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THIRD EDITION
Legal
Fundamentals
for Canadian Business

Chapter 10

Electronic Commerce and International Trade

Learning Objectives

LO 1 Describe the nature of electronic commerce and its impact on business relationships

LO 2 Outline the jurisdictional issues that complicate online transactions

LO 3 Recognize specific kinds of tortious conduct that are pervasive on the internet

LO 4 Describe the concerns electronic and global business transactions have in common

LO 5 Explain difficulties in engaging in international contracts

LO 6 Describe how contractual problems are best resolved in the global environment

LO 7 Outline how international commerce is regulated

LO 8 Discuss jurisdictional issues and enforcement of judicial decisions

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For most of us the internet has changed the way we conduct our lives. We shop online, ordering everything from groceries to cars. Using the internet we never have to deal with salespeople, agents, or manufacturers. We can have an item shipped from anywhere in the world without leaving our home or office. Whether we are functioning as an individual consumer, a small business, or a large corporation, it's inevitable that a considerable portion of what we do will be done over the internet and probably across borders. While international trade has always been an important source of business relationships, the internet has facilitated the trading process in ways that could not have been imagined two decades ago. It is necessary to look at the laws affecting these two areas and consider how they are applied in both electronic and global commerce. As well, the need for and the impact of government regulation in both these areas should be examined. They share some commonalities that will be discussed in this chapter, including contractual processes, jurisdictional issues, and the resolution of disputes.

BUSINESS AND THE INTERNET

LO 1

Internet facilitates business and education

The enormous expansion of the internet has brought about significant and basic changes to our economy and society. Communication of information has never been so easy and so seamless. The internet is much broader than just a business tool. It also provides education, entertainment, and social interaction. It has, to a large extent through electronic mail services, supplanted paper correspondence.

Electronic commerce facilitates the purchase and sale of goods and services at the retail level. Those same interchanges, between businesses of all sizes, are an even more significant aspect of ecommerce. Even the most complicated forms of business transactions are now largely completed over the internet or involve other forms of electronic communication including fax and telephone communications. It is also important to remember that all of these transactions normally involve third parties that facilitate the deals. In retail sales, service providers such as eBay and PayPal advertise the products and facilitate payment and collection. Less obvious are the services supplied by the internet service provider itself (the ISP), which makes ecommerce possible.

The development of the internet and electronic commerce has moved forward at an astounding rate and has created a free and open Wild West–style online environment, which is still relatively free of government regulation and legal restrictions. Now we are dealing with Web 2.0, which enables the newer, more socially interactive practices, such as instant messaging, blogging, wikis, Facebook, Twitter, and ever more varieties of online communication. These additional layers of complexity make it that much more difficult for government controls to be effective. Note that the various forms of law, including civil remedies for fraud, breach of contract, and tort, as well as most forms of criminal law and federal and provincial regulation, apply to transactions and activities conducted online. The difficulties consist primarily in determining the laws of what jurisdiction should apply and in enforcement.

Normal civil and criminal remedies apply to internet

The laws that are in place are often not readily adaptable to this new form of communication, and the courts, legislators, and regulators have been slow to respond. One of the greatest fears of the proponents of the internet and other forms of digital communication is government control that they fear would inhibit the freedom that has been the basis of the tremendous growth and flexibility that has characterized the medium thus far. Governments, realizing that too much regulation would destroy the very nature and value of the internet, have also been reluctant to introduce regulation and control too quickly. But that is gradually changing.

Laws are outdated and regulation is lacking with respect to the internet

Regulations can compromise freedom of expression

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Jurisdiction

A major problem is to determine what laws apply to internet and internet transactions

An important feature of the internet is that it is not restricted to one country or state. It does not recognize borders, which gives rise to some serious problems for internet users. For example, what is legal in a jurisdiction such as Nevada, where gambling and sexually explicit forms of entertainment are common, might well be prohibited in another state or province, and yet material on the internet is generally available to everyone. Valid laws may apply, but from which province or state—where the product originates or where it is used? Similar problems have arisen with gambling as well as with obscene, racist, subversive, and seditious material. The difficulty posed by trying to make every advertisement or service conform to the local laws of each nation, state, or province is overwhelming and would completely destroy the freedom of internet communication.

Another major problem is determining where an action should be brought

Another difficulty is that it is often not clear who to sue, or where to bring the legal action. One advantage of the internet is that a company or individual can work anywhere in the world, and the place of origin of the material will not be apparent to the users. Kazaa, for example, was a popular music-downloading service on the internet. The program was developed for a company in the Netherlands, which then sold it to another company operating from a small Pacific island, whose executives and principals work out of Australia. Which jurisdiction is appropriate for an action to be brought against them? Could they sue in Canada, Europe, or the United States, where the data was downloaded? Could they bring an action in the Netherlands or Australia, or are they limited to suing in that small island nation where the laws likely neglect to mention such offences? Online gambling leads to a similar result. U.S. law[1] prohibits taking bets over a network, such as the internet, and this has led several significant internet gambling businesses to set up offshore, particularly in Caribbean countries, which encourage this activity. It is impossible for U.S. authorities to intercept these gambling operations, which have created a billion-dollar industry with most of its customers in the United States. Some regulatory steps have been taken to overcome these difficulties, but each has the potential effect of limiting freedom of expression, movement, or association—rights the courts are bound to protect. Without a satisfactory means of regulating the internet, people are becoming more and more subject to computer crimes. A 2010 Gallup survey found that 11 percent of adults in the United States reported that they were the target of computer vandals and that the average loss was just under $1000.[2]

Finding and identifying the perpetrators of computer fraud presents the first challenge. Prosecuting in the appropriate jurisdiction makes the task even more difficult and costly. This reality encourages fraudsters and should prompt internet users to be very careful with whom they deal or to whom they provide personal information.

A huge online retail business has developed as well. This has caused a considerable problem for local jurisdictions with respect to taxation. A store physically located in a province or state is required to collect sales tax from its customers, but that is easily avoided where the purchase is made over the internet. Laws have been passed in some areas requiring online retail businesses to pay local sales taxes or to levy taxes on the internet service provider, but enforcement is a continuing challenge.

The general rule is that a particular location can exercise jurisdiction if the person being sued is resident in that jurisdiction or if that is where the complained-of action

[1] *Federal Interstate Wire Act*, 18 U.S.C. § 1084.
[2] http://www.crime-research.org/news/05.01.2011/3855/.

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took place. The problem is that most offensive content does not target a particular victim in a particular state, but is directed at anyone with a computer. Many jurisdictions have passed **long-arm statutes**, allowing them to take jurisdiction even when no resident is directly involved, with the result that business people providing an internet service from one area where the activity is completely legal will find themselves being sued or prosecuted in jurisdictions they were not aware of, and where they had no idea they were breaking the local law. A better approach is to allow a judicial action only where there is a close connection between the jurisdiction and the act complained of. Thus, if an internet site offers pornographic materials or gambling services, and an internet user in a particular state or province subscribes or places a bet, that would be enough connection to establish the jurisdiction and an action could be brought there. But even this goes too far for many.

Businesses providing services over the internet may be subject to different laws in many jurisdictions

Case Summary 10.1 *Dow Jones v. Gutnick*[3]

What Court Had Jurisdiction for Internet Defamation?

Gutnick (Plaintiff/Respondent), Dow Jones (Defendant/Appellant) in this appeal before the High Court of Australia.

In this case an article by an American company published on the internet defamed an Australian resident. The issue was whether Australia was an appropriate jurisdiction to bring a defamation action. The Australian court found that the harm done was in Australia, thus creating a sufficient connection between the defamation and that country for the case to be heard in an Australian court. The American company, Dow Jones, pointed out that this would require them to know and comply with the laws of every country, "from Afghanistan to Zimbabwe."

In a similar case brought in Ontario[4] an article published on the website of the *Washington Post* stated that the United Nations, after several investigations, failed to renew Bangoura's contract because of "misconduct and mismanagement." In fact Bangoura was not an Ontario resident at the time of the conduct complained of, but only moved there later and initiated the action in that province. The *Washington Post* brought an application to have the action dismissed, claiming that the most convenient jurisdiction was the District of Columbia. Note that the libel laws in the United States are much friendlier to media than in Canada, and require proof of actual malice when public figures are defamed.

At the trial court level the judge dismissed the application, but on appeal the Ontario court held that since the plaintiff did not reside in the province at the time of the alleged liable, and there was little other connection between Ontario and the libel action (there were only eight subscribers to the *Washington Post* in the province at the time), the application of the *Washington Post* to stay the Ontario action was granted. In the Australian case the plaintiff lived in Australia and the harm done was in that country. In the Canadian case there was little connection to that province and the courts refused to hear the matter. These cases illustrate the general approach used when determining whether a court has jurisdiction to hear a case or not.

Canadian courts are willing to find jurisdiction where there is a real and substantial connection between the conduct complained of and the province. But even then jurisdiction will be declined if the court can be convinced that it would be more reasonable for some other jurisdiction to deal with the matter. This is especially true where an action has already been started in that other jurisdiction. It is evident that there is a great potential

Canada requires a real and close connection for action to be brought

[3] [2002] H.C.A. 56 (Aust.).
[4] *Bangoura v. Washington Post*, 2005 CanLII 32906 (ON C.A.) (2005), 258 D.L.R. (4th) 341; (2005), 202 O.A.C. 76.

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Passive internet messages are more likely to be exempt from action

for people doing business online to find themselves embroiled in disputes in various jurisdictions all over the world. Only if the business can demonstrate that the internet message was passive (in the sense that there was no interaction in that jurisdiction, that no bets were taken, and that no orders or subscriptions were sent) will there be little likelihood that an action could be brought against that business in the courts of that state or province. But it is often difficult to selectively do business in that way. It may help to state within the contract for the service or goods that the law of a particular jurisdiction, such as Ontario or British Columbia, will govern the transaction. It could also be stated in the website or internet pop-up advertisement that the offer is not extended to specific provinces or states where the activity is prohibited. But even these steps are no guarantee that such a business will not find itself sued or prosecuted in another jurisdiction.

Internet offer or service should state limitations of availability

For example, the Ontario *Consumer Protection Act*[5] specifically provides that the rights set out in it apply to all consumer transactions where the consumer or the other party is located in that province at the time of the transaction[6] and that the rights set out in the *Act* apply despite any agreement to the contrary.[7] The *Act* even has a provision stating that any clause requiring arbitration in a consumer contract is invalid where it attempts to limit the consumer's right to bring an action in the Ontario Superior Court.[8]

Of course, when a foreign judgment is obtained against a Canadian business or individual, they might expect it to be difficult to enforce in this country and ignore the threat. But that protection is often an illusion. If the business has assets in the foreign jurisdiction or if there are treaties in place to allow for enforcement here, as is usually the case, it is quite likely that the foreign judgment will be enforced against them. It can be very dangerous to ignore such actions, even when commenced in some remote province or state. The reverse is also true; it may be difficult to enforce a Canadian judgment abroad, but there are important treaties in place that do allow for such enforcement. In general the courts are much more willing to enforce judgments for money that can be enforced against the assets of an individual or business. The courts are more reluctant to enforce non-monetary judgments against individuals, although there is a growing trend to enforce injunctions. Where criminal matters are involved and there is an extradition treaty in place, Canadian courts will order the surrender of the accused to the foreign jurisdiction, although for less serious matters this is usually more trouble than it is worth.

