

Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts

By Lorna E. Gillies

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The Internet, or the World Wide Web (“WWW”), has become an integral part of the commercial world. Private consumers have begun to rely heavily on the Internet for their transactions when purchasing goods and services. Technological developments along with the increased in popularity of electronic commerce have created a greater need for consumer protection. The WWW has created unique issues that have affected the consumer’s ability to bring suit in their own jurisdiction against a business conducting transactions with consumers electronically. Throughout the past decade, courts around the world (particularly in the United States) have begun to face an increase in litigation over jurisdictional issues in regards to electronic transactions. Courts have had to interpret existing consumer transactions laws, i.e. jurisdictional and choice of law rules, which were created before the popularity of electronic commerce, in light of the unique issues created by transactions via the WWW.

Courts have struggled to adapt their jurisdictional laws to the issues created by the transactions done through a business’ website, and their attempts have resulted in inconsistent rulings. As a result of electronic commerce, companies that conduct business through the Internet may find themselves subject to the jurisdiction of a court in a place they had not anticipated because consumers have the ability to view their website from anywhere in the world. Therefore, courts have had to balance justice and fairness when applying traditional

jurisdictional laws to parties conducting their business electronically. In *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts*, Lorna Gillies explores international private law and how these laws are being adapted to cope with the unique issues raised by electronic commerce, particularly jurisdictional issues, and gives insight into the factors a court should focus upon when considering such issues. These factors, she explains, should allow a consumer to sue in their own jurisdiction and provide predictability for businesses contracting with consumers via a website.

A Lecturer in Law at the University of Leicester School of Law, Gillies' research is focused upon the conflicts of law and international private law, particularly jurisdiction and choice of law aspects of electronic commerce.¹ She has published works on the topic such as *A Review of the New Jurisdiction Rules for Electronic Consumer Contracts within the European Union*, *Rules of Jurisdiction for Electronic Consumer Contracts*, *New European Rules for Electronic Consumer Contracts*, *Choice of Law Rules for Electronic Consumer Contracts: Replacement of the Rome Convention by the Rome I Regulation*, and *Legal Regulation of Risk in B2C Electronic Commerce- From Top-Down Regulation to Promoting consumer Trust*. Her latest work brings all of her research together and gives an in-depth overview of international private laws dealing with electronic consumer contracts. This book combines the legislative, judicial and scholarly works on the subject to give the reader a vast amount of information on the jurisdiction aspects of electronic consumer contracts.

Electronic Commerce and International Private Law examines recent legislation and case law in the European Union, United Kingdom and the United States and provides the reader with a clear understanding of the reasoning behind them. Gillies calls for greater protection for the

¹ University of Leicester website, <http://www.le.ac.uk/la/staff/leg4/index.html>.

consumer while contracting by electronic means to ensure that they will be able to have their disputes with a foreign seller heard in their own jurisdiction, and believes that courts and legislatures should introduce a connecting factor that shall be precise and effective in order to give parties of a electronic consumer contract predictability when contracting with one another. The underlying theme is Gillies' proposal to have international private law be harmonized for electronic consumer contracts, which in turn will result in greater protection and predictability.

The first part of the book provides the reader with a background on e-commerce and the reason why harmonization is required. Inequality in bargaining power between the consumer and the business creates a need for greater consumer protection in e-commerce because the consumer is in a substantially weaker position. Gillies explains that part of the reason for the greater inequality in Internet transactions is because there has been an increase in cross-border consumer activity via the WWW where there is ambiguity between the consumer and seller. Neither party knows who they are conducting business with and both must rely on the other party to provide information to them. In addition, at the same time cross-border activity has increased, international private law rules governing consumer contracts have been inconsistent.² As a result, there is a need for legislators to provide clearer protection for consumers in such transactions. Since e-commerce has become extremely important in today's society, cooperation between countries regarding electronic consumer contracts has become necessary. Gillies argues that this can only be achieved by taking a universalistic approach to jurisdiction and choice of law rules for electronic consumer contracts, rather than relying on the theory of particularism

² Lorna E. Gillies, *Electronic Commerce and International Private Law* 40 (Geraint Howells ed., Ashgate Publishing Limited) (2008).

which states that international private law shall reflect societal influences and substantive private law.

In the later portions of the book, Gillies goes on to discuss the developments of international private law by exploring the legislation and judicial decision within the European Union (particularly the Brussels 1 Regulation and Rome 1 Regulation), the United Kingdom and the United States. Gillies believes a clearer connecting factor which would subject a business to a consumer's jurisdiction is required and would create predictability for a business and protection for a consumer. According to Gillies, a connecting factor is a link, i.e. directing their activity or principal place of business, between a business and a consumer's jurisdiction that will subject the business to that jurisdiction's legal system or rules. In particular, in the Brussels 1 Regulation there is language which states that a business directing their activities into a forum would be subject to a consumer's jurisdiction. However Gillies argues that when dealing with websites it is not all that clear whether a business is actually directing their activities towards that consumer's jurisdiction. She further states that the European Court of Justice will need to provide further guidance on what will constitute "directing" their activity. With this in mind Gillies goes on to look at the United States courts' decisions regarding electronic consumer contracts. In particular she looks at different types of tests that courts have employed when trying to confer jurisdiction on a business, such as the "sliding scale" or "effects" tests. In the end, Gillies concludes that a new connecting factor should be developed and implemented by the EU, UK and the US, calling it a "target based" test. This new connecting factor should be a rule that focuses on whether the business intentionally targeted the consumer via its website, rather

than whether the website targeted the consumer. She argues that by applying this standard, the scope of a business' online operations can be determined with far greater accuracy.³

While reading this book it is clear that the author has done a tremendous amount of research and is very knowledgeable on the topic. A person practicing or wanting to learn about this area of law would be greatly served by reading this book. It gives a great overview of the law within the EU, UK and US while at the same time going into depth on the issues that appear to be most relevant to recent litigation over electronic consumer contracts. In addition Gillies uses vast sources of information and intertwines them into a coherent argument that can be easily followed. The underlying theme of harmonization of private international law may seem, at first, wishful thinking, but her policy based ideas make it clear that a common connecting factor that courts within the EU, UK and US use to protect consumers in their jurisdiction is a viable option. Her "target based" test would be easy to implement and would be consistent to the tests already in place and being used in many of the US courts' decisions as well as with the Brussels 1 Regulation.

³ Gillies, *supra* note 2.