International Perspectives on Consumers' Access to Justice

edited by
CHARLES E. F. RICKETT
and
THOMAS G. W. TELFER

CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge CB2 1RP, United Kingdom

CAMBRIDGE UNIVERSITY PRESS
The Edinburgh Building, Cambridge, CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town 8001, South Africa

http://www.cambridge.org

First published 2003

Printed in the United Kingdom at the University Press, Cambridge

Typeface Lexicon A (*The Enschedé Type Foundry*) 9/12.5 pt *System* LaTeX 2ε [TB]

A catalogue record for this book is available from the British Library

Library of Congress cataloguing in publication data

International perspectives on consumers' access to justice / edited by Charles E. F. Rickett
and Thomas G. W. Telfer.
p. cm.
Includes bibliographical references and index.
ISBN 0 521 82432 X
1. Consumer protection – Law and legislation. 2. Conflict of laws – Consumer protection.
3. Commercial law. 4. Dispute resolution (Law) I. Rickett, C. E. F. II. Telfer, Thomas G. W.
K3842 .I584 2003 343.07′1 – dc21 2002031456

ISBN 0 521 82432 X hardback

Contents

Table of cases

Australia

Canada

European Court of Human Rights

European Union

France

Germany

The Netherlands

United Kingdom

United States

World Intellectual Property Office (WIPO)

Table of statutes and other instruments

Australia

Canada

European Union

Conventions

Directives

Regulations

Treaties

Finland

Germany

The Netherlands

United Kingdom

United States

1 Consumers' access to justice: an introduction

CHARLES E. F. RICKETT AND THOMAS G. W. TELFER

Introduction

Consumer protection law in the age of globalisation poses new challenges for policy-makers. The legislative and regulatory framework developed to undergird consumer protection law in the 1960s and 1970s has come under pressure, 'spurred', as Michael Trebilcock suggests in his essay in this volume, 'both by the changes in the nature of modern industrial economies and the evolution of economic theories'. Trebilcock argues that consumer protection law at the beginning of the new millennium 'is a much messier and more complex affair' than it was some thirty or forty years ago. The changes he describes include 'rapidity of technological change, deregulation of hitherto monopolised industries, globalisation of markets' and the 'increasing sophistication in economic theories that evaluate market structure, conduct and performance'.

Governments can no longer develop domestic consumer protection law in isolation from international developments. Iain Ramsay argues herein that globalisation has 'increased the international dimensions of access to justice and consumer protection as developments in communication technology facilitate the possibility of cross-border frauds'. Consumer law in the twenty-first century must become what he calls 'applied comparative law'.

The growth of international consumer transactions and the emergence of a new conception of the role of the state have led to a proliferation of consumer protection models all designed with the idea of improving access to justice. As Ramsay demonstrates in his essay, consumer protection and access to justice have traditionally been linked. Legislators often view the improvement of access to justice as one of the overarching goals of any new consumer protection legislation. However, not all legislative and regulatory schemes achieve that goal. The aim of the essays collected for this book is essentially to highlight some of the difficulties in framing regulatory responses to the problem of consumers' access to justice and to illustrate how governments and industry have responded to some of the new international problems that have arisen in the global economy.

The essays in the volume, which were originally delivered at the Eighth International Consumer Law Conference at Auckland, New Zealand, in April 2001, examine traditional private law mechanisms, such as judicial scrutiny of exclusion

clauses, as well as newer forms of protection, such as ombudsman schemes, class actions and schemes designed to deal with cross-border transactions. In some instances, new initiatives derogate from more traditional rights and erode consumers' rights to redress or remedies. The growth of private dispute mechanisms on the Internet which limit a consumer's right of redress, and the restrictions on the consumer bankruptcy discharge in North America, are two examples which are examined in this volume. As the essays demonstrate, the achievement of access to justice for consumers proves to be a challenging and sometimes elusive task.

