Penn State International Law Review

Volume 27
Number 3 *Penn State International Law Review*

Article 17

5-1-2009

Transnational Consumer Law-Reality or Fiction?

Norbert Reich

Transnational Consumer Law—Reality or Fiction?

Norbert Reich*

I. BEYOND SPACE AND TIME: CYBER LAW

The traditional legal mechanisms of consumer protection are usually limited to national law and, to some extent, to the law of supranational organisations like the European Union ("EU"). There may be trends to extend the sphere of application or to make sure that EU nationals can always refer to the protection of their home country, but this will be difficult to implement in a globalised market with transactions easily crossing borders, especially by the use of the internet. This is particularly obvious in cases of software transactions: there is not a national marketplace, only a virtual marketplace, not determined by space and time. The partners may not know each other's residence, only their IP address; the payment and the download-delivery is done via the internet, without any personal contact of the parties being a necessary or usual prerequisite of the transaction. It seems impossible or at least very complicated under existing conflict rules to determine jurisdiction and applicable law.[1]

International uniform laws like the Convention for the Sale of Goods ("CSIG") ratified by most States (with the exception of the United Kingdom, Portugal and Ireland) exclude consumer transactions "unless the seller . . . neither knew or ought to have known that the goods were bought for (personal, family or household) use" (Article 2a) and are not

---

* This article is part of a greater study on "Crisis and Future of European Consumer Law," published in the *British Yearbook of Consumer Law*, 2008/2009, at 3-65. *See also* my earlier paper in the 2008 edition of the *Uniform Commercial Code Law Journal*, at pages 67 to 77.

1. There is abundant literature of this phenomenon. *See* HANS MICKLITZ, NORBERT REICH & PETER ROTT, UNDERSTANDING EUROPEAN CONSUMER LAW ch. 7 (2008). In *Understanding European Consumer Law*, the authors discuss the practical application of the consumer protection provisions of Article 5 the Rome Convention, Article 6 of the new Regulation (EC) No. 593/2008 of the EP and the Council of 17 June 2008 on the law applicable to contractual obligations *("Rome I")*, 2008 O.J. (L 176), 6, and of specific EC directives to cross-border transactions.

mandatory in their legal application according to Article 6.[2] They are therefore not appropriate for cross-border consumer transactions. Other soft-law initiatives like the UNIDROIT-principles[3] are limited to commercial transactions and while the Principles of European Contract Law contain some rather weak consumer protection provisions[4] they are applicable (if at all) only to transactions within the EU. Both are without prejudice to mandatory consumer protection law. The globalisation of trade in consumer markets, in particular via the internet, has not generated a globalisation of law. "Cyber law" is still an empty catchword without a supportive legal framework that would force transactions via e-commerce into the national legal system. In any event, the national legal system is not adequate any more for these transactions.

The World Trade Organisation ("WTO") has not yet emerged as an actor in transnational private law or, in particular, consumer law, with the exception of intellectual property via the TRIPS agreement.[5] This is due to the WTO's mostly "negative" impact on national (and supranational) law: it is concerned with impediments to international trade mostly by product-related regulations which cannot be justified by mandatory and proportionate public interests like health or safety.[6] Therefore, the WTO does not have jurisdiction for setting mandatory standards for international commercial and consumer transactions, including conflict resolution.

II. CONSUMER LAW AS IMPEDIMENT TO E-COMMERCE?

Some authors go even further in their critique. Consumer law (in the narrow sense as used by the EU or in a broader sense as advocated here) is always based on mandatory standards, such as information,

2. JAN RAMBERG, INTERNATIONAL COMMERCIAL TRANSACTIONS 25 (3d ed. 2004); U. Magnus, *in* A. STAUDINGER, CISG IN BGB-KOMMENTAR art. 2, paras. 10-31 (13 ed. 2005).

3. Michael Joachim Bonell, *The UNIDROIT Principles and Transnational Law*, *in* THE PRACTICE OF TRANSNATIONAL LAW 23 (K.P. Berger ed., 2001); Michael Joachim Bonell & R. Peleggi, *UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law: A Synoptical Table*, 2004 UNIFORM L. REV. 315-96 (comparing the Unidroit principles with the Principles of European Contract Law (Lando-Principles)).

4. Hans-W. Micklitz, *The Principles of European Contract Law and the Protection of the Weaker Party*, 27 J. CONSUMER POL'Y 339-56 (2004).