Dangerous to ignore foreign actions since judgments can be enforced in other jurisdictions

Business Transactions over the Internet

Many businesses did not appreciate the potential significance of the internet and failed to take the steps necessary to protect these valuable assets by registering their business and brand names. When they eventually tried to do so, they often discovered someone else had appropriated their name or phrase by registering it first. It is not surprising, therefore, that conflicts have arisen over **domain names.**

Initially, business often failed to register domain names

Such conflicts may arise legitimately because of the global nature of the internet, where two similar businesses in different locations try to register the same name, or two dissimilar businesses have similar names. Registering a trademark or a copyright, even

Each domain name is a unique address, giving rise to considerable conflict

[5] S.O. 2002, c. 30, Sch. A.
[6] Ibid., s. 2.
[7] Ibid., s. 7.1.
[8] Ibid., s. 7.2.

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when done in more than one jurisdiction, will not normally be sufficient to give that registrant a sure claim to a corresponding domain name. The problem is that each domain address is unique and not limited to the geographical location where the business is active or to one type of business as opposed to another. Only one of them can have that domain name. Conflicts also arise when less well-intentioned individuals register the names first and then, in effect, hold the names for ransom. This is called **cybersquatting,** and even when there are methods for dealing with such practices, it is often cheaper for a business to simply purchase the address, name, or phrase from the cybersquatter who has managed to register it first. Sometimes similar names are registered so that visitors making slight but expected mistakes are intercepted and redirected to a competing business.

Cybersquatters capture domain names that rightfully should go to others

Arbitration and litigation is possible, but it is often cheaper just to buy the name

Case Summary 10.2 *Black v. Molson Canada*[9]

Who Owns This Domain Name?

Black (Applicant), Molson Canada (Respondent) in this trial before the Ontario Superior Court of Justice.

The issue before the court was who was entitled to the domain name "canadian.biz." Mr. Black, a resident of Ontario, went through an auction process and obtained and registered the internet domain name "canadian.biz." Molson's, a producer of beer in Ontario and elsewhere in Canada, produced a product called "Canadian" and they took the position that Black's registration of the domain name "canadian.biz" infringed their trademark and demanded that the registration be transferred to them. Black refused. Molson brought an application to the National Arbitration Forum (NAF), the body authorized to hear disputes in such matters and they decided in favour of Molson's, ordering Black to transfer the domain-name registration to Molson Canada. Black again refused and brought this action to the Ontario court to overturn the decision.

The problem is that the term "Canadian" is generic and can refer to many different businesses and situations. To decide in Molson's favour the NAF had to find that not only was the name used identical to their trademark but also that Black had no legitimate use or intended use for the name and that it had been registered or used in bad faith. As far as legitimate interest, Black had intended to start an internet business using the name but was reluctant to do so until these proceedings were concluded. The judge found that Black did have a *bona fide* business purpose in mind when he registered the name and that Molson's had failed to establish bad faith, and so Black was entitled to the domain name "canadian.biz."

Arbitration processes have been established to deal with disputes over the entitlement to domain names, reducing the problem to a significant extent. The bodies responsible for the registration of domain names, for example the Canadian Internet Registration Authority (CIRA), have established a policy for the arbitration of bad-faith domain-name registration disputes, which gives preference to the businesses with the more legitimate claim. In Canada, for *.ca* designation domain names, bodies such as the British Columbia International Commercial Arbitration Centre (BCICAC) and Resolution Canada Inc. have been authorized to provide arbitration services in such disputes. The largest organization providing domain-name dispute arbitration services is the World Intellectual Property Organization (WIPO). Disputes involving legitimate conflicting interests can often be handled through traditional trademark or passing-off litigation. As with most disputes it is much better to take steps to avoid the problem in the first place.

It is important to take steps to avoid name infringement problems

[9] 2002 CanLII 49493 (ON S.C.) (2002), 60 O.R. (3d) 457.

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Case Summary 10.3 *Bell ExpressVu Limited Partnership v. Tedmonds & Co.*[10]

Trademark Infringement or Freedom of Expression?

Bell (Plaintiff), Tedmonds (Defendant) in this application for summary judgment before the Ontario Superior Court of Justice.

Bell, the operator of a properly licensed satellite TV service under the registered trademark of "ExpressVu," brought this action for trademark infringement against the defendant company, which operated a rival but unlicensed satellite TV service when they registered an internet website using the domain name of "expressvu.org." The opening page made it clear that this website was not associated with Bell, but was set up to criticize Bell's service. Bell sued for trademark infringement, but the judge considered this a non-commercial use, which was protected by the freedom of expression provisions of the *Charter*, and so he refused to grant an injunction. This was only an application for summary judgment, but it does illustrate how proprietary rights might conflict with freedom of expression.

Compare this to *Itravel2000.com Inc. (c.o.b. Itravel) v. Fagan,*[11] where a travel company had been using the name "ITravel" for several years before they tried to register it as a domain name. They discovered that another company had registered the name a month earlier, and then offered to sell it to the travel company for $75 000. There was no internet name registration dispute mechanism in place at that time, and so this action was brought. The plaintiff applied to stop the second company from using or selling the name, claiming it was a trademark violation. Neither company had registered the name as a trademark, but it was clear that the travel company had been using the name under various circumstances in Ontario for years. The defendant had not used the name and had no connection to the travel industry, and so an injunction was granted. The difference in the two cases is that in the second the registration of the name was simply being used as a method of extracting funds from someone who had a superior claim.

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Torts

Internet defamation is a particular problem because of ease of widespread distribution

The most common type of tort on the internet is defamation, but the approach will likely be the same where passing-off, fraud, or other forms of tort are involved. Widespread distribution and uncertain jurisdiction are the factors that make internet cases unique. As with written communications, online defamation can take many different forms, ranging from a remark made in a private email message, to chat room conversations, to postings on social network sites and blogs, or to an article posted on a business' website that says disparaging things about a competitor. Even newspapers and magazines run into problems when they place their material on the internet.

Case Summary 10.4 *Henderson v. Pearlman*[12]

Is Defamation on the Internet Actionable?

Les Henderson (Plaintiff), Louis Pearlman and 14 others (Defendants) in this action in the Ontario Superior Court of Justice. (Note that the action was withdrawn against all but eight defendants.)

The plaintiff is an expert on fraud on the internet and operated a fraud awareness site as well as authoring several books and articles on the subject and being an advisor to many police and other concerned government and private bodies.

The eight defendants were various players in the talent and modelling business who were the subject of negative comments on the plaintiff's website and bulletin

[10] [2001] O.J. No. 1558 (Ont. S.C.J.).
[11] [2001] O.J. No. 943 (Ont. S.C.J.).
[12] CanLII 43641, [2009] O.J. No. 3444 (ONT. S.C.).

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boards. They in turn set out various accusations on their own websites with each linking to the others' websites. The undisputed contents, among other things, accused the plaintiff of being a criminal wanted by the FBI, having a criminal record, being an extortionist, contributing to the delinquency of a minor, and further alleged that his books were plagiarized and that his website was a sham used to lure victims. He produced screenshots of the various offending websites as evidence. Most of the defendants didn't defend the action and those that did didn't deny the allegations and only challenged the Ontario court's jurisdiction and tried to have the action moved to Florida.

This action was brought to seek summary judgment against the eight defendants and for an injunction to have the material removed. The judge decided that the test to be applied for the injunction, because no one was defending, should be the stricter test usually applied to an interlocutory injunction. This test requires that the words must be clearly defamatory and that there was no possibility that a jury could find justification (that the words were true). The judge found that, "The statements are clearly capable of being defamatory. And in these circumstances, as untrue, baseless attacks on the character and integrity of the plaintiff, they are clearly defamatory in fact." The judge awarded $10 000 in damages against six of the defendants. He also ordered a permanent injunction prohibiting the defendants from continuing to post these comments.

Note that the issuing of an injunction in a defamation case is a rare event, but in this case because of the conduct of the parties, because they refused to defend and because the offending postings continued even up to the day of trial an injunction was an appropriate remedy. Note that a recent Supreme Court of Canada decision[13] has established that merely posting a link to a website containing defamatory material would not constitute publication and so not amount to defamation by itself but that adding any indication of approval of those defamatory comments would make the link and comments defamatory.

There are dangers for businesses that are not careful about their internet and email communications. Note that not only will the person making the defamatory statement be liable, but the business that employs him or her may be liable as well, especially if company email services or websites are used to publish the offending statements. When a business provides access to their website for chat rooms or for discussion forums, there is also the danger it too could be held responsible for any defamatory or otherwise offensive statements that are made. It is unlikely that the actual ISP (the internet service provider) will be liable, unless it fails to remove or block the offending messages once required to do so by a court. A major area of controversy, however, is the requirement that the ISP will likely be obligated to disclose the identity of those users that are accused of defamation or other internet offences. Note that one of the proposals in Bill C-11 would insulate ISP providers from such liability, but require them to disclose user identities. It is likely that those businesses or individuals providing access to the internet will also be responsible where criminal law or other government regulations are infringed, depending on the degree of control they had or should have exercised over the offending communications.

Note that the danger of liability extends to the employer or business providing bulletin board or chat room services

Case Summary 10.5 *Mosher v. Coast Publishing Ltd.*[14]

Must Service Providers Disclose Users' Identities?

Mosher and Thurber (Plaintiffs), Coast Publishing Ltd. and Google Inc. (Defendants) in this application before the Supreme Court of Nova Scotia.

An article was published in a Halifax weekly newspaper *The Coast* about racism in the fire department. *The Coast* also provided a website where comments could be

[13] *Crookes v. Newton*, 2011 SCC 47 (CanLII).
[14] 2010 NSSC 153 (CanLII), [2010] N.S.J. No. 211. (N.S.S.C.).

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made and several anonymous, offensive, and likely defamatory comments were posted on that website in response to the article. Similar comments were published anonymously through a Google Gmail account. This action is brought by the fire chief and deputy fire chief, who were the subjects of the offensive comments, asking for an order that *The Coast* and Google be ordered to disclose the identity of these individuals so that an action for defamation could be brought against them. The order was granted. The judge commented.

> Because the court does not condone the conduct of anonymous internet users who make defamatory comments and they like other people have to be accountable for their actions. So, this is an appropriate circumstance where your clients should have the right to seek the identity of those persons so you can take the appropriate action with respect to the alleged defamatory acts.

Although debate continues, the case illustrates not only how defamation on the internet is actionable, but also the fact that some courts are willing to assist the injured party by ordering ISPs and those operating bulletin boards and websites to disclose the identity of individuals who use their services for inappropriate purposes. It is interesting that neither of these defendants opposed the application, and in fact Google cooperated in the wording of the application. It is also interesting to note how difficult it is to actually maintain your anonymity on the internet. This action resulted in the identification of the offending parties making it possible to sue them.

