif 1997; Greif 1993; Milgrom, North et al. 1990). Also, the roles of organisations like IETF or W3C in setting technical standards for the Internet is deliberately excluded from the scope of the paper, for the problem of at what stage of the system development cycle e-customs actually come into existence would require a separate paper.

The paper addresses the most important issues associated with the concept of international trade custom as a source of law. The method is to set out a series of issues associated with making use of this idea. These issues are: the importance of custom, the definition of custom, the problem of long standing practice as a necessary requirement for successful formation of custom, the environment in which a trade custom is to function, and the nature of custom. Finally, as a practical illustration of the application of the concept of custom, the issue of security of transactions in an e-commerce environment will be analysed. It is argued that certain widely accepted practices have emerged and petrified, and the implications of this for possible disputes over contractual obligations are discussed.

EXISTING APPROACHES TO REGULATING GLOBAL ELECTRONIC COMMERCE

Before making the case for custom as a source of e-commerce law, it is necessary to review the progress and limitations of other important approaches being pursued both by the international community and by academics.

Model Law on Electronic Commerce.

The first important development for international electronic commerce was The Model Law on Electronic Commerce adopted by United Nations' General Assembly in December 1996 (UNCITRAL 1996). The Model Law resolution is based on two principles: functional equivalence, which means that electronic documents are functionally equivalent to paper documents and technology neutrality, which means that all the provisions of the model law are expressed in technology neutral language in order to remain applicable irrespective of the technological progress (UNCITRAL 1996).

In summary, the importance of The Model Law is that it offers recognition of electronic writing and signatures, supports admission of computer evidence in court and

provides for recognition of the validity and enforceability of contracts formed through electronic means. The Model Law has gained a worldwide recognition as a good "start to defining an international set of uniform commercial principles for electronic commerce" (White House 1997) and its provisions have already been voluntarily implemented in the number of states throughout America, Australia, Europe and Asia.

However, The Model Law does not target the development of a global legal framework for electronic commerce. Instead, The Model Law provides national legislators with a template that is aimed at helping them with the enactment of domestic laws based on proposed principles.

European Union Directives

Other important international developments include two European Union Directives on electronic commerce: The Electronic Commerce Directive (Official Journal of the European Communities 2000) and Digital Signatures Directive (Official Journal of the European Communities 1999).

The Electronic Commerce Directive, which has not become fully implemented by EU member states yet, establishes a set of rules in relation to, among other things, establishment of service providers, commercial communication, liability of intermediaries, validity of electronic contracts and out-of-court dispute settlement (art. 1.2). The Electronic Commerce Directive applies only to on-line businesses established within the European Union. The Electronic Commerce Directive employs The Model Law functional equivalent approach (Murray 2000) requiring 15 EU Member States to implement legislation to remove current requirements, including the requirements of form, which are likely to curb the use of contracts by electronic means (Recital 34 of Directive).

The importance of the Electronic Commerce Directive is that this is the first mandatory, transnational recognition of electronic contracts linking both Civil and Anglo-Saxon contractual traditions. Moreover, the regulation not only affects European Union countries but is also likely to be adopted by candidate states to the European Union, thus promoting a uniform e-commerce law across the whole Europe. However, the directive is also somewhat limited, regulating electronic commerce in only 3 articles, therefore raising many controversies within the EU community itself (London Investment Banking Association 2000; Murray 2000). Moreover, the Electronic Commerce Directive is restricted in its application to Europe. Therefore, it does not guarantee a uniform set of rules for global, intercontinental digital trade.

Similar remarks can be made in relation to Digital Signature Directive that establishes the requirements for electronic signature certificates and certification services throughout the EU and includes mechanisms for co-operation with third countries on the basis of mutual recognition of certificates, bilateral and multilateral agreements.

E-commerce Law Literature

The literature relating to international e-commerce law is very modest. Contemporary writers e.g. (Gringras 1997; Lloyd 1997; Akindemowo 1998; Chissick and Kelman 1999; Bainbridge 2000; Edwards and Waelde 2000; Forder and Quirk 2001) generally study Internet law from the perspective of a national legal system, thus ignoring its supranational character, and as a result do not contribute to the development of a global legal framework for international e-commerce. These works almost all look at the implications of the use of computers from the perspective of domestic constitutional, intellectual property, privacy, competition, and contract law, law of negligence or tax law. Even those authors (Lessig 1999; Lessig 2001) adopting wider than purely legal perspective on Internet regulation still adopt a domestic constitutional viewpoint. Similarly, those authors discussing supranational Internet legal frameworks see e.g. (Boss 1992; Dickie 1999; Hultmark 1999; Patrickis and Heller 1999; Rawson 1999; Nichols 2000) use national legal systems as a point of reference.

