
TABLE OF CONTENTS

| | |
|--|-----|
| Preface | VII |
| Acknowledgments | XI |
| List of tables and figures | XXI |
| One Introduction | 1 |
| 1. The Idea of the Book | 1 |
| 2. Aim and Scope of the Book | 4 |
| 3. Methodology | 6 |
| 4. Organisation of the Book | 7 |
| 5. Important Definitions | 8 |
| (a) Internet | 8 |
| (b) Electronic commerce | 9 |
| (c) Custom | 9 |
| (d) International custom | 9 |
| (e) Electronic commerce custom | 9 |
| (f) Methodology | 10 |
| 6. Hypothetical Case Studies | 10 |
| 6.1 Transaction confirmation case | 10 |
| 6.2 Strong encryption case | 11 |
| <i>Part I – The Internet and the Law</i> | 13 |
| Two Internet Architecture and its Implications | 15 |
| 1. Introduction | 15 |
| 2. Brief History of the Internet | 15 |
| 3. Brief History of Electronic Commerce | 19 |
| 4. Legal Issues Raised by the Internet | 22 |
| 4.1 Intellectual property law | 23 |
| 4.2 Contract law | 26 |
| 4.3 Crime and offence law | 28 |
| 4.4 Privacy law | 31 |
| 4.5 Freedom of expression and jurisdictional problems | 32 |
| 5. Summary | 34 |

| | | |
|-------|---|-----|
| Three | Internet Governance | 37 |
| 1. | Introduction | 37 |
| 2. | Internet Governance | 37 |
| 3. | Internet Organisations | 40 |
| 4. | Private Sector | 44 |
| 5. | Governmental and Non-governmental Organisations | 45 |
| 6. | Summary | 47 |
| Four | International Regulation of the Internet | 49 |
| 1. | Introduction | 49 |
| 2. | International E-commerce Regulation | 50 |
| 2.1 | 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG) | 50 |
| 2.2 | 2005 United Nations Convention on the Use of Electronic Communications in International Contracting | 58 |
| 2.3 | European E-commerce Directive | 67 |
| 3. | Model Laws | 71 |
| 3.1 | 1996 Model Law on Electronic Commerce | 71 |
| 3.2 | 2004 UNIDROIT Principles of International Commercial Contracts | 74 |
| 4. | Other Internet-related Treaties | 78 |
| 4.1 | 2001 Convention on Cybercrime | 78 |
| 4.2 | 1996 WIPO Treaties | 82 |
| 5. | Self-regulation versus Internet Regulation | 85 |
| 6. | Summary | 88 |
| 7. | Attempt to Solve Hypothetical Case Studies | 89 |
| 7.1 | Transaction confirmation case | 89 |
| | (a) Model Law on Electronic Commerce | 90 |
| | (b) Electronic Commerce Directive | 92 |
| 7.2 | Strong encryption case | 93 |
| 7.3 | Summary of hypothetical case studies | 94 |
| 8. | Conclusion | 94 |
| | Part II – Custom | 97 |
| Five | The Role of Custom | 99 |
| 1. | Introduction | 99 |
| 2. | Historical Importance of Custom in Western Culture | 101 |
| 2.1 | Custom in the Roman Empire | 101 |
| 2.2 | Custom in the European legal tradition | 103 |
| 2.3 | Medieval Law Merchant | 109 |
| 2.4 | Custom in contemporary Western legal tradition | 111 |
| 2.5 | Summary | 118 |