Online Contracts

Good idea to keep written copies of transactions

Traditional contract rules apply to internet transactions

Whether a company is involved in direct retailing of products, software, or services to consumers over the internet or is simply contracting with other companies through email or a website, they are transacting business and creating new legal relationships. The common thread with respect to all of these internet transactions is that their legal status is determined by contract law.

Written evidence of a contract, while not generally required, is a sensible thing to have. It is a permanent record that can be referred to later and constitutes evidence if any disagreement arises. In some cases, under the *Statute of Frauds* or equivalent legislation, such writing and signatures are required for the transaction to be legally enforceable. But when transacting business electronically, there are no signatures or written documents. It is true that written copies can be produced, but they are unreliable due to the ease with which they can be altered.

Provinces are adopting federal *Uniform Electronic Commerce Act* guidelines

Statutes recognize electronic equivalent of written documents and signatures

Consensus Under the auspices of the federal government, a working group following international recommendations produced the *Uniform Electronic Commerce Act* (*UECA*).[15] This document has no legal standing, but it serves as a model for the design of provincial legislation so that similar statutes will be in place throughout Canada. Every province has enacted such a statute, although they vary considerably between jurisdictions.[16] The object is to make electronic documents and signatures as binding on the parties as are written ones. In general, the *UECA* and provincial acts do not change the law with respect to the requirement of written documents and signatures. Rather, they recognize electronic or digitally stored documents and signatures, or their equivalent, as satisfying those requirements. A signature equivalent might be a password or some other form of encryption, which is controlled by the author of the document (and possibly verified by a trusted third party). The password or encryption would authenticate the document and give it the same status as one that was written and signed. Note that this doesn't apply in all cases and some types of documents, such as wills, still have to be in writing and signed

[15] http://www.chlc.ca/en/us.
[16] http://mccarthy.ca/pubs/ht-netlaw_2002_binding_contracts/sld022.htm.

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to be valid. Note, as well, that there are important variations between provinces and that some provinces now allow many forms of government documentation, including court registry filings and land registry transactions, to take place electronically. Many jurisdictions also allow the use of electronic documents relating to proxies, prospectuses, and other documentation related to the purchase and sale of securities.

Another problem that arises with respect to the formation of contracts is to determine when and where the contract was created. This can determine whether an offer was accepted within time, what law applies to the transaction, and whether a particular court has jurisdiction to hear a dispute. It might also determine whether the individuals involved were minors or adults at the time; whether transactions involving such things as pyramid selling schemes, gambling, or pornography are legal; and what consumer protection statutes apply to the transaction; all of which vary with the jurisdiction. A business will often state that the law of a particular jurisdiction will apply to the transaction, and, while this is helpful, it does not always end the dispute.

The parties can declare in the contract which jurisdiction's law will apply

In online commercial transactions the concerns over consensus are normally addressed by the understanding that hitting an "I accept" button on a website is the equivalent of removing the shrink-wrap on a package or downloading software. It entitles the purchaser to limited use of the product. The seller is the person making the offer. The "I accept" button indicates to the seller that the buyer has read and agreed to the terms of the contract. It achieves the consensus element of a binding contract. The seller then confirms that the order has been received. It is now generally accepted that where such instantaneous methods of communication are involved, the post-box rule should not apply. Thus, an offer will be accepted and a contract formed only when and where the offeror learns of the acceptance. This is consistent with the recommendations of the *UECA* with respect to contracts formed over the internet discussed above. Also, although internet communication involves intermediaries located in other jurisdictions, the *UECA* recommendations make the location of these intermediaries irrelevant in determining the validity of the contract and the legal obligations between the parties. Whether a contract or another form of internet communication, these provisions determine that a message is sent as soon as it is committed to the system (hitting send), and it is received as soon as it arrives on the recipient's computer, even if it is never read. As you will recall, an offer ends when a revocation is received and, where implemented, these *UECA* recommendations determine when that takes place and can have a direct impact on that pre-contract negotiation process.

Clicking a button will bind party to terms

Post-box rule will not apply to internet transactions

In an Ontario case, *Kanitz v. Rogers Cable*,[17] the court was asked to determine whether unilateral changes to the terms of a contract were valid when they were merely posted on the offeror's website. It was decided that as long as that possibility was stipulated on the website, it was sufficient notification that the terms of the contract were being altered. It is important that both sellers and purchasers be aware of such a condition in the electronic contract. As with contracts generally, when exemption clauses are included, these must be brought to the attention of the person accepting. This is effectively done in most cases by forcing the consumer to indicate they have read and accepted all of the terms before they can click the acceptance button completing the contract. Of course, local legislation will protect consumers where standard-form contracts include disadvantageous terms, but the problem remains to determine the law of what jurisdiction will apply to the transaction. Typically, the agreement will also include a term stating the law of what jurisdiction will apply and where any action or arbitration must be brought.

It is difficult to be sure with whom you are dealing over the internet

[17] 2002 CanLII 49415 (ON S.C.).

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Capacity It is difficult to determine in an online transaction whether the parties actually have the capacity to enter into a contract. A person's age, mental capacity, or even whether a business has or has not been incorporated are difficult to verify online. Parties should take care to find out as much as they can about the company or individual, relying on more than the webpage to gain that information. The question of authenticating someone's identity may also present a challenge, as trust is a diminishing quantity in the online environment. **Electronic signatures** are most effective in identifying people if used in conjunction with trusted third parties who provide a digital certificate that authenticates the identity of a party to the contract. The federal government has provided guidelines for the development, implementation, and use of authentication products and services in Canada.[18]

Illegal activities are rampant on the internet

Legality The legality of the activity that is at the heart of the contract is also a concern and it is important to note that illegal activity is rife on the internet. The potential to remain anonymous and avoid regulation and policing of one's activities have provided an opportunity for every sort of criminal activity in the real world to move into the virtual world. For example, internet gambling is a $16 billion industry, with Americans accounting for half of that amount according to the *Washington Post*.[19] Other investigators conclude that financial incentives and consumer demand for this kind of activity makes legal prohibitions ineffective. The United States has attempted to make online gambling illegal but has only succeeded in moving the operations offshore, ensuring that the "business activity, employment, and tax benefits will accrue overseas. Further, the more that established and legitimate companies are threatened for engaging in any activity connected with internet gambling, the more opportunity it provides for marginal and perhaps unethical companies to enter the field and reap tremendous profits."[20]

While the sales of goods acts and consumer protection legislation theoretically apply to online transactions, it is extremely important that buyers be careful, as fraudulent scams are commonplace in this medium. The law cannot keep up with the creative schemes of people who take advantage of the opportunities to disguise their intentions in online communications. One means of avoiding the rules in a given jurisdiction is to simply move the illegal operation outside of the countries where the activity is deemed illegal, thus avoiding liability when dealing with clients. Victims of such scams usually find it extremely difficult to seek redress when the perpetrator is in another country or on another continent.

Online payment difficult to secure

Payment Online Even when the goods are being legitimately bought and sold, payment for products purchased also becomes a problem. Many services have been created, such as PayPal, to insure that the customer gets what he has paid for or to provide a remedy if a dispute arises. The problem is that, while these methods seem foolproof, there is a constant cohort of scam artists developing ways to overcome them and separate people from their money.

[18] Industry Canada, *Principles for Electronic Authentication*, May 2004, http://www.ic.gc.ca/epic/site/ecic-ceac.nsf/en/h_gv00240e.html.
[19] Dan Eggen, "Internet Gambling Again in Play," (7 February 2010) *The Washington Post*.
[20] David Giacopassi and Wayne J. Pitts, "Internet Gambling: The Birth of a Victimless Crime?" in *Crimes of the Internet*, ed. Frank Schmalleger and Michael Pittaro (Pearson, Upper Saddle River, New Jersey, 2009), p. 430.

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Having a third party hold the funds is an effective way for significant transactions between large businesses to be conducted. Usually a bank or other financial institution is chosen to hold the funds and to advance them to the manufacturer or other contracting party only upon them satisfying some aspect of the contract and upon receiving a release from the payer. Even before the advent of ecommerce this was accomplished by issuing a bill of exchange or a draft drawn on a bank (usually chosen by the payee) so they could be assured the funds were available before delivering the product.

Legality varies with jurisdiction

Close connection and other factors determine jurisdiction

Jurisdiction Determining where the contract was formed is an important factor in determining the laws that will apply to the transaction and whether a dispute can be brought in a local court. As mentioned above, the legality of such things as contracts with minors, pyramid sales, pornography, and gambling can vary with the jurisdiction. In determining jurisdiction a court will normally ask whether the matter is closely linked to the place in which the plaintiff wants to sue. Because a website is universally accessible, to convince the court that it has jurisdiction the plaintiff must establish that the defendant was targeting the location in which he resides.

From the point of view of the business offering the service there is the danger of conflicting with the law of a jurisdiction that prohibits such transactions. It is important to remember and stipulate where necessary which jurisdiction's laws will apply to an online transaction, although this is not always effective (see the provisions of Ontario *Consumer Protection Act* noted above). Even with legitimate transactions it may be difficult to enforce the terms of a contract if something goes wrong. If an item is purchased from a company in Texas, it is important to note whether the company will only deal with the Texas courts if there is a dispute. In some cases a company in one jurisdiction will use a website server in another and stipulate that that jurisdiction's rules will apply. It may be that the reason for this is to avoid regulations altogether and there may be no recourse if the contract is challenged. It may not be possible to appeal to the courts in the jurisdiction in which you reside because the courts may determine that the matter is not closely enough connected to their jurisdiction for them to handle it or that the parties have specifically elected that any disputes will be handled by the courts of a different jurisdiction.

Parties should declare what law applies and what court has jurisdiction

Case Summary 10.6 *Disney Enterprises Inc. v. Click Enterprises Inc.*[21]

Can Canadian Court Enforce U.S. Judgment?

Disney Enterprises (Applicant), Click Enterprises and Phillip Evans (Respondents) in this application to enforce a New York court judgment brought in the Ontario Superior Court of Justice.

Phillip Evans, through Click Enterprises, operated a software and internet business in Ontario to facilitate the illegal copying and downloading of movies. Disney Enterprises Ltd., a movie producer, brought an action against Click in New York State. After being personally served, Evans and Click did not defend the action and in a default judgment were found to be acting illegally and ordered to pay damages of US$468 442.17. It is this judgment that the Ontario court is being asked to enforce against Click and Evans personally. As a matter of policy the Ontario court will enforce a New York judgment if that court had the jurisdiction to hear the matter in the first place. That question of jurisdiction is determined on the basis of whether there was a real and substantial connection between the conduct complained of and the state. In this case the services were provided to residents in New York State and

[21] 2006 CanLII 10213 (ON S.C.) (2006), 267 D.L.R. (4th) 291.

