Digital Contracts in Global Surroundings

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Proposed abstract

The world is changing dramatically and rapidly due to advances in information technology; in particular the Internet. But despite these changes, the central role of contracts remains. In fact, it seems the role contracts play in our lives is increasing. And arguably, this trend is particularly clear in the context of cross-border online interactions raising questions of which court(s) may claim jurisdiction, and which (country's) substantive law will govern the cross-border online interaction.

This paper commences by examining this trend, and three other clear trends noticeable in digital contracts in global surroundings, namely:

- That the Internet cannot be allowed to be a lawless space;
- That cross-border online interaction fills a valuable function; and
- That there is (still) a strong focus on territoriality.

Some of these trends are so self-evident that we take them for granted, but they are all worth taking note of; the first two because of the fact that they were much less obvious not so long ago, and the third because it in fact now represent a roadblock for serious – and much needed – reform of our approach to jurisdiction.

Following that introductory part, this paper examines the central question of the validity of choice of court and choice of law terms in digital contracts. In this context, account is taken of both older decisions and the most recent developments such as those visible in the ongoing Canadian case of Douez v. Facebook Inc, and in Advocate General Saugmandsgaard Øe’s Opinion in Verein für Konsumenteninformation (C-191/15) delivered on 2 June 2016.

The third section focuses on selected problem areas in which the cross-section of private international law rules, contracts and Internet interaction produces undesirable outcomes or at best, uncertainty. More specifically those problem areas include:

- The ‘targeting’ test;
- The location of contract formation; and
- The location of contract performance.

Finally, the paper finishes by making a set of summarising observations and speculations.

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