Perspectives on consumers' access to justice

The volume begins with three essays that introduce the general theme of access to justice for consumers. Each of the contributors offers a different perspective or approach to the issue. Iain Ramsay's essay adopts a socio-legal approach. He urges that the 'study of consumer law and policy should be contextual and informed by an understanding of the role of law in society'. Ramsay notes that there has always been a tension between narrow and broad concepts of access to justice. 'The narrow dimension equates access to justice with access to legal institutions whereas a broader approach is concerned with the general conditions of justice in society.'

Ramsay's essay challenges its readers to take a much broader view of access to justice.While he notes that access to justice and consumer protection share common goals and appear to have the 'redistributional potential' for the protection of the poor and disadvantaged, his essay disputes this notion. He suggests that individualised redress procedures 'may have a distributional tilt against lower-income consumers and disadvantaged groups'. He points out the problems faced by consumers in lower-income markets and concludes that 'complaint as a problem-solving mechanism' is likely to be less effective in those lower-income markets than in the consumer market of the middle class.

Beyond the distributional aspects of dispute resolution mechanisms, Ramsay also identifies intermediaries and small claims courts as two institutions that have a significant impact upon access to justice. Intermediaries such as lawyers, social workers, debt counsellors and consumer advisors have significant power by virtue of their 'discretionary decisions', which may ultimately affect a consumer's choice of remedy. Ramsay's study of intermediaries also has implications for future reforms. He notes that the privatisation of services, which is often heralded as allowing greater consumer choice, may ultimately result in professional domination of consumer choice. To avoid this domination, he suggests the need for bright line rules that reduce the need for intermediaries. Bright line rules provide a universal and uniform approach and reduce the possibilities for the exercise of discretion.

Ramsay suggests that the concept of self-enforcing consumer laws merits further study particularly in an era of a shrinking public sector.

Whereas Ramsay offers a socio-legal analysis of the problem, Anthony Duggan examines the issue of access to justice from a law and economics perspective. According to Duggan, 'civil justice is a valuable commodity'. It not only benefits the parties themselves, but it has a wider social benefit in that adjudication lowers the social costs of disputes by providing orderly dispute resolution. Thus, adjudication performs a corrective justice role by avoiding the costs of disorder. Duggan also argues that the civil justice system works to avoid disputes in the future by generating 'judge-made rules to guide future behaviour'. Civil justice thus operates as a deterrent, by encouraging parties to 'take cost effective preventive measures to avoid liability in future cases'.

In designing a civil justice regime, the goal or economic objective is, according to Duggan, to 'achieve equilibrium in the market for consumer justice'. Duggan concludes that the cost of the civil justice system discourages people from litigating too much. Thus, possible problems of overinvesting in litigation at the expense of other methods of dispute resolution are controlled by the costs of bringing a claim. The problem, however, is that the legal cost burden discourages parties from litigating often enough to achieve equilibrium in the market for consumer justice. Market failure on both the demand and supply side discourages litigation. On the demand side, the high fixed component of the legal costs regime (parties must pay a set cost regardless of the amount at stake) discourages 'all but relatively large claims'. Conventional methods of pricing legal services 'discriminate systemically in favour of large claims and against small claims'. The costs regime also favours repeat players who may achieve economies of scale by spreading costs over a large number of claims, whereas 'one-shotters', typically consumers, are worse off. Similarly, on the supply side, the indirect costs of litigation, which include information costs, opportunity costs and emotional costs, work to discourage litigation.

Duggan suggests that there are two possible methods of resolving the problem of the cost burden. The consumer's costs must either be spread or avoided. His essay examines a variety of cost-spreading and cost-avoidance mechanisms. Cost-spreading solutions include legal aid, contingent fees, and class actions. Cost-spreading techniques facilitate access to ordinary courts. In other words, cost-spreading measures aim to give the consumer at least some of the firm's advantages so that the consumer can 'fight the case up at [the firm's] level'.

