



**ENFORCEMENT OF CONSUMER PROTECTION RULES IN
CROSS-BORDER DISPUTES OF E-COMMERCE**

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1. INTRODUCTION

As the theme of this year's conference points out, globalisation and harmonisation of rules regulating the Internet is essential, but as a follow up step, providing effective enforcement of those rules is also as important. The use of the Internet as a commercial medium has contributed to the globalisation of the consumers, as the Internet by its nature is illimitable with borders. This paper will examine the challenges of 'borderlessness' for enforcement of judgements as regards B2C ecommerce, and will try to set the merits of a system for enabling efficient enforcement.

Providing effective enforcement for consumers in their cross-border disputes of ecommerce is critical for two main purposes. First, it increases consumer confidence and the volume of e-commerce accordingly. The huge market and the vast economical motion that the e-commerce is capable of is precious for the States, as well as the businesses and the consumers who also benefit from this. Therefore it has been intensively promoted by the international policies as well as regional and national strategies. However, further boost of e-commerce is dependent on the consumers' confidence on the medium. Instead of advertising the constructive aspects of online shopping, convincing and solid steps should be taken to prove e-commerce reliable for the consumers. An instrument that is capable of providing effective enforcement of consumer protection rules in cross-border disputes of e-commerce is vital in this regard.

Second, enforcement is essential as a means of post-contractual redress for the consumers. Unified laws for protecting consumers when buying online would offer a lot to consumers in their purchases abroad, however, as regards accessing rights in case of a problem, enforceability of such rules across borders is more important for the consumers. As a matter of fact, the non-enforceable rules are equivalent to those non-exist. Accessing remedies is the most important issue for a consumer who faces a problem regarding his purchase. Therefore, simplicity and efficiency in accessing rights is what really matters as regards consumer confidence.

It is noteworthy that what empowers the consumers is that they are provided with effective legal remedies. To be empowered with enforceable legal weapons considerably increases confidence of the consumers. Even though the consumers usually prefer to not go to the courts for their disputes, it still generates confidence to be able to use their legal rights as a legal threat to counterparty. The findings of a survey conducted by Professor Genn reveals the efficiency of courts and alternative dispute resolution mechanisms for the solution of consumer problems regarding faulty goods and services.¹ According to the results, the consumers, who have sought help and advice from other organisations, were advised to threaten legal action in 23%, where commencing legal action was suggested in only 6%.² Interestingly, taking the case to an ombudsman was recommended in 4%, and to bring the case to mediation and Conciliation were only advised in 2% of all cases, and none of them were reported to go for mediation.³ Other types of alternative dispute resolution were not even indicated as a means of remedy. Consequently, in 18% of the cases legal action were threatened,⁴ where only 3% of the

¹ Professor Genn was engaged by the Nuffield Foundation in 1996 to conduct a large-scale national survey in England and Wales of people's experiences of potentially legal problems. The research used face-to-face interview method. Over 4000 individuals were screened, 1000 follow-up interviews were held, and the results were gathered in a book in 1999. The survey looked at the incidence of 'justiciable' problems, those for which the legal process offered a potential remedy. It examines how people react when they encounter different categories of legal problems. Consumer problems are one of the categories inspected in that survey Genn, H., *Paths to Justice* (Hart, Oxford, 1999)

² Ibid. p.109

³ Ibid. p.109

⁴ Ibid. p.39

cases were taken to court, and even less than 1% attends to a court hearing.⁵ In the light of these findings, the focus of this paper will be restricted to the enforcement of judgements only.

2. CHALLENGES OF ‘BORDERLESSNESS’ TO ENFORCEMENT

By the technology it is based on, “borderlessness” is arguably the primary feature attributable to commerce on the Internet. This brings some grave challenges with it particularly in terms of enforcement of judgements regarding consumer problems.

