

Table of Contents

Foreword to Third Edition	xvii
Foreword to Second Edition	xix
Foreword to First Edition	xxi
List of Abbreviations	xxv
Acknowledgements	xxix
CHAPTER 1	
Introduction	1
I. The Seven Themes of the Current Paradigm of Private International Law and the Internet	2
A. A Recognition That the Internet Cannot Be Allowed to Be a Lawless Space	2
B. From the Illusion of a Borderless ‘No-Man’s Land’ to the Reality of a Location-Sensitive ‘Every-Man’s Land’	3
C. An Appreciation That Cross-Border Online Interaction Fills a Valuable Function	6
D. A Mismatch between ‘Oughts’ and ‘Cans’	6
E. A Universal Focus on Territoriality	7
F. A Focus on Extraterritorial Enforceability of the Extraterritorial Claim at the Expense of Ignoring Domestic Enforceability of Extraterritorial	11
G. A Focus on Effective Enforceability of Jurisdictional Claim at the Expense of Ignoring the Broader Function of Law	12
II. The Substantive Focus	14
A. Issues	16
1. Jurisdiction	17

Table of Contents

	a.	Scope of (Remedial) Jurisdiction as a Third Type of Jurisdiction?	20
	2.	Declining Jurisdiction	24
	3.	Choice of Law	25
	4.	Recognition and Enforcement of Judgments	26
	B.	Areas of Law	27
	1.	Contracts	27
	2.	Consumer Contracts	28
	3.	The Tort of Defamation	29
	4.	Intellectual Property	31
	5.	The Relationship between Contracts, the Tort of Defamation and Intellectual Property	37
III.		The Jurisdictional Focus	38
	A.	Australia	39
	B.	England	40
	C.	Germany	40
	D.	Hong Kong SAR	40
	E.	Sweden	41
	F.	The People's Republic of China	41
	G.	The United States of America	43
	H.	The Chosen Mix of States	44
IV.		Comments on the Terminology	44
	A.	Private International Law, Conflict of Laws or Jurisdictional Issues?	45
	B.	IT Law, Cyberspace Law or Internet Law	47
	C.	The Relevant Actors	48
CHAPTER 2			
Approaching the Internet			51
I.		The Internet's Characteristics	56
	A.	Borderlessness	56
	B.	A Degree of Geographical Independence	58
	C.	Limited Language Dependence	60
	D.	One/Many-to-Many	61
	E.	Low Threshold Information Distribution	62
	F.	Widely Used	63
	G.	Portability	64
	H.	Limited Utilization of Geographical Identifiers	66
	I.	Reactive Nature	68
	J.	Lack of Central Control	72
	K.	Convergence	73
	L.	Intermediaries Playing a Central Role	74
II.		Consequences of the Characteristics of Internet Communication	78
	A.	Consequences for the Jurisdictional Issues in General	78

B.	Consequences for the Jurisdictional Issues in Contracts	82
C.	Consequences for the Jurisdictional Issues in the Tort of Defamation	83
D.	Consequences for the Jurisdictional Issues in Intellectual Property	86
III.	Concluding Observations	87
CHAPTER 3		
	Approaching Private International Law	89
I.	Unilateralism and Multilateralism	91
II.	Desirable Qualities of Private International Law Rules	94
A.	Legitimate Party Expectations (A Fundamental Quality)	101
1.	The Relation between Predictability and Flexibility	103
2.	Contracts	105
3.	Defamation	111
4.	Trademarks	113
5.	Copyright	114
B.	Suitable Level of Generalization (A Fundamental Quality)	114
C.	Abuse-Resistance (A Fundamental Quality)	115
D.	Non-violation of Public International Law (A Fundamental Quality)	117
1.	The Statute of the International Court of Justice	121
2.	International Customs	122
3.	Public International Law in the Form of International Trade Law	130
E.	Non-violation of Human Rights Law (A Fundamental Quality)	130
F.	Policy Fulfilment (A Non-fundamental Quality)	132
G.	Forum-Neutral Language (A Fundamental Quality in Some Settings)	136
H.	Efficiency (A Non-fundamental Quality)	137
I.	Simplicity (A Non-fundamental Quality)	138
J.	Wide Acceptance (A Non-fundamental Quality)	139
K.	Independence from Substantive Law Concepts (A Non-fundamental Quality)	139
L.	Sufficient Specificity (A Non-fundamental Quality)	140
III.	Principles to Guide the Application of Private International Law Rules	141
IV.	Concluding Observations	144
CHAPTER 4		
	Traditional Common Law: Australia, England and Hong Kong SAR	147
I.	Jurisdiction	149
A.	Contracts	155
1.	Limits on Exclusive Forum Selection	157
B.	Defamation	159