Cost avoidance techniques include small claims tribunals, mediation by consumer agencies, and industry-specific dispute resolution schemes such as tribunals, ombudsmen or compensation funds. Cost-avoidance measures typically involve 'forms of alternative dispute resolution. They involve substitutes for ordinary courts.' These alternative dispute mechanisms involve the firm fighting the case 'down at [the consumer's] level'.

Duggan concludes that 'no one measure is a complete solution. Each has its costs and benefits.' He recommends that 'there should be a mix of cost spreading and cost avoidance measures to secure the benefits of both traditional litigation and alternative dispute resolution'. His essay offers recommendations on how each of the cost spreading or cost avoidance mechanisms might be better tailored to specific types of claims. The essay offers a valuable method by which to assess each of the more specific mechanisms discussed in the essays in the later sections of the volume.

Finally in the first section, in a wide-ranging essay, Michael Trebilcock develops principles for an information-based approach to consumer protection policy and evaluates a number of institutional options for the provision of civil justice. Trebilcock argues that the true focus of consumer protection policy is 'the quality and cost of consumer information'. He begins with what he terms 'an information-based model of a consumer transaction' which analyses a consumer's decision on how many resources to expend on information about a particular transaction. His model isolates two important characteristics of the market setting: (1) the value of the information to the consumer; and (2) the cost of the information. He concludes that consumers are less likely to be in need of consumer protection where the cost of the information is low relative to the value of the information. Consumer protection problems occur, according to Trebilcock, where information costs are relatively high or the value of information is perceived to be relatively low.

Trebilcock's essay demonstrates that policy-makers are faced with a number of choices at many different levels. The essay provides both a framework for determining whether or not regulation is necessary, and a feasible response to the consumer protection problem. He urges that policy-makers must 'identify the policy objectives to be served by state involvement or intervention with maximum clarity and precision'. Beyond the decision whether to regulate or not, policy-makers must choose a relevant policy instrument to serve the particular objectives. These policy instruments must be evaluated and re-evaluated in light of comparative, historical and empirical evidence. Trebilcock examines a variety of policy instruments, including warnings, bans, information intermediaries, experience ratings and standardised contract terms.

Legislators also face the task of choosing an administrative or institutional forum that will have the responsibility for administering the chosen policy instruments. Trebilcock's essay provides a decision-tree framework for evaluating institutional options for the provision of civil justice, and analyses a variety of institutional mechanisms including public or private enforcement, public education, informal dispute resolution, no fault liability regimes, and small claims courts. Trebilcock also makes several suggestions for reforming the formal adjudication process, including possible roles for class actions, legal insurance, contingent fees and punitive damages. His essay concludes with a detailed discussion of judicial policing of standard form contracts.

Issues in contract and tort

Standard form contracts are the focus of the first of two essays in this section. Leone Niglia questions the widely accepted view that terms in standard form contracts that shift to consumers as many of the risks of the transaction as possible should be regarded as unquestionably 'unfair'. Niglia argues that the unquestionably unfair viewpoint was conceived and sustained by a socio-legal analysis that understood standard form contracts as the exercise of unjust firm power over consumers, such power emanating either from the monopoly position of or the institutional structure of the firm. The accuracy, and hence pre-eminence of this socio-legal analysis, has in the last twenty years or so been challenged as a part of the emergence of law and economics scholarship, whereby standard form contracts are not *per se* unfair, but are unfair only where the high transaction costs involved mean they do not reflect the parties' actual preferences.

Niglia demonstrates, however, that the law and economics analysis has 'left largely unaffected the belief that certain standardised terms are unquestionably unfair'. Although the victimised-consumer model is rejected, the imposition of compulsory terms – which 'would save the customer from the transaction costs of acquiring information and the seller those of disclosing information' – is widely seen as the best solution.