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payments were made to the defendants. In this case Click's involvement in the United States was not passive, but consisted of tendering their products and selling directly to residents in that state, making a profit and being paid for their services in the United States. This created sufficient connection with that state and the Ontario court ordered the enforcement of the New York judgment. The growth of international commerce and especially the internet, and the flow of wealth and services across borders require modification of the law of jurisdiction.

To avoid these problems, contracting parties should include product warranties or disclaimers on their websites such as "only available in Canada" or "Alberta laws and regulations will apply." Stating that the service or product is only available in a specific jurisdiction such as Canada or the United States, or stating that it is only available in those jurisdictions where it is legal, will go some way to protect the provider from prosecution.

Alternate Dispute Resolution

When large amounts of money are involved it is important for the Canadian seller or purchaser to know how a dispute will be resolved and if an arbitrator has been selected to deal with the matter. In fact, seeking an arbitrated settlement either online or through a professional arbitration service may be the best way to seek a resolution, since the courts must first deal with the jurisdiction question and will be reluctant to pursue cases outside of their own jurisdiction. Provisions to provide for such arbitration ought to be included in not only consumer transactions but also transactions between businesses of any size. Note, however, that there may well be consumer protection legislation in place making any term that provides for mandatory arbitration rather than recourse to the courts invalid. (See the Ontario *Consumer Protection Act* discussed above.)

Many organizations facilitate arbitration of disputes

Online dispute resolution services are now available for electronic transactions. These services are considerably less costly and less time consuming than traditional court processes. The National Arbitration Forum (NAF) has been very effective in handling internet domain-name disputes. Other provincially based arbitration companies in British Columbia, Ontario, and other provinces may also extend their services to ecommerce disputes. Negotiation and mediation services such as Cybersettle.com also offer their services. Arbitration has proved to be a valuable tool for ecommerce disputes but arbitration can also have its downside, as illustrated by the Dell case discussed on page XXX.

Problems can be avoided by including arbitration clause

It has always been hoped that users of the internet would self-regulate, but that seems to be unlikely. It will be left to national governments enforcing international treaties and even international organizations to regulate on a global scale.

Regulating the Internet

Governments have been alert to the development of online business, and while there is considerable reluctance to introduce legislation and regulations in an attempt to control illegal activity that would require enormous effort and expense to enforce, they are somewhat more anxious to regulate the collection of taxes. This entails its own difficulties since Canadian goods can be sold from other countries. It is yet another challenge to discover and tax goods and services that can be downloaded on private computers. Some companies seek to avoid the imposition of taxes on their products by selling their

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products from other jurisdictions. Attempts to insure that tax laws are properly enforced have had mixed results. One angle where control has been attempted is by holding the ISPs responsible to control illegal online activity, but this also has had limited success. In a federal Court of Appeal case the court refused to order ISPs to disclose identity of customers.[22]

The Canadian government was successful in forcing the Canadian components of eBay to disclose their financial records on certain "power sellers" to Revenue Canada, even though records of such transactions are kept at their San Jose, California, facilities. This was done to ensure that these parties paid the required income tax on their successful business activities.[23] One significant problem that arises is the threat to our privacy. If the Canadian government or any arm of it can force these businesses to disclose such information, there is nothing to protect this and other information from similar access by government and government institutions, whether our own or foreign.

Legislative attempts to limit Internet abuses

It took Parliament until December 2010 to pass into law Bill C-28, Canada's anti-spam legislation. Bill C-27, the prior incarnation of this legislation, which did not make it into law, was entitled the *Electronic Commerce Protection Act*, which seems to better catch the nature of the legislation. Bill C-28 has no short title. The intent of the *Act* is to prohibit unsolicited commercial email, prohibit false and misleading representations, prohibit the collection of personal information, impose liability for abuses, and control other abusive practices such as identity theft, phishing, and spyware. The CRTC, the Privacy Commissioner and the Competition Bureau have been given additional powers under the *Act* to investigate, regulate, and provide remedies. It is clear that the *Act* goes further than the simple control of "spam," but it remains to be seen just how effective this type of regulation will be. Note as well that the Canadian Bar Association has argued that the *Act* goes too far interfering with the *Charter* protection of free speech.

Also Bill C-11 will likely soon be passed into law. This is an amendment to the *Copyright Act*, intended to control downloading of music, games, movies, and other forms of information and data communicated over the internet. This bill was discussed in some detail in Chapter 9.

INTERNATIONAL BUSINESS TRANSACTIONS

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No international court to litigate private matters

Because of the borderless nature of the internet, much of what has been covered in the first part of this chapter applies to the international aspects of business law as well. What follows are issues and information relating specifically to doing business in other jurisdictions. At the outset it should be noted that there is no international court that deals with private disputes between businesses doing business between jurisdictions. Rather, the parties must look to local courts in either jurisdiction to resolve their problems. In fact there are international dispute resolution mechanisms, such as the International Court of Justice, the World Trade Organization (WTO), and guidelines such as the General Agreement on Tariffs and Trade (GATT), but they only deal with disputes between sovereign nations applying public international law. An important recent development has been the implementation of the panel system of the World Trade Organization, which sometimes enables governments to appeal adverse decisions of foreign domestic tribunals, thus

[22] *BMG Canada Inc. v. Doe*, [2005] 4 C.F. 81; (2005), 252 D.L.R. (4th) 342 (FCA).
[23] *eBay Canada Ltd. v. Canada (National Revenue)*, 2008 FCA 348 (CanLII).

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sidestepping national courts. But they do not deal with private matters between individuals or businesses. In most cases it is best for the parties to include a provision in their agreement to have any disputes between them arbitrated, usually by using one of the many international arbitration services available for that purpose.

Import and export of goods most common

In addition to internet activities, Canadian businesses can become involved in business in another country in many different ways. Perhaps the most common involves the import and export of products, but Canadian businesses can also be involved in dealings with intellectual property including copyrights, patents, and trademarks. This usually involves licensing agreements of intellectual property, particularly patented processes and inventions, and the use of copyrighted or trademarked material. Disputes often arise where such intellectual property interests are not recognized and patents or copyrighted material is wrongfully reproduced without respect for the rights of their creator. This can involve direct copying, but also can include the practice of selling **grey market** materials, which involves importing materials from another jurisdiction in violation of a local distributor's exclusive right to distribute the product. Brand-name electronic goods, watches, and fashion accessories brought in from another jurisdiction where they sell for less are examples. Often the laws in place in that foreign jurisdiction are different from ours and they either don't recognize our intellectual property interests or don't provide adequate enforcement measures.

Protection of intellectual property serious problem

In addition to the selling and licensing of physical and intellectual products in other countries, Canadian businesses will often become involved in providing or acquiring services from other jurisdictions. This may involve call centres for banking, credit card, telephone, and other services, but may also include warehouse distribution centres, which are increasingly being located offshore. They will also become involved in activities in those other countries such as mining and resource exploration development and management. This can involve joint ventures with a business in that foreign country or setting up branch plants, local offices, or distribution facilities. Whatever forms the international business activities take, there are some common legal considerations that must be kept in mind. Properly drawn contracts, controlling as many variables as possible that might arise when dealings between jurisdictions are involved, are a vital aspect of doing business abroad. Secondly, the parties must carefully comply with government regulations both in Canada and in the foreign jurisdiction. Keeping careful records, being aware of a changing political climate, and vigilance with respect to export permits and tariff requirements are a few examples. And finally, all possible steps must be taken to ensure that when disputes do arise they are resolved favourably with as little time delay as possible and with minimal expense. This will include ensuring that terms are included in the agreement that limit liability, provide for insurance, require arbitration of disputes, and are consistent with international trade agreements and arbitration standards and rules.

Contract governs all international transactions

Governments will often become involved when the project is big enough, entering into BITs (bilateral investment treaties) and FIPA's (foreign investment and promotion agreements) designed to stabilize the investment environment for corporations doing business abroad, especially for those involved in mining and natural resources extraction in countries where the political climate is unstable. Insurance is also available from the Export Development Bank and various private companies that insure against political risks such as expropriation, government contracts that are breached, and political violence. Although expensive, such insurance may be especially attractive for smaller companies doing business abroad in unstable countries.

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Contracts

Before even contemplating the terms of a contract, the importance of knowing who you are dealing with can't be overemphasized. No amount of precision in the language in a contract can replace careful research into the reliability and reputation of the people you are dealing with, whether in Canada or in a different jurisdiction. Disputes can still arise, but at least you can be somewhat assured that you are dealing with honourable and reputable people.

Important to declare what law applies

Just as with any business contract, the parties must be careful to set out all the obligations and expectations of both parties. Any assumptions that these obligations are based on should be set out as well, eliminating all ambiguous language. At the outset it must be emphasized that any contract to be applied in a foreign jurisdiction must take into consideration the specialized rules or practices in that jurisdiction. For example, when dealing with a civil law jurisdiction or even some other common law jurisdictions, and especially when dealing with less sophisticated countries, the very terminology used may have different meanings. The only way to safely deal with this kind of problem is to acquire the services of a professional specializing in the law of that jurisdiction.

Contract should include dispute settlement mechanism

It is particularly important to include provisions in the contract setting out what will happen if things go wrong. A dispute mechanism other than the courts is usually vital and can avoid much hardship, as can clauses setting out the law of what jurisdiction is to govern the transaction and be applied in the event of a dispute. Note that the declared law does not have to be the local law of either party but may be that of some third jurisdiction, usually chosen because it better deals with the types of transactions involved. Using the phrase "the agreement will be interpreted under the laws of Ontario," will normally determine what law will govern the transaction, but it will not determine which court will have exclusive jurisdiction. For example, if such a phrase were used in a transaction between parties in Ontario and Arizona, the Arizona court might well be able to hear the dispute, but the rights of the parties should be determined using Ontario law. This would be established by producing a witness who is an expert in Ontario law. In most cases the Arizona judge would respect the choice and apply Ontario law, but that judge would not be bound to do so and could choose to follow Arizona law if the situation required it. A better approach would be to make it clear in the contract that not only would Ontario law apply to the transactions but also that Ontario courts would have exclusive jurisdiction to hear any dispute arising from it. Even then that choice may be overridden by local rules or circumstances. For example, the designated court may determine that they are not the appropriate court to deal with the matter because of where parties live, where the witnesses reside, where the contract was negotiated, or where the alleged breach took place and will acquiesce to the jurisdiction of a different court in another jurisdiction. And there may be legislation in place in that other jurisdiction that simply prevents the ousting of the jurisdiction of the local court. For example, the Ontario *Consumer Protection Act* makes any attempt to limit the jurisdiction of the Ontario court in such transactions "invalid."

And what court has jurisdiction

Important to know who you are dealing with

Expert help needed to draw up agreements

It is important to be aware of the differences between local law and the rules in place in the foreign jurisdiction where you are doing business. For example, it would be a significant mistake to include a restriction limiting the territory where the product could be sold or the price at which it could be sold in that jurisdiction if that were contrary to any anti-competition provisions in place there. Similarly, government requirements may make it impossible to comply with non-disclosure provisions in the agreement.

