

# Table of Contents

<b>List of Abbreviations</b>	<b>xv</b>
<b>Foreword</b>	<b>xix</b>
<b>Acknowledgements</b>	<b>xxi</b>
<b>Chapter 1</b>	
<b>Introduction</b>	<b>1</b>
I. From the Illusion of a Borderless 'No-Man's Land' to the Reality of a Location-Sensitive 'Every-Man's Land'	2
II. The Substantive Focus	4
A. Issues	6
1. Jurisdiction	7
2. Declining Jurisdiction	10
3. Choice of Law	11
4. Recognition and Enforcement of Judgments	12
B. Areas of Law	13
1. Contracts	13
2. Consumer Contracts	14
3. The Tort of Defamation	15
4. Trademarks	16
5. The Relationship between Contracts, Torts and Trademarks	17
III. The Jurisdictional Focus	18
A. Australia	19
B. England	19
C. Germany	20
D. Hong Kong SAR	20
E. Sweden	20
F. The People's Republic of China	21



## *Table of Contents*

G. The United States of America	22
H. The Chosen Mix of States	23
IV. Comments on the Terminology	24
A. Private International Law, Conflict of Laws or Jurisdictional Issues?	24
B. IT Law, Cyberspace Law or Internet Law	26
C. The Relevant Actors	27
 <b>Chapter 2</b>	
<b>Approaching the Internet</b>	<b>29</b>
I. The Internet's Characteristics	33
A. Borderlessness	34
B. Geographical Independence	35
C. Limited Language Dependence	37
D. One-to-Many	38
E. Low Threshold Information Distribution	39
F. Widely Used	40
G. Portability	41
H. Limited Utilization of Geographical Identifiers	44
I. Reactive Nature	46
J. Lack of Central Control	49
K. Convergence	50
II. Consequences of the Characteristics of Internet Communication	52
A. Consequences for the Jurisdictional Issues in General	52
B. Consequences for the Jurisdictional Issues in Contracts	56
C. Consequences for the Jurisdictional Issues in the Tort of Defamation	57
D. Consequences for the Jurisdictional Issues in Trademarks	60
III. Concluding Observations	61
 <b>Chapter 3</b>	
<b>Approaching Private International Law</b>	<b>63</b>
I. Unilateralism and Multilateralism	64
II. Desirable Qualities of Private International Law Rules	67
A. Legitimate Party Expectations (A Fundamental Quality)	73
1. The Relation between Predictability and Flexibility	75
2. Contracts	77
3. Defamation	82
4. Trademarks	84
B. Suitable Level of Generalization (A Fundamental Quality)	84
C. Abuse-Resistance (A Fundamental Quality)	85
D. Non-Violation of Public International Law (A Fundamental Quality)	87
1. The Statute of the International Court of Justice	89
2. International Customs	90
E. Forum-Neutral Language (A Fundamental Quality in Some Settings)	96



F. Policy Fulfilment (A Non-fundamental Quality)	96
G. Efficiency (A Non-fundamental Quality)	100
H. Simplicity (A Non-fundamental Quality)	101
I. Wide Acceptance (A Non-fundamental Quality)	101
J. Independence from Substantive Law Concepts (A Non-fundamental Quality)	102
III. Principles to Guide the Application of Private International Law Rules	103
IV. Concluding Observations	105

## Chapter 4

<b>Traditional Common Law: Australia, England and Hong Kong SAR</b>	<b>107</b>
I. Jurisdiction	109
A. Contracts	115
1. Limits on Exclusive Forum Selection	116
B. Defamation	118
C. Trademarks	126
II. Declining Jurisdiction	131
A. <i>Forum Non Conveniens</i>	132
B. <i>Lis Alibi Pendens</i>	147
C. Ineffectiveness	147
III. Choice of Law	148
A. Contracts	148
1. Limits on the Selection of Applicable Law	150
B. Defamation	151
C. Trademarks	156
IV. Recognition and Enforcement	157