Niglia's thesis is that both the socio-legal and efficiency-oriented analyses are 'too concerned with preserving the unfairness belief'. His ultimate concern is that both the striking down of unfair terms and the imposition of compulsory terms are too costly for society. In the first case, the decision-maker uses 'fairness' or 'unfairness' as a proxy for the decision-maker's own 'choice on how to allocate costs that society ought to bear in the face of the materialisation of the contractual risk contemplated in the term under consideration'. In the second case, the decision-maker 'will allocate the relevant costs to the drafter [of the standard form contract], but this is not necessarily convenient for society', since the costs might be wrongly allocated.

The resulting challenge for consumer law scholarship in the context of maximising protection of consumers transacting by standard form contracts (or indeed preserving their access to meaningful justice) is, as Niglia suggests, the stark choice – *either* to admit that the notion of unquestionable unfairness is wrong, *or* to sustain the noble purpose of protecting the weak against abuse of private power but to admit at the same time that the application of the noble purpose 'merely generat[es] unintended perverse effects'.

Concentration, in the context of consumers' access to justice, on processes by which consumers' rights are more efficiently vindicated is important, but it must not be overlooked that the provision of effective liability rules, determining such rights, is just as vital a part of modern consumer law. Mass infections of product sectors is an area of particular importance and difficulty in this respect. The

second essay in this section, by Jane Stapleton, is part of her ongoing research on the challenges that this area throws out to product liability regimes around the world. The essay concentrates on the manner in which the US *Restatement (Third) of Torts: Product Liability* (1998) deals with those challenges. Stapleton's particular focus is on how the *Restatement* will cope with cases of BSE/CJD ('mad cow disease'). Her argument is that the fragmented approach that the *Restatement*'s structure mandates means that 'the treatment of BSE/CJD cases . . . would be highly fractured'. More particularly, this fractured approach 'does not', as the *Restatement*'s Reporters claim, 'immediately seem to be the most effective way of addressing the "conceptual difficulties in trying to respond to products liability claims rationally, consistently, and fairly"'. In fact, Stapleton argues, the US regime 'is incoherent in its approach to infection cases'. There would be no redress for infections contracted from human blood or tissue; there might be recovery if contracted from food, or from leather/woollen clothing; and 'the US regime might provide recovery only on the basis that the product condition was to be classed as a design case . . .'

Stapleton contrasts the unsatisfactory response of the *Restatement* with the response offered by the 1985 European Directive on Product Liability and its various clones. She suggests that, although the existing case law is thin and mixed in its application to infected products, the Directive's avoidance of the fragmented approach of the *Restatement* might have offered hope of producing a better model for dealing with mass infection cases. Interestingly, however, Stapleton suggests that 'despite all the energy thrown into the Directive and *Third Restatement*, the law of negligence may continue to provide citizens with a more flexible and coherent cause of action'. 'Traditional general causes of action, such as negligence and warranty, also provide a clearer forum for courts to enunciate the complex moral and policy dilemmas that characterise generic mass infections of essential product sectors.'

Stapleton also makes passing reference to the artificial distinction often made between products and services. Delivery of essential products to consumers in truth contemplates the delivery of a service to those consumers. In such circumstances, the point is well taken that liability regimes should accordingly encompass both products *and* services.

Services and the consumer

Consumers of course come into contact with a variety of service industries, where the focus is principally on the service rendered rather than a product, and the challenge for policy-makers is to determine whether to and how best to regulate particular services as they intersect with the interests of consumers. Thomas Wilhelmsson examines the implications of the privatisation of publicly provided services and asks whether European principles of private law may play a role in

assisting consumers. The two papers that follow in this section examine specific reform programmes in respect of United Kingdom financial services and banking. Rhoda James and Philip Morris explore the implications of the new Financial Ombudsman Service, while Jenny Hamilton and Mik Wisniewski examine the new Financial Services Authority and question whether the introduction of a cost–benefit analysis regime protects the interests of consumers.

