

## Law of the Level

Posted at 10:42 AM on January 25, 2010 by Sheppard Mullin

### Global Games. Global EULA?

I will leave the discourse on the necessary role an end user license agreement (“EULA”) plays in the game environment for another day.<sup>[1]</sup> Instead this entry takes a quick dip into the challenges to enforcing a EULA for a game with global player base and offers a few quick suggestions for catering your EULA to address some of these pitfalls.

Online play is a critical component to many blockbuster games (MMOs being a particularly obvious example). While the servers may be residing in the United States, players are often logging on across the globe. This creates an interesting issue: how does a company enforce a EULA when the player or third-party (such as a company creating improper mods) resides abroad?

The simple solution is technical in nature: restrict access. Unfortunately, banning individual users may be problematic for a number of reasons: the user may have had his account hacked by a third party (who was the actual infringer, not the banned user), a banned customer results in subscription loss with no guarantee the user won't return to harass again, the company doesn't recover any damages for instances where the infraction was particularly egregious (such as crashing the servers, introducing a highly disruptive hack/mod, etc.), and, finally, in the case of third-party ne'er-do-wells, the ban may not impact the culpable party at all.

As a result, a legal solution may be called for under certain circumstances. Often companies will use forum selection and choice of law clauses as a means for making the enforcement of EULAs against foreign parties more predictable. Unfortunately, the lack of an international framework complicates the enforcement of choice of law and forum selection provisions where foreign parties are involved.<sup>[2]</sup> Forum selection clauses in EULAs can be disfavored in some jurisdictions. Choice of law clauses enjoy a greater likelihood of enforcement, but foreign courts may not enforce such clauses where they believe it might undermine local public policy (particularly in areas of consumer protection). Finally, if the company manages to obtain a judgment in the United States, the lack of international treaties mandating the recognition of judgments can stymie attempts to enforce the judgment abroad.

So what is a company to do? In an ideal world, there would be a separate EULA for each country that has been catered to the law of that country and players from each country were required to play on servers subject to those restrictions. But of course, that ideal world is one only a lawyer could love -- it's impractical since it is difficult to determine where players are located (particularly problematic users will be behind proxies and IP anonymizer clients) and in many

cases players from one country will be playing on servers intended for another player base (and different rules and regulations for different players on the same server can undermine game play).

As an alternative, a company can adopt a middle-of-the-road approach. First the EULA can include both a choice of law and forum selection provision. If the company elects to include both, the provisions should be separated. Keeping the clauses in the same provision runs the risk of having them both struck down simultaneously under a single unconscionability analysis. In order to increase the likelihood of enforcement of a forum selection clause, the company should consider whether it would like to designate multiple venues across different regions to minimize inconvenience to the foreign party. Finally, the company should consider including an international arbitration clause since the international treaties relating to arbitration awards are significantly more developed and broadly ratified.<sup>[3]</sup>

Authored By:

[Shawn Foust](#) (GamerTag: OMG SRSLY)  
(310) 228-3724  
[sfoust@sheppardmullin.com](mailto:sfoust@sheppardmullin.com)

and

[Craig Cardon](#)  
(310) 228-3749  
[ccardon@sheppardmullin.com](mailto:ccardon@sheppardmullin.com)

---

<sup>[1]</sup> Though if one were inclined to read my editorializing, it would go something like this: Players don't want to play in a world dominated by glitchers, hackers, cheaters, and modders. Companies aren't interested in a world that no one wants to play in (it's hard to extract value from chirping crickets). The EULA and TOS, which are often rolled into the same document, create the foundation for a system of enforcement that makes a livable game-world a reasonable possibility. Otherwise, ANARCHY!

<sup>[2]</sup> For example, the 2005 Hague Convention that was meant to create a framework for enforcing forum selection clauses has failed to gain broad acceptance (Any day now I expect some serious movement. 1...2...3...Ratify! No? Maybe next year.).

<sup>[3]</sup> For example: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified by well 140 countries (including the United States). Under the convention, a party may seek enforcement of the award in any contracting state.