5. Ralf Michaels & Nils Jansen, *Private Law Beyond the State? Europeanisation, Globalisation, and Privatisation*, 54 AM. J. COMP. L. 843, 867 (2006).

6. For details, *see* HANS-W. MICKLITZ, INTERNATIONALES PRODUKTSICHERHEITSRECHT 257 (1995) (arguing it should be transformed into a "human right of safety." *See also* WTO – TECHNICAL BARRIERS AND SPS MEASURES 96-120 (R. Wolfrum et al. eds., 2007) (providing a detailed commentary on the clause concerning actions "necessary to protect human, animal or plant life or health" of Art. XX (b) GATT and related agreements).

quality, fairness in pre-formulated contract terms, adequate remedies, non-discrimination rules, and access to justice. This entire complex of protection is vested upon a functioning state legal order which makes the judge the final arbiter in consumer disputes. Law is state-oriented and guaranteed. In the EU, this follows the fundamental right to judicial protection under Article 6 of the European Convention of Human Rights ("ECHR"), confirmed on many occasions by the European Court of Justice ("ECJ")[7] and to be included in Article 6 of the Lisbon Treaty on European Union integrating the Charter of Fundamental Rights in the EU and in particular Article 47 on judicial protection into EU law. In its numerous cases concerning the obligations of Member States to implement and enforce Community consumer law, the Court has insisted on this *obligation de résultat* of states also under Article 10 EC; a violation may even make the state directly liable towards consumers under the *Francovich*-doctrine.[8]

This concept of consumer protection is challenged as a consequence of a globalised trade and consumer market. This challenge comes in a seemingly contradictory direction:

- Consumer law is criticised because it becomes an impediment to trade by imposing mandatory standards on business which differ from country to country or region to region. As a result, search cost for finding out applicable law to consumer transactions become unreasonably high.

- As a seemingly contradictory consequence, consumer law cannot be fully be implemented in a globalised world. State borders are still legal borders, especially in the enforcement of consumer rights.

Consumer law in the traditional, state based concept runs the risk of becoming an ideology: instead of protection, it compartmentalises the (global) market, and at the same time it promises a protective standard which it cannot possibly achieve. For some authors there seems to be only one way out of this dilemma: If mandatory consumer protection standards prove to be dysfunctional to trade, the easiest way therefore to overcome this dilemma would be a system of liberalised world trade based on self-regulation while guaranteeing freedom of contract for business and freedom of choice for consumers.

7. Takis Tridimas, THE GENERAL PRINCIPLES OF COMMUNITY LAW 418 (2d ed 2006); NORBERT REICH, UNDERSTANDING EU LAW 239 (2d ed. 2005).

8. Case C-178/94, Dillenkofer et.al. v. Germany, 1996 E.C.R. I-4845.

III. *LEX MERCATORIA ELECTRONICA* AS EMERGING "TRANSNATIONAL LAW"?

International commercial law had to face the challenges of globalisation already for many years because trade is by its very nature directed across borders, and the emerging *lex mercatoria* seemingly has been an answer to these challenges. The concept of *lex mercatoria* is quite controversial and cannot be discussed here in detail.[9] It relates to a set of norms, practices, and standards in international trade and conflict resolution mechanisms mostly through arbitration which have evolved through commercial usage and customs, and have to some extent been "codified" by private international organisations like the International Chamber of Commerce ("ICC"), International Standardising Organisations like ISO, international law harmonising institutions like UNIDROIT, and specialised organisations for special business areas or for specific ways of communication—e.g., ICANN in the particular case of the internet.[10] The basis of applicability in commercial contracts is not state law or an international treaty, but usually agreement of the parties which need not be express and formalised, but can be implied. This practice may result in *general principles* which are accepted by the relevant business community as guidelines for their commercial transactions. They will usually be enforced in arbitration; arbitrators will use them in contract interpretation and decision making unless the arbitration agreement provides otherwise. Therefore, some authors argue for a "private ordering," meaning a law created by the economic agents themselves which results in a "global governance" of self-regulation.[11] Other authors refer to a "global civil society" which emerges as a "law creating instance" via a "creeping codification of transnational law."[12]

These concepts seem however to be somewhat exaggerated and misleading because in the end the basis of their applicability to international commercial transactions is the free will of the parties. The parties can always opt-out of these "standards" or "principles" even

---

9. *See* KLAUS P. BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA (1999); THE PRACTICE OF TRANSNATIONAL LAW (Klaus P. Berger ed. 2002); CHRISTIAN JOERGES, INGER-JOHANNE SAND & GUNTHER TEUBNER, TRANSNATIONAL GOVERNANCE AND CONSTITUTIONALISM (2004); Michaels & Jansen, *supra* note 5, at 870 (also referring to the "private law created within the internet community").