Know what you can and cannot do in that foreign jurisdiction

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Financial Reporting Another important provision to include in such contracts is a method to account for profits or royalties (depending on the nature of the transaction). This usually includes specifying what records must be kept by that foreign partner or customer and the method of providing access to them for your accounting department or for a specified accounting firm mutually agreed on by the parties.

Foreign Ownership Where the business activity contemplated involves actually setting up a branch operation in that foreign country, incorporation in that jurisdiction is likely. Often these countries have legislation in place restricting foreign ownership of land as well as shares or directorships in such corporations. This will likely require contractual relationships to be established with local residents who will own the land and the majority of shares and function as directors, causing more complication and risk. Of course, operating a branch business in a foreign country subjects the Canadian business to all of the laws in place in that jurisdiction and all must be complied with whether they govern the workforce, prices charged and paid, marketing practices, or environmental restrictions.

Supplementary standard form contracts:

- Bills of lading
- Letters of credit
- Insurance

Specialty Contracts Depending on the nature of the transactions, additional specialized contracts may also be involved. Examples are a bill of lading, to establish the rights and obligations of the parties and the carrier when goods are shipped through a third-party carrier; a letter of credit or other financing instrument, to ensure that the selling party is paid when the purchasing party is satisfied; and insurance, to cover the risks of the transaction. Note also that whenever common documents such as these are involved there are standard-form contracts in place using tested terminology that are generally accepted by all parties and used exclusively. In addition, the governments of both parties often require customs declarations and invoices and other information relating to the transaction.

Dispute Resolution

Because of the great costs of litigation and because of the uncertainty of the outcome there is a growing practice to include an arbitration clause in contracts. The clause would require that all disputes be determined by arbitration and set out how the arbitrator is to be chosen, as well as the powers and procedures to be used. But even these clauses can be overridden where the local rules or circumstances require.

Arbitration clause can avoid litigation

Alternate dispute resolution was discussed in Chapter 1, but it is reviewed here because of its profound value in international transactions. All of its advantages, especially over litigation, apply to international transactions because of the lack of any court of international jurisdiction to deal with private disputes, and because of the uncertainty and risks associated with submitting to a court in a foreign jurisdiction.

Alternate dispute resolution can consist of negotiation, mediation, and arbitration. Negotiation and mediation are, of course, just as valuable in international dealings as in domestic relationships, but it is arbitration that is particularly appropriate when dealing with international disputes. The risks and potential expense and delay associated with the litigation process are amplified significantly when dealing with foreign courts. The idea, of course, is for the parties to include a provision in their contract to submit any dispute arising from the transaction to an arbitrator chosen by them, and also setting out any limits on what that arbitrator can decide and what kind of decisions and remedies can be

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imposed. In effect the parties create a private court designating the judge and the power of the court to resolve disputes arising between them, and local courts will usually honour such contract provisions. The parties then exert some control over the dispute and reduce the uncertainties, costs, and delays associated with the litigation process.

When the parties include an arbitration clause in their contract they can determine who shall arbitrate any disputes between them. This normally makes both parties more satisfied with the outcome, no matter which side it favours. Also, they can specify an arbitrator with particular expertise in the industry or business that the transaction involves, which provides more confidence in a proper outcome. The decision may be made in a more expeditious and efficient manner when the arbitrator already has knowledge of the business or industry, and the formalities involved in a trial are avoided. Alternatively, the contract can specify that the arbitrator be chosen by the body selected to do the arbitrating, for example, the London Court of International Arbitration.

Parties can control who arbitrates and arbitration process

The main advantages of arbitration are reducing risk, respecting mutual obligations and rights, and minimizing costs. Any delays can be kept to a minimum and the dispute can be less confrontational and remain confidential, all of which is valuable where the relationship will continue. There are a number of international bodies mandated to arbitrate private disputes between trading partners in different jurisdictions. The London Court of International Arbitration, the American Arbitration Association, and the International Chamber of Commerce are examples. It should be noted that the United Nations Commission on International Trade Law (UNCITRAL) has provided rules to guide such arbitrations and these bodies have adopted those rules.

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Case Summary 10.7 *Dell Computer Corp. v. Union des consommaterus*[24]

Can Arbitration Clause Prevent Consumers' Action?

Dell computers (Respondent/Appellant), Union des consommaterus (Applicant/Respondent) in this appeal before the Supreme Court of Canada. The issue was whether the parties were restricted to arbitration of the dispute as set out in the contract.

Dell computers had a head office in Toronto and a facility in Montreal. On 4 April 2003, an error was made on their internet ordering site that stated the price of two models of handheld computers to be substantially lower than they should have been. When the error was discovered Dell blocked orders on the site, issued a correction, and announced that they would not process any orders at the lower prices. When Olivier Dumoulin learned of the low price, he found the site blocked and used a "deep link" to get around the block and place an order. When Dell refused to honour that order he, along with a Quebec consumer group, brought this application to commence a class action against Dell. Dell opposed the application and submitted that the parties be directed to use an arbitration process as required in the order of sale contract. Despite a provision in the Quebec *Civil Code* stating that in consumer transactions the Quebec courts will have jurisdiction to hear a dispute despite an arbitration clause to the contrary, the Supreme Court of Canada held that the arbitration clause prevailed, the class action application should be dismissed, and the matter should be referred to arbitration.

This was done despite the inconvenience of the American process of arbitration specified in the contract. The court held that the contract did not require the dispute to be submitted to a foreign authority, but that the arbitration clause was a private agreement between the parties and the private aspect of the contract was being enforced. Note that a similar case for class action proceedings against Dell in Ontario was successful using different

[24] 2007 SCC 34 (CanLII), (2007), 284 D.L.R. (4th) 577.

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legislation, and so it is not clear whether Dell will be able to hide behind this arbitration clause in their standard contract in the future.[25]

Dell's preference for its arbitration clause is easily understood when you realize that Dell is much better off if they can stop any class action suits against them and force individuals to submit their complaint to arbitration. Such actions will probably not proceed, given the minimal amount of money involved and the difficulty of dealing with a U.S. jurisdiction.

The main disadvantage to arbitration used to be a difficulty in enforcing the award. This is less the case today, with Canadian courts showing considerable deference to the awards of an arbitrator, whether domestic or international. Examples of several bodies specializing in the arbitration of private disputes arising within the North American Free Trade Association (NAFTA) region are the International Commercial Arbitration Centre, the Canadian Commercial Arbitration Centre (formerly the Quebec National and International Commercial Arbitration Centre), the Mediation and Arbitration Center of the Mexico City National Chamber of Commerce (CANACO), and the American Arbitration Association.

Arbitration awards enforceable in courts

Additionally, provincial and federal legislation provide for the enforcement of such international arbitration awards pursuant to international treaties and conventions signed by Canada and many other nations. Pursuant to these agreements, arbitration awards can be submitted to the courts and will be enforced as a term of the contract using the court's enforcement facilities. It is interesting to note that in fact such international arbitration awards are now more likely to be enforceable in our courts than are the foreign judgments as discussed below. It is important to recognize, as well, that an "international ADR culture (particularly arbitration and mediation) is taking root as the use of ADR to resolve international disputes accelerates."[26]

Of course, many problems can be avoided altogether by simply arranging for adequate insurance coverage to support the transactions. Payment services such as PayPal essentially provide this service, ensuring that the customer gets what he has transacted for and providing a remedy and a resolution process when disputes do arise. When purchases are made through a credit card, an insurance service is also provided.

Case Summary 10.8 *Chateau Des Charmes Wines Ltd. v. Sabate, USA, Inc.*[27]

Finding the Appropriate Jurisdiction to File a Claim

Chateau Des Charmes Wines Ltd. (Plaintiff), Sabate, USA, Inc. and Sabate France (Defendants) in this action in the Ontario Superior Court of Justice.

The plaintiff ordered wine closures (corks) from the defendant and those products contaminated the wine with "cork taint." This action is brought in Ontario and the first issue was to determine whether Ontario was the appropriate jurisdiction to bring the action. The defendants were an American company and a French company both run by the same family. The contract and initial arrangements for the order were made with representatives of the American company and the corks were actually

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[25] *Griffin v. Dell Canada Inc.*, 2009 CanLII 3557 (ON S.C.).
[26] Barry Leon, "International Arbitration should continue to grow as it did in 2006" *Lawyers Weekly*, vol. 26, # 37, February 2007.
[27] 2005 CanLII 39869, [2005] O.J. No. 4604 (ONT. S.C.).

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delivered directly from France. An action was originally brought in California, but that court decided that it was an inappropriate forum for the action and stated it should be brought in Canada or France. The plaintiff then brought this action in Ontario but the defendants are also resisting it as an inappropriate forum. The court in this case also had to deal with the fact that the original order was made orally over the phone with representatives of the American company and that with the first order of corks there was included on a packing-slip a statement that the appropriate forum for any disputes was a specified French court.

This was repeated on the back of the invoices sent to the plaintiff. The judge observed that these were after the fact and did not form part of the original contract, which was made orally over the phone. The judge also found that the contract was in fact formed in Canada and was to be performed in Canada. These factors and the location of the damage and the place of business of the plaintiff all made the Ontario court an appropriate jurisdiction for the trial of the matter.

Note that in the process of reaching the decision the Ontario judge applied the provisions of the United Nations Convention on the International Sale of Goods,[28] which is in force in Canada. Note as well that had the forum selection clause formed part of the original contract, it is likely that the Ontario court would have found that they were not an appropriate forum for the action. It is extremely important to insure that such important items are included in your contracts and this case illustrates just how easily the parties can fail to do so.

Litigation and Jurisdiction

What Court? As noted above, there is no international court that has jurisdiction over private disputes between individuals or businesses. When the matter disputed involves interests in more than one country, the problem arises as to where to launch a lawsuit. Typically the plaintiff will bring an action in his or her jurisdiction and an application will then be brought by the defendant to have that court declare that they will not deal with it. This is referred to as an application for an order of *forum non conveniens* but a court is often reluctant to surrender jurisdiction in such matters. Note that the stated choice of law or jurisdiction is most likely to be overruled where it is clear that one party was stronger than the other and the choice of law benefits one at the expense of the other. Such abuse is most often found in consumer transactions. Table 10.1 lists the questions the court will consider before determining whether it has jurisdiction.

Right of a court to hear action may be challenged

Many jurisdictions are tackling these problems through statutory enactment. For instance, British Columbia has passed legislation stating how the jurisdiction of B.C. courts is to be determined.[29] Basically, the legislation follows a Supreme Court of Canada decision and recommendations by the Uniform Law Conference of Canada to simplify the

TABLE 10.1 Factors Determining Jurisdiction

1. Where was the contract formed?
2. Where was it to be performed?
3. Where do the parties (and witnesses) reside?
4. Where did the problem occur?
5. Where are the goods or property located?
6. Does the choice by either party benefit the stronger?
7. Which jurisdiction is most closely connected?