In summary, no satisfactory legal regime for global electronic commerce has been developed so far. There is no treaty or any international instrument governing parties'

rights and obligations on the Internet. Modern legislators continue to regulate the Internet using domestic methods. Their legal advisors have not overcome a national domestic perspective when discussing problems posed by the Internet. In order to remedy this situation, the concept of international custom as a source of law could be used, to fill in some gaps resulting from lack of globally binding Internet laws.

CUSTOM AS A SOURCE OF LAW

The concept of international commercial and non-commercial custom will be explained with reference to the existing legal literature. The two main sources for this concept are the international public law literature, which provides an excellent treatment of various theories of international custom as a source of law in inter-state relations, see e.g. (Oppenheim 1920; Kelsen 1939; International Law Commision 1949; Guggenheim 1950; Cheng 1965; Kelsen 1966; D'Amato 1969; Thirlway 1972; Tunkin 1974; Danilenko 1983; van Hoof 1983; Akehurst 1987; Brownlie 1990; Wolfke 1993; Degan 1997; Villiger 1997; Goldsmith and Posner 1999) and international trade law, where international commercial custom traditionally plays a very important role, see e.g. (Bonell; Schmitthoff 1964; Berman and Kaufman 1978; Lagarde 1983; Trakman 1983; Mustill 1987; Goldstajn 1990; De Ly 1992; Draetta, Lake R. B. et al. 1992; UNIDROIT 1994; Carbonneau 1997; Bonell 1998; Berger and Center for Transnational Law. 1999; D'Arcy, Murray et al. 2000)

Custom in municipal legal systems

Custom is the natural foundation of any legal order on the globe. It is through the long-lasting process of recognition of certain human behaviours as desirable or mandatory and observance of those practices by other members of the society that human communities have managed to develop legal orders. However, as humankind progressed, old customs where gradually codified. The 19th century industrialisation saw the introduction of statutes as the main regulatory instrument at the national level (Goldman 1983). Those statutes in turn, incorporated many customary rules formerly not codified. In consequence, the legislatory role of custom in municipal systems has been diminished to the extent that one could claim that nowadays custom's role, as a source of national law is marginal.

Custom in international legal orders

However, custom is the oldest (D'Amato 1969) and still very important source of legal obligations both in international public law and in international trade law. Article 38 of the Statute of International Court of Justice enlists international custom as a second source of inter-state law after treaties (United Nations 1945). Its crucial role in international public law of treaties, law of territory, law of the sea, law of airspace, law of diplomatic and consular relationships, law of war, and recently in the law of human rights (Simma and Alston 1992; Meron 1987; Meron 1996) and environmental law (Brownlie 1973; Knox 2002; Bodansky 1995) has been often expressed in the literature and in International Court of Justice judgments, see e.g. (I. C. J. Reports 1950; I. C. J. Reports 1951; I. C. J. Reports 1960; I. C. J. Reports 1969; I. C. J. Reports 1974a; I. C. J. Reports 1974b; I. C. J. Reports 1986; I. C. J. Reports 1997).

It is important to realize however, that international public law deals only with official inter-state relations, and as a result, the theory of international custom there defined cannot be directly applied to either traditional or digital commerce. It is argued, however, that after necessary modifications, the conception can be successfully reused in defining the concept of transnational e-commerce custom.

On the other hand, the importance of commercial customs in traditional international trade is well known among merchants, mainly as a result of having been codified by the International Chamber of Commerce mercantile practices (e.g. International Commercial Terms INCOTERMS or Uniform Customs and Practice for Documentary Credits). The concept of international custom in international public law has been developed independently of international commercial custom (Goode 1997), but because of its

deeper coverage in international public law literature, the latter one will primarily be used in this paper.

The Potential of custom in international electronic commerce

It is argued here that custom is an important component of the international legal systems because the essential features of those regimes are lack of central governance and, relative to modern legislatures, underdevelopment. Similarly, the Internet with its bottom-up governance and, at this stage, lack of any globally binding laws seems to be a very similar environment, which could utilize the idea of custom as a global source transnational e-commerce law.