## Chapter 5

<b>The United States of America</b>	<b>159</b>
I. Jurisdiction	159
A. Contracts	170
1. Limits on Exclusive Forum Selection	174
B. Defamation	174
C. Trademarks	180
II. Declining Jurisdiction	182
A. <i>Forum Non Conveniens</i>	182
B. <i>Lis Alibi Pendens</i>	184
III. Choice of Law	185
A. Contracts	185
1. Limits on the Selection of Applicable Law	187
B. Defamation	188
C. Trademarks	189
IV. Recognition and Enforcement	190



## Table of Contents

### Chapter 6

<b>European Civil Law: Germany and Sweden</b>	<b>195</b>
I. Jurisdiction	196
A. Contracts	201
1. Limits on Forum Selection	203
B. Defamation	204
C. Trademarks	208
II. Declining Jurisdiction	209
A. <i>Forum Non Conveniens</i>	209
B. <i>Lis Alibi Pendens</i>	211
C. Ineffectiveness	212
III. Choice of Law	212
A. Contracts	213
1. Limits on the Selection of Applicable Law	214
B. Defamation	215
C. Trademarks	218
IV. Recognition and Enforcement	218

### Chapter 7

<b>The People's Republic of China</b>	<b>221</b>
I. Jurisdiction	223
A. Definition of <i>Shewai</i> Cases	224
B. Contracts	226
1. Limits on Exclusive Forum Selection	227
C. Defamation	232
D. Trademarks	234
II. Declining Jurisdiction	236
III. Choice of Law	237
A. Contracts	239
1. Limits on the Selection of Applicable Law	241
B. Defamation	242
C. Trademarks	243
IV. Recognition and Enforcement	244

### Chapter 8

<b>International Instruments</b>	<b>247</b>
I. The Relevant European Instruments	248
A. Brussels I Regulation/New Lugano Convention	248
B. Brussels Convention/1988 Lugano Convention	261
C. Rome I Regulation	265
D. Rome Convention	269
E. Rome II Regulation	272
F. Directive on Unfair Terms in Consumer Contracts	278
G. E-commerce Directive	280
H. Regulation Establishing a European Small Claims Procedure	282



II. The Relevant Hague Conventions	286
A. The Hague Convention 1955	287
B. The Previously Proposed Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters	287
1. An Overview	288
2. The Relevant Provisions	289
3. Some Words about the Negotiations Process	289
4. The Future of the 'Judgments Project'	290
C. The Hague Convention 2005 on Choice of Court Agreements	291
D. Proposal for a Hague Instrument on Choice of Law in International Contracts	298
III. Other International Instruments of Relevance	299
A. United Nations Convention on Contracts for the International Sale of Goods 1980	299
B. New York Convention 1958	300
C. Charter of the United Nations	301
D. International Covenant on Civil and Political Rights (ICCPR)	308
1. Alpert's ICCPR Challenge to Australian Jurisdiction	309
2. Exhaustion	311
3. Jurisdiction	311
4. Substantive Dispute	312
5. Concluding Remarks	313
E. Paris Convention for the Protection of Industrial Property and the TRIPS Agreement	314

## Chapter 9

<b>A Critique of Current Rules of Private International Law</b>	<b>317</b>
I. Rules of Jurisdiction	319
A. Uninteresting and Uncontroversial Jurisdictional Grounds	319
B. Uninteresting but Controversial Jurisdictional Grounds	320
C. The Doctrine of General Jurisdiction	321
D. Submission	322
1. Submission after the Dispute Arises	322
2. Contract Nominating Forum (Submission before the Dispute Arises)	323
3. The Hague Convention on Choice of Court Agreements	324
E. The Location of Contract Formation	329
F. The Applicable Law Being the Law of the Forum	331
G. The Location of Contract Performance	331
H. Contract Breached within the Forum	332
I. Location of Object of Litigation	332
J. US Contractual Specific Jurisdiction	333
K. The Place of the Wrongful Act and the Place of Harm	333
1. Jurisdiction Exercised over Step One	336
2. Jurisdiction Exercised over Step Two	336