10. *See* G. Teubner, *Societal Constitutionalism: Alternatives to State Centred Constitutional Theory?*, *in* JOERGES, SAND AND TEUBNER, *supra* note 9, at 18; Jochen von Bernstorff, *The Structural Limitations of Network Governance: ICANN as a Case in Point*, *in* JOERGES, SAND AND TEUBNER, *supra* note 9, at 257. This is not the place to discuss these concepts.

11. *See* PETER-GRALF CALLIESS, GRENZÜBERSCHREITENDE VERBRAUCHERVERTRÄGE 196 (2006).

12. *See* THE PRACTICE OF TRANSNATIONAL LAW, *supra* note 9, at 12–19.

though there may be no incentives to do so, or transaction cost economics will force the parties to subscribe to these standards. It may also be imputed that, if the parties did not come to an agreement on applicable law or if there are doubts on interpretation, the *lex mercatoria* like the UNIDROIT principles will be applicable as "general principles," commercial practice or custom, particularly in commercial arbitration.[13] But arbitration is subject to second level control in enforcement proceedings by Member State or EU "*ordre public*," as the ECJ has said in its seminal *ECO-Swiss*[14] and *Claro* judgments.[15]

Can these concepts of *lex mercatoria*, of "private ordering of markets," of "global governance via self-regulation" be transferred to consumer law? This is indeed the thesis of the German author G.-P. Calliess in his seminal work on *Transnational Consumer Contracts*. He proposes these concepts as an alternative to the erosion of national (and EU) consumer law in a globalised context. He discusses a number of initiatives and mechanisms which seem to confirm his theory:

> By establishing a global civil constitution for a transnational consumer contract law, reflexive institutions must be created which organise the phenomena of self-regulation and of private ordering in such a way, that on one hand they promote effective legal protection via alternative consumer protection mechanisms, and on the other guarantee fairness and justice of such procedures via-à-vis the consumer.[16]

This radical separation of (transnational) consumer law from the state (or the EU)—and as a consequence from the existing state controlled mechanisms of consumer protection—provokes critique. Such a concept has a number of weaknesses. No representative consumer association exists world wide which could promote or at least monitor and support these standards in some sort of collective consumer interest. It cannot be implied that this would be taken care of by business institutions themselves. Neither state power nor collective action by social partners

13. For the UNIDROIT principles, *see* Bonell, *supra* note 3, at 28–36.

14. Case C-126/97, Eco Swiss China Time v. Benetton Int'l, 1999 E.C.R. I-3055 (concerning the competition *ordre public*).

15. Case C-168/05, Elisa Maria Mostaza Claro v. Centro Movil Milenium, 2006 E.C.R. I-10421. *See* Norbert Reich, *More clarity after* Claro*?*, 2007 EUR. REV. CONTRACT L. 41. *But see* a critique by P. Landolt, *Limits on Court Review of International Arbitration Awards Assessed in Light of States' Interests and In Particular in Light of EU Law Requirements*, 2007 ARBITRATION INT'L 63-91, 77-82. For a recent discussion, *see* N. Reich, *Negotiations and Adjudication: Class actions and arbitration clauses in consumer contracts*, *in* THE FUTURE OF CLASS ACTIONS IN THE EU 345-60 (Cafaggi & Micklitz eds., 2009).

16. *See* CALLIESS, *supra* note 11, at 340 (translation by author).

can guarantee the promises which Calliess sets out.[17] There is no consumer consensus to accept unilaterally-imposed standards by the international "business" or "e-commerce" community. A "global civil society" may exist on the business side using the internet (even though this seems quite doubtful due to conflicting interests as von Bernstorff has shown with regard to ICANN[18]); it certainly is not true with regard to highly fragmented consumer markets.

In his search for an alternative to the traditional state oriented consumer law, Calliess is satisfied if the soft-law mechanisms of 'transnational consumer law' at least attain what he calls "*rough justice*"[19]—probably meaning lower standards of protection than already guaranteed within existing consumer law. This must be achieved through different ADR-mechanisms, including possibly consumer arbitration. What are the standards by which these mechanisms are supposed to function? What about third-party effects of these "private orderings" vis-à-vis consumers as individuals or as a group which must be legitimised either by democratic processes or by agreement of those concerned? Is there an international consensus on certain minimal standards for consumer protection? How far is the principle of freedom of contract—which indeed is a basic rule of international commercial transactions—extended to consumer transactions which are, as we have seen, excluded both from the "hard law" of the CISG and the "soft law" of the UNIDROIT-principles?