Table of Contents

	C. Intellectual Property	171
II.	Declining Jurisdiction	180
	A. <i>Forum Conveniens</i> and <i>Forum Non Conveniens</i>	180
	B. <i>Lis Alibi Pendens</i>	202
	C. Ineffectiveness	204
	D. Abuse of Process	205
III.	Choice of Law	208
	A. Contracts	208
	1. Limits on the Selection of Applicable Law	210
	B. Defamation	211
	C. Intellectual Property	216
IV.	Recognition and Enforcement	217
CHAPTER 5		
The United States of America		221
I.	Jurisdiction	222
	A. Contracts	234
	1. Limits on Exclusive Forum Selection	238
	B. Defamation	238
	C. Intellectual Property	246
II.	Declining Jurisdiction	249
	A. <i>Forum Non Conveniens</i>	249
	B. <i>Lis Alibi Pendens</i>	251
III.	Choice of Law	251
	A. Contracts	252
	1. Limits on the Selection of Applicable Law	254
	B. Defamation	255
	C. Intellectual Property	256
IV.	Recognition and Enforcement	257
CHAPTER 6		
European Civil Law: Germany and Sweden		263
I.	Jurisdiction	265
	A. Contracts	270
	1. Limits on Forum Selection	272
	B. Defamation	275
	C. Intellectual Property	278
II.	Declining Jurisdiction	282
	A. <i>Forum Non Conveniens</i>	282
	B. <i>Lis Alibi Pendens</i>	284
	C. Ineffectiveness	285
III.	Choice of Law	285
	A. Contracts	286
	1. Limits on the Selection of Applicable Law	287
	B. Defamation	288

	C. Intellectual Property	291
IV.	Recognition and Enforcement	291
CHAPTER 7		
	The People's Republic of China	295
I.	Jurisdiction	297
	A. Definition of <i>Shewai</i> Cases	298
	B. Contracts	299
	1. Limits on Exclusive Forum Selection	300
	C. Defamation	305
	D. Intellectual Property	307
II.	Declining Jurisdiction	310
III.	Choice of Law	311
	A. Contracts	313
	1. Limits on the Selection of Applicable Law	315
	B. Defamation	316
	C. Intellectual Property	317
IV.	Recognition and Enforcement	318
CHAPTER 8		
	International Instruments	321
I.	The Relevant European Instruments	322
	A. Brussels I <i>bis</i> Regulation /New Lugano Convention	323
	B. Brussels Convention /1988 Lugano Convention	348
	C. Rome I Regulation	351
	D. Rome Convention	356
	E. Rome II Regulation	359
	F. Directive on Unfair Terms in Consumer Contracts	365
	G. Directive on Consumer Rights	367
	H. E-commerce Directive	369
	I. Regulation Establishing a European Small Claims Procedure	373
	J. Directive on Consumer ADR and Regulation on Consumer ODR	376
	K. European Convention on Human Rights	380
	L. Proposal for a Regulation on a Common European Sales Law	381
	M. Proposals for Directives concerning Contracts for the Supply of Digital Content and concerning Contracts for the Online and Other Distance Sales of Goods	382
II.	The Relevant Hague Conventions	384
	A. The Hague Convention 1955	385
	B. The 'Judgments Project'	386
	1. An Overview	387
	2. The Relevant Provisions	388
	3. Some Words about the Negotiations Process	388
	4. The Future of the 'Judgments Project'	389
	C. The Hague Convention 2005 on Choice of Court Agreements	393

Table of Contents

	D.	Hague Principles on Choice of Law in International Commercial Contracts	400
III.		Other International Instruments of Relevance	402
	A.	United Nations Convention on Contracts for the International Sale of Goods 1980	403
	B.	New York Convention 1958	404
	C.	Charter of the United Nations	405
	D.	International Covenant on Civil and Political Rights (ICCPR)	411
		1. Alpert's ICCPR Challenge to Australian Jurisdiction	413
		2. Exhaustion	414
		3. Jurisdiction	414
		4. Substantive Dispute	416
		5. Concluding Remarks	417
	E.	Paris Convention for the Protection of Industrial Property, Berne Convention for the Protection of Literary and Artistic Works and the TRIPS Agreement	417
CHAPTER 9			
		A Critique of Current Rules of Private International Law	423
I.		Rules of Jurisdiction	426
	A.	Uninteresting and Uncontroversial Jurisdictional Grounds	426
	B.	Uninteresting but Controversial Jurisdictional Grounds	427
	C.	The Doctrine of General Jurisdiction	428
	D.	Submission	429
		1. Submission after the Dispute Arises	429
		2. Contract Nominating Forum (Submission before the Dispute Arises)	430
		3. The Hague Convention on Choice of Court Agreements	431
	E.	The Location of Contract Formation	436
	F.	The Applicable Law Being the Law of the Forum	438
	G.	The Location of Contract Performance	438
	H.	Contract Breached within the Forum	439
	I.	Location of Object of Litigation	439
	J.	US Contractual Specific Jurisdiction	440
	K.	The Place of the Wrongful Act and the Place of Harm	440
		1. Jurisdiction Exercised over Step One	442
		2. Jurisdiction Exercised over Step Two	443
		3. Jurisdiction Exercised over Step Three	444
		4. Jurisdiction Exercised over Step Four	453
		5. Proof of Actual Access	454
		6. Extent of Plaintiff's Reputation	458
		7. Enforcement Difficulties	459
		8. Prior Notice (Foreseeability)	461
		9. Jurisdiction Exercised over Step Five	465