The first and arguably the gravest one of the challenges is the involvement of cross-border factors. As the Internet based e-commerce facilities take place literally all around the world, things often go beyond borders. Consumers in this broad picture often encounter severe problems as regards cross-border purchases they make online. This is generally because of the gaps in consumer protection regulations across borders, deriving from divergence of substantive standards and legal uncertainty. Therefore, in many cases the consumer may be shorn of his domestic protection rules and remedies, when making a purchase abroad. However, an effective consumer protection framework for e-commerce should have the competence to respond to the challenges of cross-border transactions. The best approach to address this problem is the utilization of potent international co-operation and information sharing. Thus, close co-operation and co-ordination among states needs to be developed for establishing international surveillance, investigation and enforcement schemes to increase consumer confidence in e-commerce.

Secondly, sometimes what “borderlessness” brings may pose a challenge to state sovereignty. State sovereignty basically refers to territoriality. The governing principle is that a state cannot take measures on the territory of another state by way of enforcement of national laws without the consent of the latter.⁶ However, extraterritoriality commenced replacing the traditional approach of sovereignty, where the extraterritorial applications started to turn out to be a challenge and prove the inadequacy of strict

⁵ Ibid. p.156

⁶ Brownlie, I., *Principles of Public International Law* (Clarendon Press, Oxford, 4th ed., 1990), p.307

territorial attitude.⁷ This new perception allows for the extended application of territorial jurisdiction, which enables managing the problems posed by e-commerce in the trend of de-territorialisation.⁸ At any rate, such a structure in the tendency of operating across borders, the determination of jurisdictional competence with man-made map borders remains insufficient. As Burnstein stated: “Nations must be willing to relinquish some measure of sovereignty in exchange for the benefits of the Internet, and ultimately nations should not allow national laws and local regulations to obstruct the thriving global Internet”⁹ The autonomous will power and the willingness of the states to take part in internationalisation is the key that compromises the challenges to its sovereignty.

Finally, borderlessness poses some challenges in physically locating the actors of e-commerce. Since the Internet cannot appreciate the physical existence of the world, geographical locations lose in sense. This creates problems especially in cases where physical location is essential in determining the jurisdiction and the law to be applied. Hence it was stated in The Hague Conference that, “Physical localisation other than the place of habitual residence declared by the consumer is no longer operational for the needs of e-commerce.”¹⁰ It also poses challenges as regards identifying the people (the business), where the physical location cannot be recovered. This difficulty in locating the counterparty reduces the traceability and the enforceability accordingly.

7 In order to serve a need emerged from extraterritorial negative effects of antitrust law applications, ‘effects doctrine’, according to which, states claim jurisdiction over acts committed abroad that produce harmful effects within the territory, has been introduced.

8 The same approach was employed in making the decision of the famous Yahoo! Case. UEJF et LICRA v. Yahoo France, Tribunal de Grande Instance de Paris, No RG: 00/05308, May 22, 2000 and November 20, 2000.

⁹ Burnstein, M., ‘A Global Network in a Compartmentalised Legal Environment’ in Boele-Woelki and Kessedjian (eds.), *Internet Law: Which Court Decides, Which Law Applies?* (The Hague: Kluwer Law International, 1998), p.34

10 Hague Conference in Private International Law, “Electronic Data Interchange, Internet and Electronic Commerce”, Preliminary Document No 7 of April 2000, p. 20 at: http://www.hcch.net/upload/wop/gen_pd7e.pdf

