

*ELECTRONIC COMMERCE AND INTERNATIONAL PRIVATE LAW: A STUDY OF ELECTRONIC CONSUMER CONTRACTS* BY LORNA E GILLIES (HAMPSHIRE, ENGLAND: ASHGATE PUBLISHING, 2008) 261 PAGES. PRICE £60.00 (HARDCOVER) ISBN 9780754648550.

Dr Lorna Gillies' book, *Electronic Commerce and International Private Law*, is a significant addition to the literature dealing with an area of law that deserves much more attention than it has received so far. Private international law (or international private law as Gillies prefers — I return to the terminology question below) is a fascinating and complex area in its own right. However, when the intricacies of modern communication are added, the area becomes even more fascinating and indeed more complex. In her insightful book, Gillies focuses on how private international law deals with electronic consumer contracts. In doing so, her jurisdictional focus is placed on the laws of the United States and the European Union (with particular emphasis on implementation in United Kingdom law).

The book follows a logical structure and the reader is taken on a well-considered journey. The Introduction is followed by several chapters equipping the reader with the background knowledge necessary to digest the latter chapters dealing with the legal issues involved in *de lege lata* as well as *de lege ferenda*.

Chapter 1 discusses topics such as the aim and scope of private international law, the operation of connecting factors and the relationship between justice in the conflicts setting and justice under material consumer protection law. Chapter 1 also provides a brief discussion of the definition of the term 'consumer'. Having referred to the *Unfair Terms in Consumer Contracts Regulations 1999* (UK) and the *Consumer Protection (Distance Selling) Regulations 2000* (UK) (the reader is not informed about the US position), Gillies states that '[t]his book regards consumers as "natural persons, acting outside their trade or profession"'.<sup>1</sup> While the definition adopted by Gillies is uncontroversial and in line with EU law, as well as international instruments such as the *United Nations Convention on Contracts for the International Sale of Goods*,<sup>2</sup> it would have been interesting if the author had spent more time discussing alternatives to this definition. For example, under Australian law, the term 'consumer' is given a much broader interpretation and includes what could be called business-consumers (that is, businesses making purchases for consumption).<sup>3</sup> This topic is also revisited when Gillies examines how consumers are identified in the context of the *Brussels I Regulation*.<sup>4</sup> However, given that a change to the definition of whom is regarded as a consumer would

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<sup>1</sup> Lorna E Gillies, *Electronic Commerce and International Private Law: A Study of Electronic Consumer Contracts* (2008) 16.

<sup>2</sup> Opened for signature 11 April 1980, 1489 UNTS 58 (entered into force 1 January 1988) ('CISG').

<sup>3</sup> *Trade Practices Act 1974* (Cth) s 4B.

<sup>4</sup> Gillies, above n 1, 78; *Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, [2001] OJ L 12/1 ('Brussels I Regulation').

have several flow-on effects on the private international law rules discussed in her book, it is my view that the definition deserves a great deal more attention.

Chapter 2 is invaluable to a reader with little or no background knowledge of the internet, e-commerce or the legal conundrums that flow from them. While keeping the discussion brief and accessible, Gillies manages to give the reader a very solid introduction to the core complications associated with the application of traditional private international law rules to modern technology.

In Chapter 3, Gillies provides a fascinating discussion of a range of theoretical issues associated with private international law rules for consumer e-commerce. Her discussion of 'universalism' and 'particularism' is particularly insightful and she concludes that '[t]he continued application of particularism as a theory to develop jurisdiction rules for electronic consumer contracts is now outmoded'.<sup>5</sup> In discussing 'harmonisation' as a future theoretical direction for private international law, Gillies mentions the previously proposed *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters*.<sup>6</sup> While the project's original scope was abandoned, the work done on art 7 of the proposed Convention dealing with consumer contracts is highly significant for the book and the author returns to a detailed and informative discussion of the relevant parts of the Convention text in Chapter 10.

Chapters 4, 5, 6 and 7 describe current private international law rules for consumer e-commerce contracts in the EU. The reader is also provided with an overview of how the relevant law developed. These chapters give an accurate, detailed and accessible account of the relevant law, including the *Brussels I Regulation* and the *Rome I Regulation*,<sup>7</sup> as well as of how the UK has applied these instruments. One of the many interesting parts of Chapters 5 and 6 is Gillies' discussion of the connecting factor of a seller 'directing' its activities to consumers in a particular jurisdiction, which is of central importance for the consumer protection afforded by both the *Brussels I Regulation* and the *Rome I Regulation*.<sup>8</sup>

Gillies uses Chapters 8 and 9 to discuss the relevant US law. Like the previous chapters addressing EU law, Chapters 8 and 9 are well written, comprehensive and accessible. Indeed, many readers will find the descriptive discussion of EU and US law in the area to be the most valuable part of the book. It is a great resource for practitioners, and due to the wealth of sources used, a valuable starting point for further research.