[28] *International Sale of Goods Contracts Convention Act*, S.C. 1991, c. 13.
[29] *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28.

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process of determining when the local courts have jurisdiction.[30] The test is **"territorial competence,"** the term replacing more involved and vague terminology found in the common law.

Legislation replaces common law in determining jurisdiction of court

Essentially, B.C. courts will have territorial competence or jurisdiction where there is a close connection between the province and the facts giving rise to the case or where 1) a party being sued has agreed that the court will have jurisdiction, 2) they have attorned (submitted) to that jurisdiction, or 3) they are ordinarily resident in British Columbia. Ordinary residence for a corporation may include having an office or other place of business in British Columbia or managing their business from a location in that province. Note that the court will have territorial competence if one of these factors is present regardless of what the parties have agreed. In a tort action the B.C. court has jurisdiction when the tort was committed in British Columbia or when the defendant resides in that province. Several other provinces, including Saskatchewan and Nova Scotia, have passed similar legislation. Given the Supreme Court of Canada decision referred to above, this indicates the most likely future direction for all provinces. An important feature of the *Act* allows the court to transfer an action started in British Columbia to a court in another jurisdiction where it is convenient to do so, thus eliminating the problem of the plaintiff having to start all over again.

Legislation allows transfer of the action

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Case Summary 10.9 *Young v. Tyco International of Canada Ltd.*[31]

Can Wrongful Dismissal Action Be Brought in Ontario?

David Young (Plaintiff/Appellant), Tyco International of Canada Ltd. (Defendant/Respondent) in this appeal in the Ontario Court of Appeal.

The appellant Young worked for the defendant in Ontario for eight years before that job became redundant. He was offered a temporary job in the United States where he would work at several of the Tyco's U.S. operations until another position became available for him in Canada. He worked in three of the company's U.S. plants until he was dismissed in 2006 for alleged sexual harassment. In 2004 he had been off work for several months due to a brain operation. It should be noted that he suffered a seizure at a presentation meeting in one of the U.S. plants, and although he had to be taken to the hospital he returned to work that same day. He brought this action for wrongful dismissal in Ontario, but the court refused to hear it, finding that Indiana was a more appropriate jurisdiction to bring the action. Note that in Indiana an employee could be dismissed at will without cause, notice, or severance. The issue before the court was whether the Ontario court had jurisdiction to hear the case.

Young then appealed that decision. The Ontario Court of Appeal found that the trial judge failed to give proper consideration to Young's version of the facts.

It found that the 2004 contract offered to Young was for only temporary employment in the United States until further work could be found for him in Canada and none of the particular jobs he took on there superseded the Canadian contract. He had been told to apply only for a temporary U.S. visa and the company had informed the immigration service that his employment in the United States would be only temporary. The original Ontario employment contract stayed in force up to the date of his termination. He claimed he was really dismissed because of his disability. Because the original employment contract was made in Ontario, he kept his home in Ontario, the witnesses were in Ontario, and he would suffer a significant legal disadvantage in Indiana, the appeal court decided that Ontario was an appropriate place to bring this action and that Ontario law should apply to the employment contract.

[30] *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077.
[31] 2008 ONCA 709 (CanLII), 92 O.R. (3d) 161 • 300 D.L.R. (4th) 385 (Ont. C.A.)

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The case emphasizes how dangerous it can be to take employment in another country where you could be subject to much less favourable laws and how important it is to include specific terms in your employment contract covering all eventualities when taking on a foreign assignment. It is also interesting to note how different those foreign laws can be, especially in employment. Here the Indiana laws of employment termination stand out in stark contrast to the much more generous severance and notice requirements in Canadian jurisdictions.

Enforcement Once the judgment has been obtained there remains the problem of enforcing it. That is not a serious difficulty where the losing party has assets in the jurisdiction where the judgment was rendered. The judgment can be enforced against those assets like any other judgment. The problem arises when the party obtaining the judgment from a court in one jurisdiction wants to enforce it in another. At the outset, a court in one jurisdiction simply does not have the power to make an order enforceable in another. The result is that such an order will only be effective in that other jurisdiction if a court in that jurisdiction adopts it. This is true even between provinces, and a receivership order from an Ontario Court, for example, will have no effect in Alberta. To seize assets in Alberta, the Alberta court must adopt the Ontario order. While this is commonly done in common law jurisdictions, it is often a serious problem when dealing with foreign jurisdictions, especially in developing countries. Again, there are conventions between nations, provinces, and states to solve this problem, and most provinces and many states in the United States and countries such as Australia have reciprocating enforcement statutes allowing the judgment or order of one jurisdiction to be enforced in another as if it were an order of that court. If there is no such reciprocating enforcement agreement in place the person wanting to enforce the order in another jurisdiction will have to start all over, suing on the judgment in that other state to get at the assets of the debtor. These orders are normally restricted to defined monetary claims, although as mentioned above there is a growing willingness for Canadian courts to enforce non-monetary orders such as injunctions.

Difficult to enforce a court order in another jurisdiction

Foreign courts will enforce a judgment if reciprocal enforcement agreement in place

Most foreign jurisdictions will recognize the validity of a judgment of a Canadian court, but the process of suing on that judgment is more involved, with many more pitfalls and greater expense than simply registering that judgment and enforcing it as is done in a reciprocating state. Proof that the debtor has actually been properly served in such an action is often a problem and it is common practice for an absconding debtor who is trying to escape his obligations to move to a jurisdiction where there is no reciprocating enforcement agreement and then avoid being served. Such tactics can be overcome, but the process is delayed and made more expensive and often is just not worth the trouble.

Finally, it should also be noted that the awards of internationally recognized arbitrators can also be enforced by filing them with a local court in the same way as a foreign judgment. In fact they are often easier to enforce because there are more comprehensive agreements and conventions between nations in place allowing for such enforcement.

Courts more likely to enforce arbitration award

Defences When suing on a foreign judgment there are many defences that can be raised to prevent its enforcement. A problem with process, such as improper service or where a party was not allowed to give evidence, may be fatal to the action. When laws are different in the foreign jurisdiction where you wish to enforce the judgment, it can also pose an insurmountable difficulty. That country will not enforce a judgment based on a legal principle that they do not recognize. For instance, if a judgment is based on the breach of a non-competition clause in a contract for the sale of a business, and that country does not allow such a restriction on competition, they are not likely to enforce the judgment or order.

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Case Summary 10.10 *Yugraneft Corp. v. Rexx Management Corp.*[32]

Does Alberta *Limitation Act* Apply to a Foreign Arbitration Award?

Yugraneft Corp. (Plaintiff/Appellant), Rexx Management Corp. (Defendant/Respondent) in this appeal in the Supreme Court of Canada. (There were also a number of groups specifically concerned with ADR that were interveners.)

The defendant contracted with the plaintiff, a Russian company, to supply certain oil production equipment, but a dispute arose that was arbitrated by a Russian arbitration tribunal as provided in the contract (the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation). That arbitrator found against the Alberta company and ordered it to pay the Russian company US$952 614.43. This arbitration award was presented before the Alberta court for its enforcement against the defendant. Nothing in the arbitration award nor in any of the treaties or agreements involved stated that the Alberta *Limitation Act*[33] or any other limitation provision applied, and the issue before the court was to determine whether in this case the provisions of the Alberta *Act* applied to the arbitration award.

The Supreme Court of Canada in this decision has made it clear that the treaties and rules involved require that the award be enforced "in accordance with the rules of procedure of the territory where the award is relied upon." As a result the Court decided, "Alberta need only provide foreign awards with treatment as generous as that provided to domestic awards rendered in Alberta." Any local arbitration award would be subject to a two-year limitation period after which it could not be enforced. This Russian award was subject to the same limitation, and since it was beyond that time limit it could not be enforced.

The case illustrates the flexibility of such arbitration awards and how they can be enforced in most jurisdictions in the world, and the operation of the special treaties and rules in place that apply to them. But it also illustrates that local rules may still apply and is a reminder of the operation of the limitation rules in place in all jurisdictions, which in this case made the enforcement of the award impossible where the time limitation had run out.

LO 3 GOVERNMENT REGULATIONS AND TREATIES

International Treaties

From the above discussion and from prior chapters it should be clear that there are a number of international treaties and conventions that Canada is party to that either directly or indirectly affect the transactions carried on between business people in different countries. For example, as noted in Chapter 9, Canada has adopted the Bern and Rome conventions with respect to copyright, with the result that rights of copyright holders in other countries that are signatories to those conventions are recognized here, and in turn Canadian copyright holders have rights to protection in those countries as well. As mentioned above, Canada also has accepted the United Nations Convention on Contracts for the International Sale of Goods, and statutes have been implemented at both the federal and provincial levels[34] declaring the convention to be law in those jurisdictions. This requires that each province pass its own version of the *International Sale of Goods Contracts Convention Act*, and, like the regular sale of goods acts discussed in

Judgment difficult to enforce where laws are different

Provinces have enacted versions of the international sale of goods act

[32] 2010 SCC 19, [2010] 1 S.C.R. 649, 2010 SCC 19 (CanLII).
[33] *Limitations Act*, RSA 2000, c L-12.
[34] United Nations, "United Nations Convention on Contracts for the International Sale of Goods (1980)"; *International Sale of Goods Contracts Convention Act*, S.C. 1991, c. 13, and for example *International Sale of Goods Act*, RSBC 1996, c 236.

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Chapter 5, the provincial acts supply missing terms into contracts between businesses for the sale of goods across borders. Again like the normal sale of goods acts, when the parties include terms in their agreements that are inconsistent with the terms of the provincial act, the contract terms will override the provisions of the provincial act.

These acts apply to consumer goods, to goods sold by auction, to securities, to ships and aircraft, and even to electricity sold across boarders. The *International Sale of Goods Contracts Convention Act* sets out how and when the contract is formed, who bears the risk and when it is transferred, and the remedies available in the event of breach. To facilitate this *Act* and the transactions taking place that are covered by it, standardized definitions and rules of interpretation have been developed to make the interpretation of such contracts clearer and thus avoid disputes. When disputes do arise these rules make their resolution much simpler. The definitions and rules are called Incoterms® (International Commercial Terms) and are used worldwide in contracts for the sale of goods. Recently they have been extended (where applicable) to domestic contracts as well.

Perhaps the most important consequence of international treaties is the encouragement of free trade between nations. These agreements reduce or eliminate tariffs and duties that are usually imposed by a nation to protect their own industries. Canada was an early signatory to GATT. GATT was an agreement rather than an organization, and it developed from a failed attempt to create an international trade organization after World War II. Over the years the parties to GATT met regularly and negotiated to reduce trade barriers (in the form of tariffs) and encourage trade between the member nations.

GATT reduces trade barriers

This type of process is very difficult, involving attempts to balance this move toward freer trade against national policies that support and subsidize local industries. The idea is to promote fair trade, encourage balanced competition, and prohibit or control abusive practices.

GATT required that a member grant all other members the same tariff advantage as the lowest tariff they charged on similar goods from any nations. This was called **most favoured nation status.** The agreement also required that goods that were imported into the country from a member state had to be treated the same as domestic goods, with no special requirements or restrictions.

