

PRIVATE INTERNATIONAL LAW AND THE INTERNET

BY DAN JERKER
B. SVANTESSON

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Dan Jerker Börje Svantesson



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In Loving Memory of the Borderless, and Location-independent, Internet

List of Abbreviations

AC	Law Reports: Appeal Cases
AD	Arbetsdomstolen; Arbetsdomstolens Domar
ADR	Alternative Dispute Resolution
All E.R.	All England Law Reports
ALR	Australian Law Reports
ALRC	Australian Law Reform Commission
Ann.	Annotated
BGB	Bürgerlichen Gesetzbuch
BGH	Bundesgerichtshof
B2B	Business-to-Business
B2C	Business-to-Consumer
Cal. App.	California Appellate Reports
Cal. Ct. App.	California Court of Appeal
Cal. Rprt.	California Reporter (West)
Ch.	Chapter
C2C	Consumer-to-Consumer
CCPR-OP1	International Covenant on Civil and Political Rights, First Optional Protocol
Cir.	Court of Appeals (Fed)
CISG	United Nations Convention on Contracts for the International Sale of Goods
CLR	Commonwealth Law Reports
CPR	Civil Procedure Rules
Ct App	Court of Appeal
Cth	Commonwealth
D Conn.	US District Court for the District of Connecticut
EC	European Community

List of Abbreviations

ECJ	European Court of Justice
ECR	Extraordinary Contractual Relief Reporter
E.D.	US District Court for the Eastern District (of a State)
EEC	European Economic Community
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch
e-mail	Electronic Mail
E.M.L.R.	Entertainment & Media Law Reports
ER	The English Reports
EU	European Union
EWHC	High Court, (England & Wales)
F.2d	West's Federal Reporter, Second Series
F.3d	West's Federal Reporter, Third Series
FCA	Federal Court of Australia
F.R.D.	Federal Rules Decisions
F.Supp.	West's Federal Supplement
HCA	High Court of Australia
HKCA	Hong Kong Court of Appeal
HKCFA	Hong Kong Court of Final Appeal
HKCFI	Hong Kong Court of First Instance
HKLR	Hong Kong Law Reports
HTTP	Hypertext Transfer Protocol
ICCPR	International Covenant on Civil and Political Rights
IKL	Lag (1964:528) om tillämplig lag beträffande internationella köp av lösa saker
ILR	International Law Reports
KB	King's Bench Court or Division
LJQB	Law Journal Reports Queen's Bench
Lloyd's Rep.	Lloyd's Reports
MAC	Media Access Control
Md.	Maryland Reports
N.D. Cal.	US District Court of the Northern District of California
N.D.Miss.	US District Court for the Northern District of Mississippi
NJA	Nytt Juridiskt Arkiv, avd. I
N.J. Super.	New Jersey Superior Court Reports
NJW	Neue Juristische Wochenschrift
NSW	New South Wales
NSWLR	New South Wales Law Reports
NSWSC	Supreme Court of New South Wales
NZLR	New Zealand Law Reports
ODR	Online Dispute Resolution
OJ	Official Journal of the European Union
P2P	Peer-to-Peer
PRC	People's Republic of China
QB	Queen's Bench Court or Division
QBD	Law reports, Queen's Bench Division.

Qd R	Queensland Reports
QLD	Queensland
QSC	Supreme Court of Queensland
RB	Rättegångsbalk (1942:740)
RH	Rättsfall från hovrätterna
SAR	Special Administrative Region
SASR	South Australian State Reports
S.Ct.	Supreme Court Reporter
S.D.N.Y.	US District Court for the Southern District of New York
SvJT	Svensk Juristtidning
TAS	Tasmania
TLR	Times Law Reports
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNHRC	United Nations Human Rights Committee
URL	Uniform Resource Locator
US	United States of America
US App.	United States Appeals Reporter
U.S.P.Q.	United States Patents Quarterly
Vic	Victoria
VR	Victorian Reports
VSC	Supreme Court of Victoria
WASCA	Supreme Court of Western Australia
W.D.Pa	US District Court of the Western District of Pennsylvania
WIPO	World Intellectual Property Organization
WL	Westlaw
WLR	Weekly Law Reports
WN	Weekly Notes
WWW	World Wide Web
ZPO	Zivilprozeßordnung

Foreword

Private international law has a long and complex history. The inevitability of legal conflicts between states with different legal and cultural traditions makes it important that rules exist to determine (a) when a particular body of law applies to an activity or dispute; (b) when a state has legislative and regulatory competence over parties; and (c) whether a judgment may be recognised or enforced in a different jurisdiction.