"Rough justice" as advocated by Calliess means indeed *rough* justice—only a vague guarantee of certain consumer expectations which can hardly be called "rights" and which usually can be "enforced" only via private arbitration not subject to any public control or transparency, and without clear rules on applicable law. The concept of "transnational law" remains unclear and illusionary; it hits the death stroke to the consumer *acquis* either on an EU or a national basis. It is already doubtful whether it can really be called law at all. This either requires some state monitoring, or a minimum consensus between the parties—two elements well set out in Article 1134 of the French Code Civil whereby "*les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites*" ("contracts legally entered into take force of law for those who have made them").

Calliess defends his concept with the following words:

---

17. *See* D. Schiek, *Private rulemaking and European governance—issues of legitimacy*, 2007 EUR. L. REV. 443 (concerning the need for (collective) autonomy to justify private rulemaking in the EU context). This also applies to international law.

18. *See* von Bernstorff, *supra* note 10, at 274–81.

19. CALLIESS, *supra* note 11, at 351.

> Transnational law describes a third category of autonomous legal systems beyond the traditional categories of national or international law. Transnational law is created and developed by the global civil society through acts creating law (Rechtsschöpfungskräfte). (1) It is based (a) on general principles of law and (b) on practice and custom in the civil society, which leads to their confirmation and further development. (2) Its application, interpretation and development is regularly *conferred* to private providers of dispute resolution mechanisms. (3) Its mandatory character is based on legally (rechtsförmig) organised orders and enactment of social-economic sanctions. (4) A codification of transnational law—if at all—occurs in the form of general catalogues of principles and rules, standardised contract forms and codes of conduct which are established by private standard setting institutions (Normierungsinstitutionen).[20]

This definition may be true for the classical *lex mercatoria* but always requires some express or implied agreement between the parties to be applicable in their relations if there has been no constitutionally delegated power behind its enactment. It cannot be used against third parties like consumers who have not participated in the elaboration of this "transnational law," neither personally nor via their representatives. We do not argue that law always requires state enactment—but if this is not the case there must at least be some other mechanisms substituting the decision of the legislator which can only be party autonomy of those concerned, whether individual or collective. Even the argument of Calliess set out above requires some sort of "conferral" of power to (binding?) dispute resolution mechanisms, but does not explain who has validly effected this transferral to the detriment of state or other legitimate mechanisms; the idea of an "international civil society" is too vague and too abstract to have this power of conferral. Therefore, the concept of "transnational law" cannot be transferred to consumer transactions even in a globalised setting without the state because of the lack of equality of parties and the limited freedom of choice for consumers.

It is interesting to see that the so-called institutions of an international "civil society" upon which Calliess relies for his concept of "transnational law" refer themselves to mandatory standards which are set by state (or international[21] respective to supranational) law. It seems

20. *Id.* at 371 (italics added) (translated by author).

21. The need for mandatory international standards has been emphasised by the International Council on Human Rights Policy. *See* INT'L COUNCIL ON HUMAN RIGHTS POL'Y, BEYOND VOLUNTARISM: HUMAN RIGHTS AND THE DEVELOPING INTERNATIONAL OBLIGATIONS OF COMPANIES (2002), *available at* http://www.ichrp.org/files/reports/7/107_report_en.pdf; *see also* Michele Micheletti & Andreas Follesdal, *Shopping for Human Rights*, 30 J. CONSUMER POL'Y 167, 167 (2007).

that the international "civil society" (which is, in my opinion, a fiction anyway) cannot live without the state as will be shown in the following section.

IV. THE EVOLUTION OF SOFT-LAW STANDARDS—AN ALTERNATIVE TO "HARD" LAW?

It can be useful to look at some of the soft-law standards which have been developed by internet service providers. Most of these are American, being the main players on the global market for e-commerce. The surprising point in all these systems seems to be that they offer the consumer certain mechanisms to guarantee satisfaction and to resolve disputes, but they do not completely replace the traditional, state bound consumer law and protection. The following examples are documented by Calliess:

- The Better Business Bureau*OnLine* "Code of Online Business Practice"[22] contains 5 principles, including consumer satisfaction. It recommends informal dispute settlement mechanisms, including non-binding or conditionally binding arbitration (under which the decision is binding on the company if the consumer elects to accept the decision, thereby making it binding on the consumer as well), without pre-empting further governmental actions in this field; the critical point for arbitration is obviously the 'election by the consumer'—can it be done in general contract terms communicated electronically to the consumer?—Calliess does not answer this question.