WTO expands on GATT

GATT has since been incorporated into the WTO, whose objectives are the same: to reduce trade barriers, thus encouraging international trade; to foster cooperation; and to contribute to the process of globalization generally. The WTO goes further than GATT in that it is an organization of countries rather than just an agreement between them. It adds a dispute resolution process, and while GATT was limited to the trade of goods, the WTO covers subjects beyond goods, including financial and other services and intellectual property. GATT started as a negotiated agreement between 23 contracting parties, but the WTO is an organization now consisting of 153 member countries (at the time of writing).

Continental Treaties In addition to these world organizations, Canada is also a participant in more localized trade treaties, such as NAFTA. NAFTA is an agreement between Canada, the United States, and Mexico, and is designed to promote easier trade relations between the three countries. It eliminates trade barriers in the form of tariffs and duties as much as possible, and promotes free trade between the three countries. The agreement expands on the WTO agreement between these three countries, and most duties and tariffs have been or are being removed on goods and services traded between them. This free trade is extended to allow some professionals greater access to the other nations as well, allowing them to move more freely and practice their profession in the three

NAFTA creates free trade zone between Canada, U.S.A., and Mexico

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NAFTA includes dispute resolution mechanism

countries. There are also environmental protection provisions and labour standards included in the agreement. NAFTA also provides for a dispute resolution mechanism. There is a movement to admit other countries into NAFTA, and so we are likely to see something like a North and South American free trade agreement in the not-too-distant future.

Note that these agreements are very complex and this discussion only indicates the basic features; in no way is it an attempt at a comprehensive summary or critical analysis. When dealing with NAFTA, the WTO, or any other of the many treaties and conventions that may affect your business transaction, there is no substitute for specific advice from a professional such as the advisors at International Trade Canada, the Canadian Border Services Agency, as well as private services such as customs brokers and freight forwarders. The Canadian government provides information on the treaties to which Canada is a signatory at www.treaty-accord.gc.ca.

Sometimes regulations in place in other countries, especially the United States, will have an impact in this country. For example, ever-evolving global warming initiatives designed to reduce harmful emissions are being set out in international protocols, and the resulting national regulations need to be taken into consideration when operating a business abroad. There is also a growing movement to impose liability on domestic companies and individuals for human rights violations that take place in their operations abroad. For example, a recent action has been brought in Ontario against Copper Masa for human rights abuses that that company allegedly committed against workers at their copper mining operation in Ecuador.[35] There is considerable pressure on governments to bring in legislation to control such abuses and on security regulators to impose audit and reporting requirements on companies with respect to their foreign operations.

Canadian Regulations

World trade negotiations generally deal with such concerns as free trade between countries, eliminating trade barriers, prohibiting dumping of goods, protecting Third World economies, allowing for sustainable use of natural resources, and protecting the environment. When Canada subscribes to such international agreements, they commit to the regulations imposed by trading partners and expect that other countries will do the same.

The Government of Canada has imposed a considerable body of regulations that must be adhered to when doing business between countries. In this final section of the text we will look at a few of the statutes in place in this country designed to regulate businesses carrying on their business across borders.

Canada imposes few restrictions on exports

Export There are only a few federal statutes that affect the export of Canadian products to other countries. There are controls in place that are mainly concerned with security and anti-terrorism measures, the laundering of money, and the avoidance of taxes. In addition, the *Export and Import Permits Act*[36] empowers the federal government to restrict certain exports to specific countries. The government department involved (Foreign Affairs and International Trade Canada) manages several lists that set out certain countries to which some exports are restricted. If the specified goods are to be exported to one of these designated countries, a permit must be obtained from that body. There are

[35] Cristin Schunitz, "Lawyers Take Aim at Mining Companies" (April 3, 2009) *Lawyers Weekly* Vol 28, No 44.
[36] R.S.C. 1985, c. E-19.

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restrictions on the export of certain strategic materials such as weapons and sophisticated computer technology, as well as on the trade of exotic and threatened species, but these are relatively insignificant restrictions on exports.

There are also a number of statutes regulating specific goods or practices, such as the *Softwood Lumber Products Export Charge Act (2006)*,[37] the *Export and Import of Rough Diamonds Act*,[38] the *Cultural Property Export and Import Act*,[39] and the *Corruption of Foreign Public Officials Act*.[40] Note that this last act has been passed pursuant to the Organization for Economic Co-operation and Development (OECD) Anti-Bribery Convention that came into force in 1999, making it a crime to bribe foreign officials. It should be noted that this *Act* has not been aggressively enforced in this country. Similar legislation in the United States has been much more effective. The RCMP is responsible for the enforcement of the *Act* and hopefully it will be more effectively enforced in the future.

The main problem for Canadian businesses involved in exporting is to overcome the restrictions imposed on them by the importing nation, including significant tariffs and duties. Canada is essentially an exporting nation, which is why international trade conventions and organizations like NAFTA and the WTO are so important to us. They are very helpful in removing the roadblocks that have historically restricted the export of our goods into other countries. One of the main functions of the various government agencies operating at home and abroad is to support Canadian businesses, helping them to develop markets, to expand their businesses, and to otherwise smooth the road for companies doing business in foreign countries. This involves everything from arranging trade missions by government officials and business leaders to helping to resolve individual problems by direct intervention with foreign officials. Export Development Canada also assists and encourages foreign trade by offering a wide range of protective services to reduce many of the risks associated with foreign business transactions. In addition, the federal government departments of Foreign Affairs and International Trade Canada as well as Industry Canada offer services that assist corporations doing business in Canada and abroad. These services range from advice on what regulations apply to various activities in Canada and to best practices for Canadians doing business in foreign countries. The services offered by these bodies are invaluable to any business and it is recommended that you familiarize yourself with them and the services they offer. The website for Industry Canada is www.ic.gc.ca and for Foreign Affairs and International Trade Canada is www.international.gc.ca.

Canadian government agencies assist export process

Of course, a good understanding and careful compliance with labelling, content, and other product requirements in the destination jurisdiction is also necessary. For example, the European Union has recently imposed important new regulations with respect to the importation of chemicals, requiring registration and further information under REACH (Registration, Evaluation, Authorization, and Restriction of Chemicals) that exporters must now comply with. It is also important to note that the growing practice of laundering money through international trade (money that was obtained in various criminal enterprises) has forced governments to expand their investigation activities to this area. Such money laundering can take place by over- or undercharging for the services or goods supplied, by issuing multiple invoices for those services, or by falsely describing the goods or services that are supplied.

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[37] S.C. 2006, c. 13.
[38] S.C. 2002, c. 25.
[39] R.S.C. 1985, c. C-51.
[40] S.C. 1998 c. 34.

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CBSA officials have extensive powers

Imports Import of goods is regulated in Canada primarily by the *Customs Act*.[41] The *Customs Act* empowers customs officials (the Canadian Border Services Agency, CBSA) to enforce various regulations that restrict what can be imported or to impose duties of varying amounts on those goods. CBSA officials have significant enforcement powers that may lead to confiscated goods and the imposition of penalties for failure to properly comply with the declaration permit and duty regulations. Canada, the United States, and other developed countries all have statutes in place preventing the sale of products manufactured in other countries that unfairly compete with products manufactured in their own, either because of subsidies, unusually low wages, or simply because the foreign manufacturer is selling below cost to get rid of excess production. This is called **dumping,** and in Canada extra duties are imposed under the *Special Import Measures Act*[42] to overcome the unfair advantage. In addition, the *Excise Act*[43] creates special procedures requiring licensing, permits, and duties for the import of beer, wine, and spirits.

Practice of dumping controlled

NAFTA and free trade reduces regulation of imports

As mentioned above, the WTO and NAFTA give goods imported from nations associated with these treaties special status, with generally lower or no tariffs imposed, but the application of the regulations to actual imports can be very complex. These agreements have force in Canada under the *North American Free Trade Agreement Implementation Act*[44] and the *World Trade Organization Agreement Implementation Act*.[45] There are also a number of special bilateral agreements that Canada has implemented giving certain developing nations, such as Costa Rica, favoured trading status.

Restrictions on the import of dangerous, hazardous, and environmentally sensitive goods

As mentioned above, under the *Export and Import Permits Act*,[46] certain countries are put on a list to which exports are restricted. The *Act* also restricts imports coming from these listed countries. There are also restrictions on the import of hazardous products and those posing a health risk, as well as products that are generally prohibited, such as certain types of weapons, exotic and threatened animals or products made from these animals, and products from other threatened species such as exotic plants and wood products. The point is that there is a veritable forest of regulations potentially affecting any business that imports products or services into this country, and a business doing so must determine ahead of time just what duties and permits are necessary given the foreign country involved and the product to be imported. When exporting goods or services or when developing resources outside of Canada it would be wise to first go to the Foreign Affairs and International Trade Canada website discussed above and access their very extensive services and information.

Finally, it should be noted that Canada has recently amended the *Competition Act* so that it now has the world's greatest restrictions on the creation and operation of cartels. Where a person is found guilty of agreeing to fix prices, control markets, or restrict output they can be imprisoned for up to 14 years and/or face fines of up to $25 million.[47]

Extraterritorial Reach

Some counties, particularly the United States, have enacted laws that attempt to work extraterritorially. An important example of U.S. legislation that has an effect extraterritorially

[41] R.S.C. 1985, c. 1 (2nd Supp).
[42] R.S.C. 1985, c. S-15.
[43] S.C. 2002, c. 22.
[44] S.C. 1993, c. 44.
[45] S.C. 1994, c. 47.
[46] R.S.C. 1985 c. E-19.
[47] *Competition Act*, R.S.C. 1985 c .C-34.

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is the *Patriot Act*,[48] passed in reaction to the 9/11 tragedy. An earlier example is the legislation passed by the United States that was designed to punish individuals and businesses in Canada and other countries that did business with Cuba after the Cuban revolution. Canada passed legislation attempting to protect its sovereignty by shielding its citizens from the operation of such laws. The *Foreign Extraterritorial Measures Act*[49] is designed to thwart the operation of U.S. laws that attempt to punish Canadian businesses dealing with countries such as Cuba. Other examples of retaliatory legislation have been passed in Canada, but these are generally ineffective because Canada is primarily an exporting nation and these retaliatory measures generally have to be imposed on imports. Unfortunately, retaliatory measures often simply encourage more restrictions on our exports in turn. Note that Nova Scotia has enacted legislation to ensure that the extraterritorial reach of the U.S. *Patriot Act* doesn't interfere with the privacy rights and personal information of Nova Scotians.[50] The United States is not the only country passing laws with extraterritorial reach but we are particularly vulnerable to their laws because the United States is our biggest trading partner.

Some foreign governments attempt to apply their regulations beyond their borders

Finally, it should be mentioned that sometimes conduct in Canada by Canadians that affects others in another jurisdiction can lead to liability in that other jurisdiction, as the following case illustrates.