Custom may turn out to be a very important source of international Internet law because it petrifies and rises to the level of law commonly recognized and observed practices. In a fast changing digital world, its ability and flexibility in recognizing globally binding e-commerce practices may prove to be the best "regulatory" option available. At the same time, the concept of custom does not contradict other regulatory developments at the national and international level, because it can be assumed that custom will be overruled by any contrary treaty, statute or agreement.

Hence, the possible regulatory role of custom appears to be a good solution before, in the next phase of the development of international electronic commerce law, some explicit conventional regulations materialize. It appears that in the near future, the international community will not see any major global regulations attempting to govern Internet transactions. Instead, the international community will have to rely on its own resources, through the careful use of contracts and, as argued here, utilisation of commercial customs. Nevertheless, the codification of existing and emerging customary rules in relation to electronic trade will be necessary in the long run, in order to allow commercial parties to ascertain their rights and obligations.

But the role of a custom is much broader than just an interim regulation of some of the aspects of the e-market. Custom plays, and will play, an important role in interpreting contract clauses. Also, its capability of modifying existing or future concurrent sources of e-commerce law like conventions or contracts should be stressed. Furthermore, custom can widen the scope of applicability of international conventions. Finally, a custom will remain the best "filler" of the gaps left by formal e-commerce related legislatory works.

THE DEFINITION OF CUSTOM

Definition of international custom in international public law

Article 38 of the Statute of the International Court of Justice defines international custom as "evidence of general practice accepted as law" (United Nations 1945). This definition distinguishes two constituent elements of international custom: general practice and acceptance of this practice as law by international law subjects (D'Amato 1969; Villiger 1997). Moreover, this definition does not accentuate the longevity of practice as an essential element of custom. This approach reflects the interesting fact, which will be addressed below, that due to a rapid development of technology in the 20th century international custom can be formulated faster than in the past (I. C. J. Reports 1969).

4.2 Definition of international custom in international trade law

According to Schmitthoff, international trade law is derived from two sources: international legislation and international custom. Describing international commercial custom, he stated: "International custom consists of commercial practices, usages or standards, which are so widely used that businessmen engaged in international trade expect their contracting parties to conform with them and which are formulated by international agencies, such as International Chamber of Commerce, or United Nations Economic Commission for Europe, or international trade associations." (Schmitthoff 1988, pp.148-149)

There are three striking elements in this definition of custom. First, as in the previous definition, custom does not need to have a long tradition in order to be binding. Second, commercial practice needs to be widely used. Third, formulation of custom by various

international trade associations seems to be the necessary condition of a successful formulation of custom. The first two elements of the definition are widely accepted in international public law theory. However, the third element is Schmitthoff's own proposal relating to international trade law specifically.

4.3 A proposed definition of international e-commerce custom (e-custom)

The above definitions of custom are the basis for the definition of e-custom presented below. However, both the definitions of custom in international law as well as international trade law have some weaknesses. The most important problem of the international public law definition is the requirement of a practice to be accepted as law, which makes it impossible for the new customary practice to emerge without breaching existing law. On the other hand, Schmitthoff's definition requires formulation of custom by some organisations, which in fact should not be an obstacle in the formation of customary norm. For these reasons a definition of electronic commerce custom that is tailored to Internet needs will be presented below.

An international e-commerce custom (e-custom) can be defined as a legally relevant practice of trading on the Internet, which is sufficiently widespread as to justify the expectation that it will be observed.

This concise definition hides some important issues that should now be expanded upon. The mercantile practice must be of legal importance. For example, an Internet practice of using a certain type of font is legally unimportant and hence non-binding. Also, this definition does not require e-custom to be a long lasting practice. As will be argued below, custom can develop nowadays within a couple of months in such a quickly changing environment as electronic commerce. What is important is that a practice must be widespread, meaning established within a reasonable time frame, be it a couple of months or couple of years, intensive in terms of number of transactions within a given time period, and confined to one industry or geographical region or the whole world. Expectation as to the observance of the practice means that parties willing to deviate from it must have a very good reason to do so. The next two sections are devoted to justifying all aspects of this definition.

DOES E-CUSTOM NEED TO HAVE A LONG TRADITION?

New meaning of the time factor in e-custom

The ordinary meaning of the term "custom" presupposes the existence of widespread practice for a very long time. This notion of the term has changed in international law. Since the Second World War it has been accepted that international custom can be recognized after a short period of time, since developments in society, particularly in commercial or technology law, take place at a quicker pace (Cheng 1965; Danilenko 1983; Wolfke 1993).