The supply of services is an area where consumers suffer from acute information asymmetries. Consumers are often unable to make informed evaluations of the quality of service providers. Governments may respond by instituting general minimum service guarantees that might be implied into all service contracts or by adopting industry-specific regulation that might impose service standards, disclosure requirements or mandatory rules governing the form and content of the service provider's contract.

In his essay, Wilhelmsson adopts a 'more principled approach' and examines the opportunities for developing private law responses to the issue of the shrinking public state and the deregulation movement. He asks 'what new private law means are to be envisaged when public services are, to an increasing extent, performed on the basis of market rationality'. His analysis begins with the premise that private law has the potential to assist consumers when dealing with privatised service industries. However, he also extends his examination to include other services that fulfil the needs of citizens. In this category he includes financial services and information society services. He argues that such services are 'central to the infrastructure of society, and the consumer cannot reasonably be expected to live without them'. Aspects of financial and information services 'can be treated as social rights in the same way that services provided by "traditional" public utilities are'. New principles of private law that are developing in response to the privatisation of public utilities might 'infect' (or provide what Wilhelmsson calls the 'Trojan horse effect') service providers such as banks that have traditionally operated in the realm of the private sector.

Wilhelmsson argues that access to services has become more important than before with the 'privatisation of public functions, as well as the increased role of private actors with social functions such as banks and financial institutions'. Here he develops a principle of non-discrimination that would focus not simply on racial and gender discrimination but also on economic discrimination. He argues that 'when public supervision and control become more lenient' service providers should be required to 'adhere to certain fundamental principles, namely, access to the service, equal treatment of the consumers, and transparency in relation to the consumers'.

In addition, Wilhelmsson explores the additional principle of social *force majeure*. A society has a responsibility to ensure that more 'unfortunate members also have ongoing access to services that the fulfilment of our basic needs require'. Social *force majeure* operates in favour of a consumer who is affected by some unforeseeable

unfortunate circumstance (such as a change in health, employment or family circumstances). Various legal consequences might be attached to the principle. The service provider might lose certain rights against the consumer and be prevented, for example, from terminating the contract and cutting off the supply of services.

James and Morris argue that the financial services industry poses particular challenges for consumers. In that industry there is 'characteristically an acute inequality of bargaining power between the product provider and the purchaser coupled with, perhaps most notoriously in the insurance sector, a body of legal doctrine heavily weighted against the consumer'. Their essay evaluates the new Financial Ombudsman Service (FOS) in the United Kingdom and evaluates the new statutory scheme against the existing 'fragmented patchwork quilt' of largely voluntary complaint redress mechanisms.

As noted earlier, Duggan suggests that an ombudsman scheme represents one of the many possible techniques of cost avoidance in the civil justice scheme. The FOS represents part of the British New Labour Government's larger effort to reform access to civil justice. Government discussion papers have emphasised a shift towards alternative dispute resolution and a civil justice system 'where courts are a forum of last resort'. Ombudsman schemes feature in the Government's plans as 'exemplars of decision-making bodies providing "alternative adjudication"'. The new FOS brings together eight existing complaints schemes and provides a single 'one-stop' organisation for consumers.

James and Morris argue that one of the advantages of an ombudsman technique is that it has the 'capacity to transcend strict legal rules and draw upon a range of extra-legal standards in a manner that usually operates to the benefit of consumers'. Their essay provides a detailed analysis of the FOS and evaluates the effectiveness of the regime on a number of different fronts, including accessibility, procedure, jurisdiction, remedies and the performance of a quality control function.

The FOS is part of a larger reform of the financial services industry in the United Kingdom with the adoption of the Financial Services and Markets Act 2000 and the creation of a new 'super regulator', the Financial Services Authority (FSA). Hamilton and Wisniewski examine the FSA, and, in particular, the statutory requirement that the regulator conduct a cost–benefit analysis (CBA) of any proposed new regulation. Their essay evaluates the CBA process and its potential impact upon consumers. While the FSA was hailed by the British Government as the introduction of a protection measure for consumers, the authors argue that the regime does not offer a strong commitment to 'public interest' regulation but rather at its heart the regime is a 'strong affirmation of market efficiency, individual responsibility, and the need for regulatory efficiency'.