3. CHANNELS TO DEVELOP THE CAPACITY OF AN ENFORCEMENT SCHEME

Developing the capacity of an enforcement scheme, the first measures to be taken should be to increase the consumers' access to courts, which are the sources of enforceable decisions. Most of the consumer disputes that occur in e-commerce are of justiciable nature. In spite of this, unfortunately, consumers avoid taking legal action even where the dispute is a domestic one. The main reason for this is that, the consumers generally do not find it worthy to bear the hassle taking the value of the goods or services purchased. Some of the attempts to settle the dispute through negotiating the counterparty are professionally brushed off by the manoeuvres of the businesses. However, those small amounts given up by the consumers add on top of one another and get into the pockets of dishonest traders almost as an award for their success in handling with consumer complaints. The legal costs also have an important off-putting role in this surrender. Duggan emphasises the consequences of overly discouraging people from litigation. He states that it causes the under-supply of corrective justice and under-supply of deterrence.¹¹ What is more, he denotes that, high -sometimes fixed- legal costs discriminate systematically in favour of large claims against small claims, and similarly in favour of repeat players (such as businesses) against one-shotters (consumers). Therefore, in order to increase the motives to promote access to courts, consumer judgements should be free of legal costs. The governments, instead of passively supporting the unjust benefits of the businesses by overlooking, should actively maintain protection of consumers by providing them with easy access to legal remedies against those unfair business practises. Out-of-court redress mechanisms, which can offer a dispute resolution opportunity free of charge is a useful supplementary institute, however, cannot exactly be accepted as a substitute to courts. It is not acceptable for a consumer to choose to use one of these methods, just because he has to. Alternative dispute resolution methods should not be seen as mechanisms that cover the consumers who are left with no option else than being sheltered by those because they are deprived

¹¹ Duggan, A., 'Consumer access to justice in common law countries: a survey of the issues from a law and economics perspective', in Rickett and Telfer, *International Perspectives on Consumers' Access to Justice* (Cambridge University Press, Cambridge, 2003), p.47

of using their legal rights through the courts. The justice system of a so-called social state should provide the means to enable all the consumers including the low-income ones to benefit from jurisdictional services, which generally are one of the exclusive authorities of a state. Legal aids may also be employed for facilitating such an all embracing legal system, however, a system excluding consumer claims from legal fees and expenses would represent a more consistent regime.

Secondly, the governmental policies are of great importance in shaping the way enforcement is handled due to their exclusive governmental capacities. Governmental policies are the determinants of the applications with differing priorities. Unsatisfactory governmental commitment, inadequate sources and poor grants weakens the effectiveness of enforcement. Similarly, the preferences of governments may cause excessive bureaucracy, which may create obstacles for the consumers to access to justice. The approach of a government to international co-operation is another important factor that directly affects the success of an enforcement scheme. This becomes more critical for the cross-border disputes deriving from e-commerce. Whatever regime emerges must, however, have a large measure of consistency, predictability and transparency.¹²

A subsequent means of improving enforcement is the harmonisation of laws. Harmonised laws significantly increase the cross-border enforceability of judgements. Here we will make a twofold classification regarding the legal area. First we will deal with the harmonisation of substantive laws. Second, we will look at the harmonisation of private international laws.

Harmonisation of substantive laws regarding the protection of consumers in their cross-border purchases would reduce the gap emanating from divergence laws, which would contribute to legal certainty and consumer confidence. Besides, as regards providing redress, proximity in national laws would increase the common acceptance of consumer disputes and enhance the cross-border enforceability. Unified substantive laws would

¹² Cox, N., "The Extraterritorial Enforcement of Consumer Legislation and the Challenge of the Internet" (2004) 8(1) *Edinburgh Law Review* 57-80 (paper given at the 18th biennial LAWASIA Conference, Tokyo, Japan, 1st-4th September 2003) at: <http://www.geocities.com/noelcox/Tokyo.html>

increase the willingness of the states to co-operate for enforcing foreign judgements. The process of legal harmonisation has divergent forms. Unification of laws by regional or international multilateral treaties is one of the most effective ways of harmonisation. Adoption of model laws and international restatements also promote the consistency among national regulations. International standards (such as technology standards) and soft laws, despite not representing an implementation model, can be said to contribute to convergence of national laws. In the age of globalisation, this sort of a collaborative approach is inevitable for the states. When they have to act the states cannot act in isolation, they have to co-operate in order to define norms, which are internationally acceptable at all.¹³