These topics have assumed increased complexity since widespread use of the Internet began in the mid-1990s. The Internet has become omnipresent: individuals now use it to pay their taxes, purchase goods and services, fall in love, communicate with friends and relatives across the world, and perform a myriad of other activities. The Internet has greatly increased the number of communications and transactions in which a transborder element is present, and has also complicated issues of central importance in private international law, such as determining the location of a particular activity. Indeed, the Internet was designed in such a way that data flow through it without regard to national boundaries.

Given the rapid evolution of the Internet and private international law issues even since Professor Dan Jerker B. Svantesson's book was first published in 2007, this second edition is to be heartily welcomed. Academics and practitioners alike owe him a debt of gratitude for his comprehensive and meticulous account of the legal issues of private international law relating to the Internet, which also does not neglect the important policy issues involved. Particularly noteworthy in this second edition are Professor Svantesson's description of issues relating to geo-location technologies (a subject which until now has received insufficient attention in the legal literature); his analysis of the relevant law in the People's Republic of China, a subject of growing importance but one that will be difficult for most readers to penetrate without expert assistance such as is provided by this book; and discussion of significant regional and national developments, such as the Rome

I and II Regulations of the European Union and new case law and legislation in the United States.

Of course, many challenges remain for private international law in the Internet age. Certain advances have been made in reining in exorbitant jurisdictional claims, such as an increasing acceptance that the mere accessibility of a website in a state should not automatically give rise to jurisdiction over it there. However, there are still too many cases where parties are caught between conflicting regulatory or judicial demands with regard to online activities, and where questions of applicable law and jurisdiction cannot be resolved with sufficient certainty. In addition, there is a disconcerting trend for courts, regulators, and legislators to assert their authority with respect to online activity in cases where there may be a minimal, but not a substantial, contact with the forum, and to assert jurisdiction over foreign activities online where there is little chance that a judgment could ever be recognized or enforced.

Just as the Internet increases the chance of conflicts between different jurisdictional regimes, so does it place a burden on legislators, courts, and regulators not to assert their jurisdiction or law in every case where it could conceivably be justified, if the contact with another state is stronger. Such assertions of jurisdiction have the potential of causing political conflicts between states, and often represent a waste of resources. A related problem is the increased reluctance of states and individuals to recognize that their own national law cannot apply to every activity on the Internet that affects them or their forum. What is needed is a balance between protecting the interests of the forum on the one hand, and respect for the boundaries of national jurisdiction on the other hand.

Striking such a balance would be easier if there existed an international treaty or convention providing a comprehensive framework for applicable law, jurisdiction, and recognition and enforcement of judgments arising from Internet activities. An attempt was made several years ago under the auspices of the Hague Conference on Private International Law to agree on such a convention, but (as described in detail in this book) the differences between legal systems, and the attendant political difficulties, proved too difficult to resolve. While those difficulties have not diminished in subsequent years, there does seem to be a growing international realisation that such a convention will be needed sooner or later; thus, the search for harmonised international rules governing applicable law and jurisdiction on the Internet is likely to be one of the most important topics of private international law in the coming years.

All of these considerations strengthen the conviction that this book will remain an indispensable tool on the workbench of academics and lawyers dealing with the Internet and private international law topics, now and in the future.

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of the University of Copenhagen*

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As this book is based on my PhD thesis with the same title, submitted in 2004 at University of New South Wales (Australia), I want to thank all those who helped me in my work on that thesis. Particularly, I would like to thank my supervisors, Professor Graham Greenleaf (University of New South Wales, Australia) and Associate Professor Lee Bygrave (University of Oslo, Norway) for their outstanding support, both during and after the work on the thesis, and the reviewers Professor Jon Bing (Norwegian Research Centre for Computers and Law, Norway), Professor Stephen Saxby (Southampton University) and the late Professor Philip Smart (University of Hong Kong) for their encouraging comments and support. In the context of the PhD, I also wish to thank my parents, Hans and Gun Svantesson, Stiftelsen Lars Hiertas Minne, Carl Jönssons Understödsstiftelse II and the Faculty of Law (UNSW) for the generous financial support I received.

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Gold Coast (Australia)

Dr. Dan Jerker B. Svantesson
1 September 2011

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