As one of the judges of International Court of Justice put it " ... the speedy tempo of present international life promoted by highly developed communication (...) has minimized the importance of the time factor and has made possible the acceleration of the formation of customary international law. What required a hundred years in former days now may require less than ten years." (Judge Tanaka 1969)

Those findings are of paramount importance to the concept of e-custom. Certain e-mercantile practices can become binding within a very short time frame. If 30 years ago, it could take less than ten years in international public law to develop binding practices it can also take less than 10 years to develop binding e-commerce practices nowadays. In fact, given the enormous tempo of the digital revolution, one could argue that binding e-commerce practices could develop in much shorter time frame, arguably less than a year.

Volume of transactions

The traditional understanding of the concept of custom implies longevity of practice as the necessary condition of its existence. This one-dimensional, "horizontal" approach does not take into account other potential measures for assessing the practical importance of a given routine like the intensity of certain practices within a given time frame ("vertical" measure). For instance, 200 years ago there could be 100 instances of adherence

to one commercial practice within one year. Nowadays there can be 100 instances of adherence to one commercial practice within one day. In other words, one day nowadays can be as important as 1 year in the past as far as formation of a custom is concerned.

This paper challenges the traditional understanding of the concept of custom as it is argued that, in the case of electronic commerce custom, it is also the volume of the transactions that can contribute to the faster formation of international e-customary norms. The electronic commerce environment provides a unique opportunity to measure the number and type of transactions that took place in a given time frame, thus providing an excellent proof of mercantile adherence to certain practices. For instance, transaction logs might provide information about the intensity of certain types of transactions that might contribute to the faster formulation of e-custom.

WHAT CONSTITUTES A CUSTOM?

The objective element of custom

Discussion of what constitutes a custom has a very long tradition. In modern legal theory, the majority of scholars agree that a custom consists of two elements: objective and subjective (Harris 1998). The objective element is a habitual practice. The subjective element is a conviction that the habitual practice is binding.

The concept of "practice" is generally taken to refer to physical acts (Wolfke 1993). However, a debate exists concerning whether other acts like statements, negotiating positions or declarations may constitute party's practice. Most authors insisted that only physical (Danilenko 1983; Wolfke 1993) acts constitute practice (for example, writing a computer program), which from the purely logical point of view seems to be right. However, this approach seems to be too restrictive, since making a statement is also a physical act. In addition, physical deeds are usually triggered and fuelled by previous oral or written declarations (e.g. political declarations, codes of good practice) that subsequently were to be fulfilled in practice. It is argued then, that in the case of electronic commerce the term practice embraces not only physical acts but also declarations as to what an e-company intends to do.

Moreover, there is an ongoing discussion in the literature as to whether abstention or lack of positive acts can create prohibitory customary norms (Villiger 1997). There seems to be no definitive answer to this question. It should be pointed out, however, that allowing creation of law based on lack of practice is very risky, since lack of certain activities does not imply prohibition to act in that way in the future.

The subjective element of custom

The second element is of psychological nature. According to the majority of scholars, practice alone is not a sufficient element to form the legal rule (Roberts 2001). What is also required is a feeling of duty (van Hoof 1983) or a special psychological attitude towards the practice that could be described as a feeling of being bound by the norm that could be inferred from this practice. As a logical consequence, a person violating the custom should be aware of the fact that he/she is breaking the rule of law that is binding him/her.

The idea of a psychological attitude towards some practice is problematic, especially when the parties are not people as may indeed be the case in electronic commerce. It is interesting to see how international lawyers try to deal with the requirement of a psychological element. As Michael Akehurst wrote in relation to states "there is clearly something artificial about trying to analyse the psychology of collective entities such as states. … the modern tendency is not to look for direct evidence of a state's psychological convictions, but to infer opinio iuris (acceptance of practice – added by authors) indirectly from the actual behaviour of states." And further: "Permissive rules can be proved by showing that some states have acted in a particular way … and that other states, whose interest were affected by such acts … have not protested that such acts … are illegal. In the case of rules imposing duties, it is not enough to show that states have acted in the manner required by the alleged rule, and that other states gave not protested that such

acts are illegal. It also needs to be proved that states regard the action as obligatory." (Akehurst 1987, pp.29-30)

However, it is argued here that the subjective element of custom, that is, an assent to the practice by physical people while feeling legally bound by it, should no longer be a compulsory component in an electronic commerce environment. There are two main reasons for this. First, there is a chronological paradox if we assume that custom consists of the two elements already mentioned. Custom is a source of new norms of law. It can also change existing ones. How then can customary norm create a law, if it is going to be reflection of an already existing law? Or as Anthony D'Amato put it: "How can custom create law if its psychological component requires action in conscious accordance with law preexisting the action?" (D'Amato 1969, p.84) This requirement would seem to make it impossible for new customary rules to develop, since the feeling that the current practice constitutes a law would exist only in respect of those rules that already exist (Byers 1999).