Finally, Chapter 10 brings together the discussion and provides some guidance as to possible future developments in the context of how private international law deals with electronic consumer contracts. One of the key conclusions reached is that:

juridical protection for consumers who contract with foreign businesses via the [World Wide Web] can no longer be influenced by national, particularist objectives in isolation to jurisdiction rules in other countries. A universalist,

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<sup>5</sup> Ibid 50.

<sup>6</sup> Ibid.

<sup>7</sup> *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations*, [2008] OJ L 177/6 ('*Rome I Regulation*').

<sup>8</sup> Gillies, above n 1, 87–8.

consistent, predictable approach must operate across different jurisdictions to provide effective juridical protection for consumers.<sup>9</sup>

Furthermore, Gillies correctly asserts that the way forward involves an increased role for international organisations such as the Hague Conference on Private International Law.

While the book is very comprehensive, some areas could have benefited from a more detailed and balanced discussion. What I have in mind are areas where Gillies adopts a somewhat one-sided perspective without addressing strong counterarguments presented by other commentators. For example, while discussing jurisdiction based on the presence of a 'branch, agency or other establishment',<sup>10</sup> Gillies states that '[t]he "location" or "presence" of a web server in a Member State will not establish jurisdiction in that place'.<sup>11</sup> This statement is supported by reasonable arguments, and while Gillies certainly is entitled to reach that conclusion, it would have been interesting to see her address the arguments presented by leading commentators, such as Professor Michael Bogdan who suggests that a web server can be regarded as a 'branch, agency or other establishment' under the *Brussels I Regulation*.<sup>12</sup> Further, with the limited literature available on the topic of private international law and the internet, it is somewhat surprising to see that Gillies does not refer to recent books like Uta Kohl's excellent *Jurisdiction and the Internet*,<sup>13</sup> and perhaps, if I may leave modesty aside, Dan Svantesson, *Private International Law and the Internet*,<sup>14</sup> both of which address issues significantly overlapping with Gillies' book. At the same time, I hasten to add that it is obviously impossible to take account of all relevant works in writing a book like this.

As noted in the introduction, Gillies has chosen to refer to the discipline in question as 'international private law',<sup>15</sup> as opposed to the more common terms of 'private international law' or 'conflict of laws'. Gillies' choice has the advantage of being in line with the terminology used in many other languages (for example, '*Internationales Privatrecht*' in German and '*Internationell privaträtt*' in Swedish). However, neither of these terms are particularly accurate descriptors of the discipline. For example, the issues of jurisdiction and choice of law also arise within federations where they lack an international element. This should exclude the terms 'private international law' and 'international private law' to the purist. Further, we may have a situation where the question of jurisdiction is in dispute while the choice of law is undisputed, thus the term conflict of laws appears equally flawed. Perhaps the lack of a suitable and widely accepted name for this discipline is symbolic of the true complexity of this area of law. While Gillies' book has not managed, and obviously was not intended, to solve the naming issue, it certainly succeeds in what it does set out to do.

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<sup>9</sup> Ibid 211–12.

<sup>10</sup> Ibid 96–7.

<sup>11</sup> Ibid.

<sup>12</sup> See, eg, Michael Bogdan, 'Can a Web-Site Constitute an Establishment for the Purposes of Jurisdiction and Applicable Law?' (Paper presented at the Cyberspace 2005 Conference, Masaryk University, 7–8 November 2005).

<sup>13</sup> Uta Kohl, *Jurisdiction and the Internet: A Study of Regulatory Competence over Online Activity* (2007).

<sup>14</sup> Dan Jerker B Svantesson, *Private International Law and the Internet* (2007).

<sup>15</sup> Gillies, above n 1, 1.

To conclude, Gillies' book *Electronic Commerce and International Private Law* is well written and researched. It achieves what it aims to do and is a highly valuable addition to existing literature in this important field. This is a book that benefits students and academics, as well as the legal profession and those involved in law-making functions. And perhaps most importantly, it is a joy to read.

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