The essay includes a discussion of: (1) the reasons for introducing CBA; (2) an overview of the CBA process, including its origins and how a CBA is undertaken; (3) a description of the specific CBA process undertaken by the FSA with respect to

the possible regulation of mortgage advice; and (4) a critique of the CBA undertaken by the FSA.

CBA is often presented as a value-neutral way in which regulators or government officials may determine the fundamental question of whether or not to regulate. While Hamilton and Wisniewski focus on the specific FSA statutory requirement to conduct a CBA, their essay has broader application and points out the more general problems with a CBA and draws upon the work of cultural theorists to suggest ways in which consumers might have more of a voice in the design of policy parameters and in identifying values. Rather than merely commenting on or choosing between policy choices designed by experts in a 'top-down' approach, consumer input should take place at an earlier stage. The authors conclude that 'once the science has been "done" and presented to the consumer a particular cultural view about what is important and what is valuable already dominates. It is too late for other voices to be heard.'

Consumer bankruptcy law

The two essays in this section highlight recent reforms and proposed reforms to consumer bankruptcy law in North America. Thomas Telfer and Charles Tabb examine American and Canadian bankruptcy law reforms that significantly affect the ability of a consumer to obtain access to the bankruptcy law discharge. Although there are major historical differences between the evolution of Canadian and American bankruptcy law, nevertheless both jurisdictions have provided in some form a means for a debtor to obtain a fresh start through the bankruptcy discharge. With the rapid expansion of consumer debt, consumer bankruptcies have increased in both Canada and the United States. Both essays illustrate a common trend by the two jurisdictions to curtail the number of consumer bankruptcies by channelling or encouraging debtors into proposal or repayment schemes.

Telfer's essay traces consumer bankruptcy reform efforts in Canada and provides a historical perspective on the issue. He argues that there has been a reconceptualisation of the role of the discharge in bankruptcy law and a new view of debtor rehabilitation has emerged. The 1997 amendments to the Canadian Bankruptcy and Insolvency Act have significantly restricted access to the bankruptcy discharge. The new regime encourages debtors into repayment plans and discourages debtors from filing for straight bankruptcy. Debtors in Canada who opt for straight bankruptcy are scrutinised and if surplus income is found mandatory payments to the trustee are required. The new regime presumes that many debtors have the ability to pay creditors from surplus income and sets out new mandatory repayment levels. Telfer argues that 'whereas traditional bankruptcy discharge policy referred to the rehabilitation of the debtor, Parliament now asks debtors to rehabilitate their debts by making payments out of surplus income'.

Telfer's essay concludes with a historical discussion of the evolution of the bankruptcy discharge in Canadian law dating back to the nineteenth century. His paper illustrates that the 1997 reforms are not the first time Canada has restricted access to the discharge and that for a period in its history Canada operated without any bankruptcy law after Parliament decided to repeal the bankruptcy statute in the nineteenth century. Repeal however was a policy failure and a significant creditor interest group sought and obtained in 1919 a bankruptcy law that featured a discharge. Telfer's essay challenges its readers to review the current debates over the 'evils' of the rising number of bankruptcies and the legislative restrictions as part of the legislative pendulum that has over time swung routinely in favour of increasing restrictions on the discharge.

Tabb demonstrates how the bankruptcy reform bills of the Senate and the House of Representatives would 'reshape radically the contours of the United States consumer bankruptcy laws in favour of financial institutions and to the detriment of needy individual debtors'. The traditional promise of a fresh start for consumer debtors would become a 'cruel and ephemeral illusion'. The bankruptcy reform bills, according to Tabb, will have a 'draconian' effect for those debtors most in need of bankruptcy relief, while at the same time the bills offer substantial 'succour to wealthier debtors' in the form of exemptions.