- Agreement between Consumers International and the Global Business Dialogue on Electronic Commerce – Alternative Dispute resolution Guidelines.[23] ADR mechanisms are greatly encouraged, dispute resolution may be based on equity or codes of conduct. Binding arbitration before the dispute is to be avoided "where such commitment would have the effect of depriving the consumer of the right to bring an action before the courts." Development of ADR is left to governments. The

22. *See* Better Business Bureau, BBBOnline, Code of Online Business Practices, www.bbbonline.org/reliability/code/CodeEnglish.pdf; *see also* CALLIESS, *supra* note 11, at 422 (quoting full text).

23. GLOBAL BUSINESS DIALOGUE ON E-COMMERCE, ALTERNATIVE DISPUTE RESOLUTION GUIDELINES (2003), *available at* http://www.gbd-e.org/pubs/ADR_Guideline.pdf; *see also* CALLIESS, *supra* note 11, at 439.

guidelines contain a plea for deregulation of formal requirements for ADR and for a clarification of rules on jurisdiction and applicable law to be dealt with in "a manner that encourages both business investment and consumer trust in electronic commerce."

- American Bar Association (Task force) Recommendation on Best Practices for Online Dispute Resolution Service ("ODR") Providers:[24] It clearly states that ODR Providers "should disclose the jurisdiction where complaints against the ODR provider can be brought, and any relevant jurisdictional limitations."

- ICC's "Resolving disputes online—Best practices for ODR in B2C and C2C transactions":[25] They insist that "companies should not obligate consumers to agree to use binding dispute resolution processes prior to the materialisation of a dispute. However, where permissible under local law, pre-dispute commitments to binding dispute resolution are acceptable if they are clearly disclosed before the initial transaction is completed. This will allow consumers to take the dispute resolution provision into consideration and make an informed choice about doing business with the company." Again, the main point is "clear disclosure" which must be determined by the applicable law to the contract. US-American and Canadian law is much more generous in allowing electronically agreed arbitration clauses through so-called "click-wrap" agreements than the law of the Member States or EU law itself.[26]

The examples show that a concept of "transnational consumer law" based on self- or co-regulation by "civil society" cannot work in practice. Therefore, the main argument against such "*lex mercatoria electronica*"

24. AMERICAN BAR ASS'N TASK FORCE ON ECOMMERCE AND ADR, RECOMMENDED BEST PRACTICES FOR ONLINE DISPUTE RESOLUTION PROVIDERS, *available at* http://www.abanet.org/dispute/documents/BestPracticesFinal102802.pdf; *see also* CALLIESS, *supra* note 11, at 448.

25. INT'L CHAMBER OF COMMERCE, RESOLVING ONLINE DISPUTES (2003), *available at* www.iccwbo.org/home/statements_rules/statements/2004/DISPUTES-rev.pdf; *see also* CALLIESS, *supra* note 11, at 458.

26. Comb v. PayPal Inc., 218 F. Supp. 2d 1165, 1176 (N.D. Cal. 2002); *see also* Canadian Supreme Court, Dell Computer Corp. v. Union des Consommateurs, [2007] 2 S.C.R. 801, 2007 SCC 34 (Can.). For an overall critique, *see* Reich, *supra* note 15, at 46.

is still the binding force of state consumer law and consumer protection mechanisms which are part of the constitutional heritage of Member States and the Union under Article 6(2) EU, 6 ECHR. Traders may of course enhance consumer satisfaction and make dispute resolution easier by encouraging ADR mechanisms, a policy explicitly supported by EC initiatives.[27] Consumers should be given easy access to ADR mechanisms provided they are fair and transparent as proposed in EU recommendations 98/257/EC and 2001/310/EC.[28] But the final arbiter in a consumer dispute—even under transnational conditions—which cannot be resolved by ADR should always be a court of law. This may create obstacles and difficulties to e-commerce in a globalised virtual market place; it may also be difficult and eventually impossible to enforce. But this is not an argument against national or EU consumer law, it is the price to be paid for globalisation allowing greater access for traders to world markets which does not automatically overcome legal barriers.

27. *See* MICKLITZ, REICH & ROTT, *supra* note 1, at 359–64.
28. 1998 O.J. (L 115); 2001 O.J. (L 109).