As is the case for many areas of law, e-commerce poses challenges in terms of conflict of laws and rules of jurisdiction for consumer contracts concluded online. The need for harmonisation of private law has always been felt most clearly within regions where trans-boundary social and commercial exchange is particularly intense.¹⁴ Through its far-reaching capabilities, the Internet has been an astonishingly intense medium to operate cross-border facilities *inter alia* e-commerce. This turns the whole world into a region, where legal convergence is inevitable. In this globalising trend of the law, the Hague Conference on Private International Law has a major role. The Hague Conference is currently working on a draft convention to cover Jurisdiction and Foreign Judgements in Civil and Commercial Matters, which is intended for accomplishing world-wide approval. There the drafters are trying to set the merits of an international legal system that is competent to tackle the global challenges posed. However, agreement is difficult to reach, and a political blockage is quite likely when higher levels of protection for consumer disputes are attempted. In fact, harmonised regulations are not usually the best laws, but rather the outcome of the maximisation endeavours of minimum agreement points.

¹³ Hague Conference in Private International Law, "Electronic Data Interchange, Internet and Electronic Commerce", *Preliminary Document No 7 of April 2000*, p. 18 at: http://www.hcch.net/upload/wop/gen_pd7e.pdf

¹⁴ Jurgen Basedow, "Worldwide Harmonisation of Private Law and Regional Economic Integration" (2003) 8 *Unif. L. Rev.* p.36

The initial purpose of harmonisation is to increase legal foreseeability and the reliability of judgments at international level for the benefit of both the businesses and the consumers. The means of doing so consist of suggesting simple and effective solutions that are easily applicable by judges and lawyers and to strike a balance between the interests of claimants and defendants.¹⁵

Last of all to mention, promotion of international institutions and organisations to facilitate the enforcement of consumer judgements is another mechanism for reinforcing enforcement capacity. Such a system could be maintained by establishing contact points in every state and providing an intense communication and mutual assistance between them for the purpose of enabling consumers in accessing their rights abroad. Structuring an international enforcement network to collaborate with competent legal systems, which keep up with the international standards, would extensively contribute to smooth the process towards maintaining cross-border redress for consumers that are buying online. International Consumer Protection Enforcement Network (ICPEN) is a suitable example of this type. It is a membership organisation of national enforcement practitioners that share information about cross-border commercial activities affecting consumer interests. It certainly contributes to consumers in accessing their rights, but it has a very limited range, compared to the reach of e-commerce. Therefore, either the capacity of this organisation needs to be extended to cover -utopianly- all the states, or a new and comprehensive international forum to ensure that consumers are protected with effective enforcement mechanisms that enable them to access their rights should be introduced. The best forum to address this task may possibly be the UN due to its far-reaching capability.

¹⁵ The European Commission Justice and Home Affairs, "Hearing on the Draft Convention of the Conference of the Hague on Jurisdiction and Foreign Judgments in Civil and Commercial Matters" 24 October 2001, at: http://europa.eu.int/comm/justice_home/unit/civil/audition10_01/index_en.htm

4. CONCLUSION

E-commerce through the Internet has brought numerous novelties, however, together with a myriad of legal problems. Protection of the consumers as being the vulnerable actors of cross-border e-commerce is one of the main concerns of the law-makers.

However, this new technology poses various challenges to traditional laws and legal definitions of the states, which makes things more complicated for the consumers struggling to obtain remedies abroad. When cross-border factors get involved, the nature of the dispute turns into an extra-national one, where enforcement remains purely national. To fill in the gap between the national enforcement and extra-national enforcement is critical for the consumers as being the determinant of accessing rights. A fast, low-cost and easy to access system should be established with close cooperation amongst states in order to provide effective enforcement for consumers.

Therefore a legal system claiming to provide adequate protection for its consumers should initially be capable of counter-challenging the technology. The answer to improve its potential to be able to cope with the 'borderlessness' feature of the medium, a legal system needs to adopt de-territorialised and internationalised formulations. Admitting this fact, the paternalist and protectionist approach of nationalism should be minimised in order to develop efficient law protection mechanisms for the consumers taking part in e-commerce. Henceforth, a country has no choice but to promote vigorously the introduction of new technology in order to maintain and increase its international competitiveness.¹⁶

¹⁶ Serafini and Andrieu, *The Information Revolution and its Implications for Canada* (Canadian Minister of Supply and Services, Ottawa, 1981) p.96