Procedure and process issues

The contributors in this section consider two further methods or techniques to best achieve consumers' access to justice. The two essays provide an interesting contrast between the cost-avoidance and cost-spreading techniques identified by Duggan. Alternative dispute resolution is an example of cost-avoidance, while the class action is a mechanism to spread costs among a large number of parties. The essays provide concrete examples of some of the potential problems with each of these policy choices. Elizabeth Thornburg's essay examines the growth of private dispute resolution mechanisms in the context of Internet commerce and raises concerns about the increasing role that such private mechanisms are playing in the market place. Richard Faulk's essay considers the abuse of American class actions in international disputes.

Thornburg begins by acknowledging that alternative dispute procedures are typically faster and cheaper than court-based resolution. However, she claims that 'faster is not always better. Cheap is not always fair or accurate.' The essay explores 'three worlds of privatised dispute resolution': (1) the domain name dispute policy of the Internet Corporation for Assigned Names and Numbers; (2) the use by copyright owners of digital rights management technology to provide computer-activated self-help automatically to enforce contract terms even at variance with

'real world substantive law'; and (3) contractual shrinkwrap or clickwrap clauses which mandate binding arbitration in consumer transactions.

Thornburg argues that the growth of these technological and Internet-based dispute resolution mechanisms will have several important consequences for access to justice. First, the regimes will result in privatised justice with little or no input from government actors. Secondly, the resolution mechanisms shift procedural advantage to powerful players. Thirdly, the privatised regimes do not meet the traditional requirements of due process, such as 'affordable access to justice, discovery, collective action, live hearings, confrontation of witnesses, a neutral decision-maker and a transparent process'. Finally, Thornburg claims that by eliminating the courts as the arbiters of disputes, 'these processes decrease the power of the government to shape and enforce substantive law'. Thornburg challenges the notion that dispute resolution as an alternative to litigation is meant to reduce costs. She argues that 'the cost of making a claim and the burden of uncertainty' are shifted onto the less powerful claimant. Further, she illustrates that in some instances shrinkwrap or clickwrap contractual provisions, which mandate arbitration, preclude the alternative cost-spreading technique of class actions. According to Thornburg, 'privately chosen rules are being substituted for public law'.

As Faulk's essay demonstrates, class actions were originally allowed in American law on the basis that 'wrongdoers should not be allowed to reap unscrupulous gains from multitudes of victims who, without the class device, would probably forgo claims for relief in court because their losses were relatively small'. Faulk's essay, however, addresses a more recent phenomenon, the use of international class actions in the context of human rights violations in countries outside the United States. Faulk, who focuses on mass tort claims in international disputes, such as slave labour and Holocaust victims' class actions against German companies and Swiss banks, argues that the procedure is open to abuse and is critical of proposals that would seek to expand the use of the device internationally, or that would allow international enforcement of class action judgments by treaty. He notes that settlements in these cases occurred in the absence of any rulings on the merits of the case, and, in relation to the German claims, despite favourable rulings holding that the matters were not justiciable in United States courts. Further, settlements occurred before classes were certified, which according to Faulk demonstrates 'the coercive effects of class allegations'.

Globalism in this context is disturbing when 'procedural devices that are not yet recognised internationally are used to resolve claims arising from conduct that occurs beyond the forum state's borders'. Faulk's essay thus addresses the broader issue of the merits of transplanting legal rules and procedures from one legal culture to another. In our increasingly shrinking world, can American class action rules and procedures be effectively utilised to resolve international disputes? The differences between the American legal system and the civil law traditions make the 'American paradigm . . . clearly unsuitable for wholesale export to foreign legal systems'.

While class actions may have been designed to allow claims to be pursued that would not otherwise have been initiated, Faulk argues that 'the goal of promoting increased "access to justice" is not achieved by promoting access alone'. A system of collective litigation must also ensure 'the reliable and efficient dispensation of justice to all participating parties'.