Second, there exist theoretical and practical difficulties of evidencing this element both in traditional commerce and especially in e-commerce, since it relates to human feelings and opinions that are subjective in nature and cannot be measured in an objective way. In an e-commerce environment, where all transactions may be automated, very fast and deeply hidden from an end-user, it would be extremely difficult to prove the existence of psychological attitude towards some norm. It becomes even more difficult with fully automated e-commerce systems, where machines rather than humans will respond to predetermined events.

The distinction between a custom and usage that exists in some jurisdictions poses another problem. The criterion on which this classification has been made is not very precise. As explained in legal literature (De Ly 1992) the main difference between custom and the usage is that trade usages are not law since parties feel not bound by the usage. Custom binds irrespective of party consent. But since it refers to a psychological attitude as far as recognition of some common practice is concerned, the evidence of the approval or disapproval of certain physical deeds becomes very difficult if not impossible.

It is argued then, that a theory of e-commerce custom should not include the second element of the traditional definition of custom, which is the concept of feeling bound by certain practice, which is very difficult to establish. Instead, it is proposed to either completely abandon this conception or replace it with the idea of an expectation that it is highly likely that a given practice will be observed in the future. This matter requires further research.

Whose practice generates custom?

The requirement of a practice gives rise to the question of whose practice contributes to the formation of a customary rule. Since we are dealing with international e-commerce law, the major players in the development of customary rules would be companies. Besides, the subjects of international e-commerce law would be physical persons engaged in e-commerce, but possibly also international organizations and states acting as a party in e-trade environment.

General and local custom

Since a custom may be either general or local (I. C. J. Reports 1950; I. C. J. Reports 1960) even a practice of two companies would be sufficient to form a local custom that would bind them. Of course, if other companies then follow the electronic practice of these two companies, this could lead to enlarging the scope of the application of a particular customary rule, or maybe even to the formation of the general customary rule. In international public law, authors who require both practice and its acceptance as law to form a custom, state that conduct of even one state, tacitly accepted as a legal right or duty by another, can lead to the formation of a custom.

Does practice need to be constant?

As Michael Akehurst stated referring to the 1951 Fisheries Case (I. C. J. Reports 1951) "Major inconsistencies in the practice (that is a large amount of practice which goes against the 'rule' in question) prevent the creation of a customary rule. Minor inconsistencies (that is a small amount of practice which goes against the rule in question) do not prevent the

creation of customary rule, although in such cases the rule in question probably needs to be supported by a large amount of practice, in order to outweigh the conflicting practice" (Akehurst 1987, p.28). In addition, previously existing custom formation requirements have been relaxed (De Ly 1992) so it seems nowadays that custom no longer needs to be constant, voluntary, certain or reasonable.

Other issues

The question of whether all general practices, even ones prima facie irrelevant from legal point of view, create customary norms and the question of whether a practice that is not morally desirable creates customary norms, are difficult from the legal point of view.

The view taken here is that not all practices even if generally followed will automatically create legally binding norms. As an example, the practice of sending e-mails written using Times New Roman font will never create customary norm stating, "All e-mails should be written using Times New Roman font". It is common sense that will allow judges or arbitrators to ascertain whether a particular practice is legally relevant or not. Similarly, an undesirable practice even if generally followed (for example, sending unsolicited e-mails) will not create legally binding rules. However, in this case the theoretical justification is even more difficult. One will have to adhere to some other sources of law that will have to have a higher ranking than the custom. It could be argued that a general practice that violates general principles of law cannot generate customary rules. This argument creates some uncertainty in regards to the existence of the customary rule in question and puts the burden of ascertaining the existence of a customary rule on judges and jurisprudence. But in the end, it is no different to the problems associated with the ascertainment of the existence of a custom consisting of both objective and subjective elements. In both situations, the judge will have to verify that the general practice is morally desirable one.

Another difficult question is who should be given powers to confirm the practice in question. It seems reasonable to assume that it will be arbitration tribunals, although scientific and legal writings might have a profound effect on acknowledgment of the existence of a routine under debate as well. This matter requires a further research.