## Table of Contents

3. Jurisdiction Exercised over Step Three	338
4. Jurisdiction Exercised over Step Four	344
5. Extent of Plaintiff's Reputation	345
6. Enforcement Difficulties	347
7. Prior Notice (Foreseeability)	348
8. Jurisdiction Exercised over Step Five	353
9. Jurisdiction Exercised over Step Six	354
10. Concluding Observations in Relation to Jurisdiction Based on Place of Wrong/Place of Harm	355
L. Plaintiff's Habitual Residence or Domicile	355
M. The Location of the Server	356
N. US Effects Test	357
O. Plaintiff's Location when Observing the Infringement	358
P. Injunctions	358
Q. Detainable Property within the Forum State	359
R. Representative Office/Branch	360
S. Location of Registration	361
T. Directing Activities/Targeting	361
II. Rules of Declining Jurisdiction	368
A. <i>Forum Non Conveniens</i>	368
1. How Can Judges Take Away What the Lawmakers Have Given to the Plaintiff?	369
2. Too Much Discretion	370
3. Lack of Uniformity	372
4. Delays the Process	373
5. 'Case-Shopping' Used to Ease the Courts' Workload	373
6. 'Case-Shopping' Used to Protect Domestic Interests	374
7. Discretion to Uphold Choice of Forum Clauses Nominating a Foreign Forum	375
8. Conditional Exercise of <i>Forum Non Conveniens</i>	376
9. <i>Forum Non Conveniens</i> : Clearly Inappropriate for International Instruments	377
10. <i>Forum Non Conveniens</i> : Superfluous if Jurisdictional Rules Are Reasonable	378
11. The Doctrine Is Easily Circumvented	379
12. The Doctrine Has Lost Its Meaning in Modern Society	379
13. Conclusions Regarding the Doctrine of <i>Forum Non Conveniens</i>	380
B. <i>Lis Alibi Pendens</i>	381
C. Ineffectiveness	381
III. Rules of Choice of Law	382
A. Contract Designated Law	382
B. Closest Connection	383
C. Law of Buyer's Domicile	383
D. <i>Lex Fori</i>	384
E. <i>Lex Loci Delicti</i>	384



F. The 'Double Actionability' Test and Its Flexible Exception	385
G. The Law of the Parties' Common Habitual Residence	386
H. <i>Lex Loci Protectionis</i>	387
I. The Law of the Victims Habitual Residence	387
J. <i>Lex Loci Damni</i>	388
IV. Rules of Recognition and Enforcement	389
A. No Recognition and Enforcement	389
B. Convention-Based Recognition and Enforcement	390
C. Reciprocity	390
D. Restricted Recognition and Enforcement	391
V. Concluding Observations	392

## Chapter 10

<b>Geo-identification: Time to Take Technology Seriously</b>	<b>395</b>
I. Internet Architecture, Regulation and 'Borders'	396
II. Geo-location Technologies	398
A. Sophisticated Geo-location Technologies	400
1. Client-Side Geo-location	400
2. Server-Side Geo-location	401
3. The Future of Sophisticated Geo-location Technologies	414
B. Unsophisticated Geo-location Technologies	418
C. Geo-location Technologies in Practice	419
III. Non-Technical Means of Geographical Identification	426
A. Disclaimers	427
B. 'Click-Wrap' Agreements	429
C. Menus: The Better and Worst Alternative	430
D. Delivery Address	431
1. Digitized Products	432
E. Offline Identification	433
F. Non-Technical Geo-identification in Practice	433
IV. Geo-identification: A Question of Attitudes	435
V. Concluding Observations	440

## Chapter 11

<b>Proposed 'Defamation Convention Model'</b>	<b>445</b>
I. Structure of the Models	446
II. Introduction to the 'Defamation Model'	446
III. Basic Features of the Proposed Model	447
IV. Article-By-Article	450
V. Putting The 'Defamation Model' to the Test	468

## Chapter 12

<b>Proposed 'Contracts Convention Model'</b>	<b>471</b>
I. Basic Features of the Proposed Model	471
II. Article-By-Article	472
III. Putting the 'Contracts Model' to the Test	489



*Table of Contents*

<b>Chapter 13</b>	
<b>Concluding Remarks</b>	<b>491</b>
<b>Appendix 1</b>	<b>495</b>
<b>Appendix 2</b>	<b>499</b>
<b>Appendix 3</b>	<b>503</b>
<b>Selected Bibliography</b>	<b>507</b>
<b>Table of Authorities</b>	<b>529</b>
<b>Index</b>	<b>547</b>