| | | |
|-----|---|-----|
| 3. | Custom in Other Legal Traditions | 119 |
| 3.1 | Custom in Islamic tradition | 119 |
| 3.2 | Custom in Hindu tradition | 122 |
| 3.3 | Custom in Chinese tradition | 123 |
| 3.4 | Custom in Japanese tradition | 124 |
| 3.5 | Custom in tribal societies | 125 |
| 3.6 | Summary | 126 |
| 4. | Custom in Modern International Legal Orders | 127 |
| 4.1 | Custom in the international commercial law | 127 |
| | (a) Rebirth of the Law Merchant | 127 |
| | (b) Problems with the definition of commercial custom | 132 |
| 4.2 | Custom in international public law | 136 |
| 5. | The Potential Role of Custom on the Internet | 137 |
| 5.1 | Custom as a source of Internet commerce law | 137 |
| 5.2 | Custom as a source of knowledge about the Internet | 139 |
| 6. | Conclusion | 140 |
| Six | International Custom and its Proof | 143 |
| 1. | Introduction | 143 |
| 2. | The Role of Custom in International Law | 145 |
| 3. | The Definition of International Custom | 146 |
| 4. | Practice | 151 |
| 4.1 | The notion of practice | 151 |
| 4.2 | Duration of practice | 154 |
| 4.3 | Generality of practice | 156 |
| 4.4 | Consistency of practice | 158 |
| 4.5 | Objections to practice | 160 |
| 4.6 | Repetition of practice | 162 |
| 4.7 | Morality and reasonableness of practice | 162 |
| 4.8 | Summary of practice | 163 |
| 5. | Acceptance of Practice as Law | 164 |
| 5.1 | The notion of acceptance as law | 164 |
| | (a) The ‘belief’ interpretation | 164 |
| | (b) The ‘tacit agreement’ interpretation | 166 |
| 5.2 | Generality of acceptance | 168 |
| 5.3 | Critique of the subjective element | 169 |
| | (a) Critique of <i>opinio iuris</i> | 169 |
| | (b) Critique of <i>pactum tacitum</i> | 171 |
| 6. | Alternative Approaches | 173 |
| 6.1 | The ‘practice only’ approach | 173 |
| 6.2 | The ‘instant custom’ approach | 176 |
| 6.3 | Reconciliatory approaches | 176 |
| 7. | Judicial Confirmation of Custom | 178 |

| | | |
|-------|--|-----|
| 8. | Evidencing International Custom | 178 |
| 8.1 | Methods of evidencing custom | 178 |
| 8.2 | Recent evidentiary practice of the ICJ | 179 |
| | (a) The 1986 <i>Nicaragua</i> case | 179 |
| | (b) The 1996 Nuclear Weapons Advisory Opinion | 185 |
| | (c) The 2002 <i>Arrest Warrant</i> case | 188 |
| 8.3 | Two approaches to evidencing custom by ICJ | 190 |
| | (a) The ‘declarative’ approach | 190 |
| | (b) The ‘inferential’ approach | 192 |
| 8.4 | Summary of ICJ’s evidencing practice | 195 |
| 9. | The Study of Contemporary International Customary Humanitarian Law | 195 |
| 10. | Conclusion | 197 |
| Seven | Internet Custom | 199 |
| 1. | Introduction | 199 |
| 2. | Problems with Applicability of International Custom to Internet Commerce | 200 |
| 3. | Objectives of the New Concept of Custom | 203 |
| 4. | Proposed Definition of Electronic Commerce Custom | 204 |
| 5. | Practice | 205 |
| 5.1 | The notion of practice | 206 |
| | (a) Actions | 206 |
| | (b) Promises to act | 207 |
| | (c) Abstention from action | 208 |
| 5.2 | The notion of legally relevant practice | 209 |
| 5.3 | The notion of sufficiently widespread practice | 210 |
| | (a) Practice widespread in space | 211 |
| | (b) The notion of majority | 212 |
| | (a) Quantitative majority | 214 |
| | (b) Qualitative majority | 216 |
| | (c) Practice widespread in time | 216 |
| 5.4 | Duration of Internet practice | 216 |
| | (a) Horizontal element of time | 217 |
| | (b) Vertical element of time – Volume of transactions | 217 |
| | (c) New meaning of time factor | 218 |
| 5.5 | Consistency of practice | 219 |
| 5.6 | Objections to practice | 220 |
| 5.7 | Repetition of practice | 221 |
| 5.8 | Morality and reasonableness of practice | 221 |
| 5.9 | Summary of the notion of practice | 222 |
| 6. | The Subjective Element | 223 |
| 6.1 | Rejection of subjective element in e-custom | 223 |
| 6.2 | Expectation of practice observance | 224 |

| | | |
|-----|--|-----|
| 7. | Summary of the Concept of E-custom | 225 |
| 8. | The Role of an Adjudicator | 226 |
| 9. | Hypothetical Examples | 227 |
| 9.1 | Transaction confirmation practice | 228 |
| 9.2 | Hypothetical transaction confirmation case | 232 |
| 9.3 | Transaction encryption practice | 232 |
| 9.4 | Hypothetical banking case | 236 |
| 10. | Consequences for the IT Industry | 236 |