EXAMPLE OF E-COMMERCE CUSTOMARY NORMS

Custom can affect both the norms governing the formation of a contract as well as the content of a contract. The example below will show how customary Internet practice affects the content of the contract.

A new custom in banking?

It is the common practice nowadays that nearly all banking transactions on the Internet are secured, mainly through the use of cryptography. The permanent presence of computer hackers that browse the Internet in order to intercept valuable financial data makes e-commerce a highly risky and vulnerable environment. On the other hand, there is no international regulation that would force IT developers to use cryptography or other security techniques in order to protect the flow of information over the Internet channel.

Although this paper does not attempt to provide detailed analysis of online banking, it simply observes that a new banking custom has emerged that states: 'All Internet banking transactions should be appropriately secured'. The term "appropriate safeguarding of transactions" is vague and could be interpreted that state-of-the-art security technology should be used both by banks, as primarily responsible, and end-users of these programs.

Consequently, a party acting on the Internet as a professional end-user should be obliged to use well-encrypted messages. In addition, this party should have a right to expect, that its correspondent partner, the international bank, will also provide strong cryptography or a similarly secure technology in order to safeguard their transactions. As a result, if either of these parties were to break this rule, the other could expect compensation.

According to the case being made here, this e-custom would become an implied term that could be incorporated in any e-commerce software license agreement.

Hypothetical case

A software development company produces for a large international bank and its global clients a system for sending sensitive trading data or transactions electronically between the bank and the customer using client server technology and using the Internet as the message transport medium. The issue of message encryption was not explicitly discussed at the system specification stage between the bank and the developer. Also the software licence agreement between the client and the bank does not address the issue of transaction security. In this product, the messages are unencrypted or weakly encrypted. An international client's message is intercepted and there occurs a loss of business value due to the breach in security. Negotiations with the bank do not give results and the client initiates arbitral proceedings. Can the client successfully sue the bank for damages?

In order to solve this problem we can again make use of the idea of custom. What is required however is evidence that there exists a customary rule stating, "All banking transactions on the Internet should be appropriately secured". In order to do this one should evidence the general and worldwide practice of using state-of-the-art Internet security precautions, by on-line banks. Visiting banks' web pages could be one way to gather the necessary information. There is usually information available on-line regarding security features that their software provides. If the product uses encryption, it can then be verified by running the software and checking in the browser's status bar as to what level of encryption it provides. Outcomes of electronic surveys and opinions of banking security experts could also strengthen the evidence of widespread current practice that nowadays on-line banks provide 128-bit encrypted sessions.

As a result, successfully evidencing the alleged customary rule would in consequence imply a term into the banking software license agreement stating that the transaction session should be secured using state-of-the art technological precautions. Consequently, the international customer's claim would be considered justified.

Consequences for IT industry

As can be seen from the example, e-commerce customs could play a very significant role in e-commerce development. Since this role is based on adding legal value to certain practices, it can force IT companies to design carefully their products and processes, use state-the-art technology and constantly upgrade their knowledge.

Best practices have the greatest influence on custom formation and it is arguably mainly larger companies engaged in e-commerce that create these practices. Those practices are being developed quickly but at the same time are also followed by the vast majority of e-commerce companies. The consequence is that IT companies through adherence to certain practices and standards may directly influence the development of international and national law in this area. This is a very important privilege. But it also means a greater responsibility for IT companies as far as the development of the Internet is concerned.

CONCLUSION

This paper has introduced the concept of custom as a source of e-commerce law. It is argued that custom can fill the gap produced by the lack of international legislation, and the inadequacy of national legislation, in regulating the use of the Internet for commerce, particularly where this use crosses national boundaries. Despite difficulties in applying custom, it is nevertheless an important source of legal norms to which international society should abide in the early days of e-commerce. This concept of e-custom is also likely to prove to be a major legal source even if, or when, official conventions incorporate some of these customary norms into their texts. The IT industry should be especially aware of the role Internet custom is likely to play in settling legal disputes, especially where the e-company has not followed a well-established practice without a good reason. In addition, the IT industry should be proactive in developing electronic practices mindful of the eventual laws that will incorporate the best of them in their texts. The paper has set out the main issues in implementing this idea, and analysed them

using sources from international public and trade law where the use of custom as a source of law has some history and research. There are many issues that remain to be researched including: how e-customs can be evidenced and how the Internet itself may be used to do this; the role of Internet standard organisations and software development companies in influencing development of e-customs; and whether and which important e-customary norms have already developed on the Internet.

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