Conflict of laws issues

The book concludes with two essays that raise conflict of laws issues. As noted in the opening paragraph of this introduction, the age of globalisation brings special challenges to consumer law. One particular challenge is that offered by the increasing practice of concluding electronic consumer contracts between parties in different states. Lorna Gillies, in the first of the two essays, argues that the harmonisation of private international law rules is essential if the use of electronic consumer contracting is to be facilitated and thereby encouraged and if, at the same time, efficient access for consumers to justice in connection with such activity is to be achieved. Her position is that 'access to justice will not benefit if different national (i.e., international private) laws' procedures regulate electronic commerce'.

Her paper examines, first, the initiatives of the European Union in promoting a regional adaptation of private international law rules for dealing with electronic consumer contracts. She analyses in detail the Brussels 1 Regulation, which modifies existing jurisdictional rules in consumer contract disputes, concluding that the Regulation is a coherent part of the European Community's stated objective to protect consumers as the 'weaker party' in consumer contracts. She also discusses, in the context of their proposed reform, the choice of law rules relating to consumer contracts as found in the Rome Convention on the Law Applicable to Contractual Obligations (1980).

Gillies then reviews the US position, outlining the jurisdiction and choice of law rules found in the case law and the *Restatement (Second): Conflict of Laws* (1971). She argues that a number of key issues identified in US cases 'illustrate the need for the adoption of specific legislative rules for electronic commerce activity and contracts'. The issues discussed include the distinction between active and passive websites, website activity as an economic activity in a forum state, website server location as a jurisdictional test, and the relevance of the place of receipt of goods and services.

Gillies' conclusion is that, while both the European and American developments are worthy and important regional initiatives that continue to influence the development of private international law rules, private international law 'should be harmonised globally in order to facilitate uniform application of jurisdiction and choice of law principles'. Such harmonisation does not, she suggests, require the

creation of new rules for electronic contracts, but rather the adaptation of 'present offline rules for transactions that take place online'.

Axel Halfmeier's essay approaches the problem of internationalisation from a slightly different perspective than that of Gillies. He asks the question whether the growth of international electronic commerce, rather than, as widely assumed, greatly enhancing the importance of private international law rules, will in fact lead to the diminution and disappearance of private international law. His suggestion is that recent developments in European consumer protection law (whereby nation states are losing their regulatory powers) 'show that there are new mechanisms of European Union law that supplement or even replace traditional private international law doctrine'. Does this mean it is time to wave goodbye to private international law?

As Gillies does, Halfmeier discusses the impact on consumer contracts of both jurisdiction and choice of law instruments in European Union law. His main focus, however, is the decision of the European Court of Justice of 9 November 2000 in *Ingmar GB Ltd.* v. *Eaton Leonard Technologies Inc.* Although not a consumer law case, he argues that the decision expands the prospect of arguing successfully that the consumer law rules found in EC instruments are supermandatory rules. If so, 'a uniform minimum level of consumer protection would always exist before European courts regardless of conflict of laws rules'.

Halfmeier also examines non-contractual consumer protection law in the European Union, including the Treaty, the European Human Rights Convention and the E-Commerce Directive of 2000. These instruments highlight that EU law, while recognising that domestic laws of member states are theoretically applicable by virtue of private international law rules, requires scrutiny of those laws 'according to substantive European standards of rationality and necessity'. Halfmeier's conclusion is that while traditional private international law rules still exist, they 'are often blotted out by substantive EU rules'.

Conclusion

The essays by Gillies and Halfmeier indicate that the demands of a fair and effective consumer law in an age of electronic and global commerce will have far-reaching effects on the nature and content of private international law itself. The essays in the earlier sections of the book show that the same is true of consumer law's intersection with other branches of both private and public law. The essays not only provoke deeper consideration of the theme around which they were written, consumers' access to justice, but they also demonstrate that consumer law is fundamental to an understanding of the dimensions of a just, fair and efficient public and private justice system.