Part III – Evidencing Custom 239

| | | |
|-------|--|-----|
| Eight | Evidencing Custom on the Web | 241 |
| 1. | Introduction | 241 |
| 2. | Problems with Traditional Methodology | 241 |
| 3. | Overview of the Proposed Methodology | 243 |
| 4. | Sampling the Internet | 244 |
| 4.1 | Random sampling | 246 |
| 4.2 | Non-random sampling | 248 |
| 4.3 | Sample size | 249 |
| 4.4 | Representativity of the sample | 252 |
| 4.5 | Summary | 254 |
| 5. | Overview of Means of Evidencing Internet Custom | 254 |
| 5.1 | Human versus automation | 255 |
| 5.2 | Website Content Analysis | 257 |
| 5.3 | Website Traffic Analysis | 258 |
| 5.4 | Web Infrastructure Analysis | 258 |
| 5.5 | Developer Tools Analysis | 259 |
| 5.6 | Web Participants Opinion Poll | 259 |
| 5.7 | Summary | 260 |
| 6. | Proposed Three-step Methodology | 260 |
| 6.1 | E-commerce development tools capability test | 261 |
| 6.2 | Practice examination test | 263 |
| | (a) Automatic analysis of practice | 263 |
| | (b) Manual analysis of practice | 265 |
| 6.3 | Literature review test | 267 |
| 7. | Hypothetical Case Studies | 268 |
| 7.1 | Transaction confirmation case | 269 |
| | (a) E-commerce development tools capability test | 269 |
| | (b) Practice examination test | 274 |
| | (i) Automatic analysis | 274 |
| | (ii) Manual analysis | 275 |
| | (c) Literature review test | 280 |
| | (d) Case summary | 282 |

| | | |
|---|--|-----|
| 7.2 | The banking case | 282 |
| | (a) E-commerce development tools capability test | 283 |
| | (b) Practice examination test | 286 |
| | (i) Automatic analysis | 286 |
| | (ii) Manual analysis | 288 |
| | (c) Literature review test | 297 |
| | (d) Case summary | 299 |
| 8. | Conclusion | 300 |
| <i>Part IV – Towards Supranational Internet Law</i> | | 303 |
| Nine | Potential Internet Customs | 305 |
| 1. | Introduction | 305 |
| 2. | Online Property | 307 |
| 2.1 | Freedom of linking without authorisation | 307 |
| 2.2 | Right to copy certain online materials without permission | 311 |
| | (a) E-mail copying | 312 |
| | (b) WWW copying | 312 |
| | (c) P2P copying | 315 |
| 2.3 | Freedom of registration of a domain name | 321 |
| 2.4 | Right to explore user's behaviour | 323 |
| 3. | Online Security | 324 |
| 3.1 | Obligation of an online business to support non-trivial username and password authentication | 325 |
| 3.2 | Obligation of an online business to support strong encryption of all exchanges of sensitive information | 327 |
| 3.3 | Obligation of an online business to deny a service if client's web browser does not support strong encryption | 329 |
| 3.4 | Obligation of an online business to automatically sign a user out if a web browser is not used for some time (timeout) | 330 |
| 3.5 | Obligation of an online bank to use valid digital certificates issued by trusted authorities | 331 |
| 4. | Online Contracting | 333 |
| 4.1 | Obligation of an online business to display steps that follow to conclude an electronic contract | 333 |
| 4.2 | Obligation of an online business to provide means of identifying and correcting input errors | 335 |
| 4.3 | Obligation of an online business to summarise the transaction before accepting payment | 337 |
| 4.4 | Obligation of an online business to confirm an online order instantly and by electronic means | 337 |
| 5. | Online Advertising | 337 |
| 5.1 | Obligation of an online business to refrain from sending spam | 338 |

| | | |
|-----|--|-----|
| 5.2 | Right to search engines to block spamdexed websites | 341 |
| 5.3 | Obligation of an online business to allow for closure of interactive advertising | 344 |
| 6. | Right to Information | 345 |
| 7. | Conclusion | 346 |
| Ten | Towards a supranational Internet law | 347 |
| 1. | The Need for a Supranational Solution | 347 |
| 2. | Potential Sources of Supranational Internet Law | 350 |
| 2.1 | Custom | 351 |
| | (a) <i>Consuetudo secundum legem</i> | 352 |
| | (b) <i>Consuetudo praeter legem</i> | 353 |
| | (c) <i>Consuetudo contra legem</i> | 354 |
| 2.2 | Consistent arbitral awards and domestic court judgments | 355 |
| 2.3 | Conventions | 356 |
| 2.4 | General principles of Internet law | 357 |
| 2.5 | Model laws | 357 |
| 2.6 | Model agreements and commonly used contract terms | 357 |
| 2.7 | Technical standards | 358 |
| 3. | Potential Benefits | 358 |
| 4. | Issues to Consider | 359 |
| 5. | Conclusion | 360 |
| | Conclusion | 361 |
| | Glossary of legal and technical terms | 365 |
| | Bibliography | 383 |
| | Index | 409 |