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Case Summary 10.11 *Pakootas v. Teck Cominco Metals, Ltd.*[51]

Does Discharge of Waste in Canada Violate U.S. Statute?

Pakootas (Plaintiff/Respondent), Teck Cominco Metals (Defendant/Appellant) in this U.S. action in the Court of Appeals, 9th Circuit 2006.

The Canadian company operating a smelter at Trail, British Columbia, accidentally released a large discharge of tailing material into the Columbia River causing damage on the American side of the border. This action was brought in an American Federal Court (the 9th Circuit) claiming violation of the *Comprehensive Environmental Response Compensation and Liability Act* (CERCLA). The action was resisted by the defendant, that claimed that the *Act* should not have extraterritorial application. The action was taken to the U.S. Supreme Court, which refused to hear the matter pointing out that this was not an extraterritorial application of the *Act* since the toxic material had been discharged into the United States and caused damage in that country. Under the *Act* the plaintiffs could seek civil penalties and the matter was sent back to the Washington trial level court for determination. This case illustrates how careful a business, especially a mining operation, has to be not to cause pollution that escapes across a border. Not only will they be subject to Canadian law but they will likely run afoul of American law as well.

It is interesting to note that the reverse is also true. In 2007 the American company Detroit Edison (DTE Energy Company) was charged with violating the federal *Fisheries Act* because of a practice of releasing 2000 pounds of mercury per year into the St. Clair River (*Edwards v. DTE Energy Company*). The discharge took place in the United States, but the river flows into Canada so that the damage took place in this country.

The Teck Cominco case was followed as a precedent in the Detroit Edison case and the process was allowed to be served on the American company. But before the matter could proceed further, several actions were taken to clean up the St. Clair River and the charges were withdrawn. Note that in both cases environmental activists brought the private actions as permitted by the statutes in question.

[48] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act*, 2001 (USA PATRIOT Act) Public Law 107-56, U.S. Congress.
[49] R.S.C. 1985, c. F-29.
[50] *Personal Information International Disclosure Protection Act*, S.N.S. 2006 c. 3.
[51] 452 F.3d 1066 (9th Cir. 2006).

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Key Terms

cybersquatting (p. X)
domain names (p. X)
dumping (p. X)
electronic signatures (p. X)
grey market (p. X)
long-arm statutes (p. X)
most favoured nation status (p. X)
territorial competence (p. X)

Questions for Student Review

1. How has the internet changed the nature of doing business?
2. Explain the problems with jurisdiction that arise in internet business transactions.
3. What must be demonstrated for a Canadian court to hear an action in a dispute involving an online transaction?
4. What is the danger of ignoring an action brought in a foreign jurisdiction?
5. Explain why internet defamation has become a greater potential problem compared to ordinary written or spoken defamation. What other torts can be committed on the internet?
6. What sorts of opportunities does the internet provide for losing control over personal information?
7. Explain the unique problems associated with the formation of contracts over the internet and what federal and provincial governments have done to respond to these issues.
8. Explain the role played by the federal *Uniform Electronic Commerce Act* and how it relates to provincial legislation.
9. What is cybersquatting and what attempts have been made to control it?
10. What is the most appropriate means of resolving disputes over online transactions?
11. What are the common law obligations with respect to people who are given confidential information?
12. What steps should a business take to ensure that employees don't misuse confidential information or engage in other inappropriate online activities while in the workplace?
13. Explain the reluctance of governments to regulate the internet's business or even criminal activities.
14. Describe some of the overlapping concerns of electronic and global commercial transactions.
15. What are some things a business person who is contracting with someone in a foreign jurisdiction should consider?
16. Outline the terms that should be included in a cross-border contract.
17. What provisions should be made for dispute resolution?
18. What is the likelihood of successfully pursuing a judicial action in a foreign jurisdiction?
19. What international organizations are set up to assist in the resolution of disputes?
20. What questions will a court ask to determine whether or not to hear a matter related to an international contract dispute?
21. Explain the problems associated with enforcing a judgment in a foreign country.
22. How effective are international treaties in place to assist contracting parties?
23. Explain what statutes and organizations are in place in Canada to support international trade.

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Questions for Further Discussion

1. One of the great advantages of the internet, and one of the reasons for its tremendous growth in recent years, has been its freedom from controls and regulation. It has been a little like the Wild West, with entrepreneurs, artists, and anyone with a desire to communicate free to do so, and only limited by his or her imagination. This has led to invention and creativity, but also to abuses. The debate today relates to control and regulation of the internet and the question for discussion is whether you think that this beast should be tamed. Consider the arguments pro and con, and discuss the various ways that such controls could be imposed. Look at the jurisdictional problems, but consider also how to maintain the freewheeling nature of the internet that has contributed to so much creativity.
2. A business person who is focused on the bottom line may overlook the social impact his business activities have on people, particularly if they occur in a foreign country. When financial interests are put ahead of public good, the results can be devastating. What concerns should an ethical business manager have in mind when contracting with or opening a plant in a developing country? Keep in mind economic, ecological, and social impacts. How can ignorance or dismissal of these factors negatively affect the business climate in Canada? Consider some examples from recent times where highly industrialized countries have exploited the people and resources of developing countries.
3. There is always pressure on the various governments involved to renegotiate NAFTA with an eye to protecting their own interests, such as by insulating local industries from outside competition. What are the implications for Canada if we do it or if they do it? How will it affect our trading relationships? Think about the problem of dumping. Should Canada make more of an effort to protect our manufacturing and commodities interests? In your answer, consider the way the softwood lumber dispute was handled.
4. Can we depend on international treaties to regulate and control electronic and global commerce? What role should world trade organizations play in encouraging and regulating international transactions? Is this a forum in which the United Nations can play a positive role? How can economic powers be balanced between trading partners? Who should be responsible for protecting lesser powers?
5. Try drafting your own standard-form contract for a business selling a product over the internet. Think about the elements that must be present for such a contract to be binding, including how the process of offer and acceptance will be accomplished. What kind of exemption clauses would you like to include? How would you solve the jurisdiction problem? How do you think a customer might react to these provisions?

Cases for Discussion

1. *R. v. Benlolo,* 2006 CanLII 19284 (ON C.A.) (2006), 81 O.R. (3d) 440

Alan and Elliot Benlolo sent thousands of invoices to various businesses for the renewal of their listing on an internet "Yellow pages business directory." The invoices looked very similar to those issued by Bell Canada. In fact the recipients had never been subscribers to such a service and were misled into thinking they were renewing a service they had been party to. Even after being warned by the Competition Bureau, the Benlolos continued further mailings and eventually were convicted for misleading advertising under the *Competition Act.* At the same time that they were involved in this activity they were engaged in an international telemarketing stock swap scheme, which involved fraudulently getting people to pay for stocks at inflated prices and leading them to believe they were dealing with a legitimate stock brokerage. Note that millions of dollars were taken from their victims. What do you think might be an appropriate sentence or penalty in these circumstances?

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2. *Easthaven, Ltd. v. Nutrisystem.com Inc.* (2002), 55 O.R. (3d) 334, 202 D.L.R. (4th) 560 (Ont. S.C.J.)

Easthaven, Ltd. was a company registered in Barbados with a head office in that country. It registered the domain name of "sweetsuccess.com" to further an internet sports-related business. The domain name was registered with Tucows Inc., a company incorporated in Delaware but with a head office in Toronto. Nutrisystem.com Inc. was incorporated in Pennsylvania with a head office in that state as a weight loss business with products and trademarks based on the name "Sweet Success." When they approached Easthaven about the domain name, Easthaven offered to sell it to them for US$146 250. They brought a successful action in Pennsylvania asking that court to order that the domain name "sweetsuccess.COM" be transferred to them. The Pennsylvania court sent an order to Tucows to transfer the name to Nutrisystem. In the meantime, Easthaven brought this action in the Ontario court for damages against Nutrisystem and an order against Tucows to prevent the transfer of the domain name to Nutrisystem. Do you think the Ontario court should become involved? How could the matter best be handled? How would your answer be affected by the added information that before the action went to trial in Ontario, Tucows reversed their decision to transfer the domain name to Nutrisystem and put it on "Registrar Hold," meaning it could not be used by either party. In response to this Easthaven withdrew their action against Tucows. This left Nutrisystem the only defendant in the Ontario action.

3. *Kanitz v. Rogers Cable Inc.,* 2002 CanLII 49415 (ON S.C.)

Rogers Cable Inc. provided cable and internet services to customers in Ontario and other areas of Canada. The plaintiffs were customers who brought this class action against Rogers claiming that they had breached their contract by providing interrupted, intermittent, and slow service over a specific period of time. The original contract that Rogers had subscribers sign when they first obtained the service had a provision allowing them to make changes to it. The subscribers' continued use of the service after notification of the change constituted acceptance. If they chose not to accept they were to cease the service immediately and notify Rogers. In fact, in November 2000 such a modification was made by the inclusion of an arbitration clause in the contract so that all disputes had to be arbitrated following a specific process rather than be litigated. What do you think? Should this provision be part of the contract? Does the Ontario court have the right to hear the class action brought by the plaintiffs? Would your answer be affected by the information that Rogers and Shaw cable had made a swap of customers and facilities in British Columbia and Ontario with the result that some of the customers were originally with Shaw and were not original contracting parties with Rogers? What other information would you need to know?

4. *Znamensky Selekcionno-Gibridny Center LLC v. Donaldson International Livestock Ltd.,* 2010 ONCA 303 (CanLII)

The Russian applicant agreed to purchase 8500 pigs from Donaldson but a dispute arose with respect to the health of the pigs and the matter went to arbitration in Russia as per the contract provisions. The Canadian company refused to go to Russia and participate in the arbitration because of alleged death threats received from the Russians. The Russian arbitrator decided against Donaldson and in this application the Russian purchaser is applying to have the $1 million plus award enforced in Ontario against Donaldson. Donaldson claims that the Russian arbitration should be set aside because of the death threats and is asking that the matter be set down for trial in the Ontario court. What do you think? Was the appropriate place to bring up this argument at the Russian arbitration centre or here in Canada?

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5. *Crookes v. Wikimedia Foundation Inc.*, [2008] B.C.J. No. 2012; *Crookes v. Newton*, 2009 BCCA 392 (CanLII); *Crookes v. Yahoo*, 2008 BCCA 165 (CanLII), see also *Crookes v. Newton*, 2011 SCC 47

Wayne Crookes is a B.C. business person who is claiming he was defamed on the internet. He has named several specific individuals who were the actual defamers but also is suing Yahoo, MySpace, Wikipedia, and other intermediaries, claiming that they are responsible for the defamation because they failed to monitor their sites properly to ensure that such defamatory articles were promptly removed. For example, he claimed Yahoo refused to take down an offending site (chat room) and therefore was equally responsible, and MySpace failed to take down a personal page containing defamatory material and allowed a link to another site containing defamatory material. How far should the liability for defamation go? Should these intermediaries also be responsible? What if they fail to take the offending item down when asked? Are there any situations where an intermediary should also be responsible for defamation?

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