	10. Jurisdiction Exercised over Step Six	466
	11. Concluding Observations in Relation to Jurisdiction Based on Place of Wrong/Place of Harm	467
L.	Plaintiff's Habitual Residence or Domicile	468
M.	The Location of the Server	468
N.	Directing Activities/Targeting and the US Effects Test in Defamation Cases	470
O.	Plaintiff's Location When Observing the Infringement	480
P.	Injunctions	480
Q.	Detainable Property within the Forum State	481
R.	Representative Office/Branch	482
S.	Location of Registration	483
T.	Centre of Interests	483
II.	Rules of Declining Jurisdiction	484
A.	<i>Forum non conveniens</i>	484
	1. How Can Judges Take Away What the Lawmakers Have Given to the Plaintiff?	485
	2. Too Much Discretion	486
	3. Lack of Uniformity	488
	4. Delays the Process	490
	5. 'Case-Shopping' Used to Ease the Courts' Workload	491
	6. 'Case-Shopping' Used to Protect Domestic Interests	491
	7. Discretion to Uphold Choice of Forum Clauses Nominating a Foreign Forum	492
	8. Conditional Exercise of <i>Forum non conveniens</i>	493
	9. <i>Forum non conveniens</i> : Clearly Inappropriate for International Instruments	494
	10. <i>Forum non conveniens</i> : Superfluous If Jurisdictional Rules Are Reasonable	495
	11. The Doctrine Is Easily Circumvented	496
	12. The Doctrine Has Lost Its Meaning in Modern Society	497
	13. Conclusions regarding the Doctrine of <i>Forum non conveniens</i>	497
B.	<i>Lis Alibi Pendens</i>	498
C.	Ineffectiveness	499
D.	Abuse of Process	500
III.	Rules of Choice of Law	500
A.	Contract Designated Law	500
B.	Closest Connection	501
C.	Law of Buyer's/Consumer's Domicile	501
D.	<i>Lex Fori</i>	502
E.	<i>Lex Loci Delicti</i>	504
F.	The 'Double Actionability' Test and Its Flexible Exception	505
G.	The Law of the Parties' Common Habitual Residence	506

Table of Contents

H.	<i>Lex Loci Protectionis</i>	506
I.	The Law of the Victim's Habitual Residence	507
J.	<i>Lex Loci Damni</i>	508
IV.	Rules of Recognition and Enforcement	508
A.	No Recognition and Enforcement	509
B.	Convention-Based Recognition and Enforcement	509
C.	Reciprocity	510
D.	Restricted Recognition and Enforcement	510
V.	Concluding Observations	512
CHAPTER 10		
Geo-identification: Impact, Risks and Possibilities		515
I.	Internet Architecture, Regulation and 'Borders'	516
II.	Geo-location Technologies	521
A.	Sophisticated Geo-location Technologies	523
1.	Client-Side Geo-location	524
2.	Server-Side Geo-location	525
3.	The Future of Sophisticated Geo-location Technologies	537
B.	Unsophisticated Geo-location Technologies	541
C.	Geo-location Technologies in Practice	542
III.	Non-technical Means of Geographical Identification	548
A.	Disclaimers	549
B.	'Click-Wrap' Agreements	551
C.	Menus: The Better and Worst Alternative	552
D.	Delivery Address	553
1.	Digitized Products	553
E.	Offline Identification	555
F.	Non-technical Geo-identification in Practice	555
IV.	Geo-identification: A Question of Attitudes	557
V.	Concluding Observations	565
CHAPTER 11		
Proposed 'Defamation Convention Model'		569
I.	Structure of the Models	570
II.	Introduction to the 'Defamation Model'	570
III.	Basic Features of the Proposed Model	571
IV.	Article-by-Article	573
V.	Putting the 'Defamation Model' to the Test	589
CHAPTER 12		
Proposed 'Contracts Convention Model'		593
I.	Basic Features of the Proposed Model	593
II.	Article-by-Article	594
III.	Putting the 'Contracts Model' to the Test	609

CHAPTER 13	
Concluding Remarks	611
APPENDIX 1	
Practical Checklist to Private International Law Issues for Drafters of Online Agreements	617
APPENDIX 2	
Practical Checklist to Private International Law Issues for Potential Litigants	621
APPENDIX 3	
Practical Checklist to Private International Law Issues for Potential Defendants	625
Selected Bibliography	629
Table of Authorities	659
Index	677