

Abstract

The law has failed to keep apace with the rapid rise in e-commerce. This is particularly so when e-commerce spans national boundaries. There exists a regulatory gap that may result in unexpected outcomes for e-commerce companies involved in litigation. This paper investigates the possibility and feasibility of employing the concept of international commercial custom (hereinafter referred to as "e-custom") as a source of law, as a potential solution to legal disputes in contractual global electronic commerce. Under this proposal, e-custom raises to the level of law the most widespread web practices thus providing the Internet community with a flexible set of norms regarding dealings on the Net. E-custom can also supplement existing domestic regulation of electronic commerce and future international regulation of digital trade. The paper sets out the issues that need to be addressed to make this proposal work and analyses them using developments from neighbouring fields of legal knowledge, mainly international public law and international trade law.

1. Introduction

The electronic commerce era has brought unprecedented benefits to the companies that have connected their resources to the Internet in order to better link their enterprises with their national and international customers and suppliers. However, these radical new business practices have not yet found recognition in law that traditionally has lagged behind new developments. As a result international electronic trade functions to a large extent in a legal vacuum. Given the current state of computer technology and the legal regulation pertaining to that phenomenon it is quite obvious that there is a large regulatory gap that needs to be filled. To remedy this situation, the international community has several times expressed its interest in defining legal policy in relation to an Internet commercial environment (e.g. [4; 27; 40; 43]).

However, both international as well as national legislatures have problems with regulating global electronic commerce mainly because it is changing too fast. So far the international community has managed to propose only a very basic framework for global digital trade, aiming at recognition of electronic documents, signatures and contracts. Specific parties rights and obligations in relation to each other are left to merchants to set out in a contract. If however a formal contract does not exist or the contract proves inadequate to regulate the disputed matter, both parties may find themselves in the state of impasse.

The aim of this paper is to investigate the possibility and feasibility of employing the concept of international e-commerce custom (hereinafter termed "e-custom") as a source of law in order to supplement global electronic commerce law with a new way of establishing electronic merchants’ rights and obligations. It is argued, that certain digital mercantile practices which are widespread, of legal importance, but not necessarily immemorial, might (under circumstances described later) attain a status of law in international electronic commerce.

The most important benefit of the proposed concept is e-custom’s ability to adapt to the fast changing digital world without government intervention. As a result, the community of Internet merchants can be provided with a set of norms as to how to deal on the Net. Governments
can benefit from the incorporation of commonly recognised practices into their national legislation. Another advantage of e-custom is that it is the best filler of gaps left by mercantile contracts. Moreover, the idea of e-custom will not contradict any future developments in the global e-commerce law area. Finally, custom can be more easily evidenced in an electronic environment compared to that of traditional trade.

The scope of the paper will be limited to international business-to-business electronic commerce. Also, the concept of custom will be discussed in the context of international contracts only, despite its potential in other areas of transnational private law like torts or intellectual property law.

The paper addresses the most important issues associated with the concept of international trade custom as a source of law. The method is to set out a series of issues associated with making use of this idea. These issues are: the importance of custom, the definition of custom, the problem of long standing practice as a necessary requirement for successful formation of custom, the environment in which an trade custom is to function, and the nature of custom. Finally, as a practical illustration of the application of the concept of custom, the issue of security of transactions in an e-commerce environment will be analysed. It is argued that certain widely accepted practices have emerged and petrified, and the implications of this for possible disputes over contractual obligations are discussed.

2. Existing approaches to regulating global electronic commerce

Before making the case for custom as a source of e-commerce law, it is necessary to review the progress and limitations of other important approaches being pursued both by the international community and by academics.

2.1 Model Law on Electronic Commerce.

The first important development for international electronic commerce was The Model Law on Electronic Commerce adopted by United Nations’ General Assembly in December 1996 [40]. The Model Law resolution is based on two principles: functional equivalence, which means that electronic documents are functionally equivalent to paper documents, and technology neutrality, which means that all the provisions of the model law are expressed in technology neutral language in order to remain applicable irrespective of the technological progress [40].

In summary, the importance of The Model Law is that it offers recognition of electronic writing and signatures, supports admission of computer evidence in court and provides for recognition of validity and enforceability of contracts formed through electronic means [40]. The Model Law has gained a worldwide recognition as a good “start to defining an international set of uniform commercial principles for electronic commerce” [43] and its provisions have already been voluntarily implemented in the number of states throughout America, Australia, Europe and Asia.

However, The Model Law does not target the development of a global legal framework for electronic commerce. Instead The Model Law provides the national legislators with a template [4] that is aimed at helping them with the enactment of domestic laws based on proposed principles [40].

2.2 European Union Directives

Other important international developments include two European Union Directives on electronic commerce (The Electronic Commerce Directive) [29] and digital signatures (The Digital Signature Directive) [28].

The Electronic Commerce Directive, which is anticipated to become fully implemented by EU member states by 17 of January 2002 (art.22) establishes a set of harmonised rules in relation to, among other things, establishment of service providers, commercial communication, liability of intermediaries, validity of electronic contracts and out-of-court dispute settlement (art. 1.2). As one would expect, The Electronic Commerce Directive applies only to on-line businesses established within the European Union. The Electronic Commerce Directive employs The Model Law functional equivalent approach [26] requiring 15 EU Member States to implement legislation to remove current requirements, including the requirements of form, which are likely to curb the use of contracts by electronic means (Recital 34 of Directive).

The importance of the Electronic Commerce Directive is that this is the first mandatory, transnational recognition of electronic contracts linking both Civil and Anglo-Saxon contractual traditions. Moreover, the regulation does not only affect European Union countries but is also likely to be adopted by candidate states to European Union thus promoting a uniform e-commerce law across the whole Europe. However, the directive is also somewhat limited, regulating electronic commerce in only 3 articles, therefore raising many controversies within the EU community itself [22; 26]. Moreover, the Electronic Commerce Directive is restricted in its application to Europe. Therefore, it does not guarantee a uniform set of rules for global, intercontinental digital trade.

Similar remarks can be made in relation to the Digital Signature Directive that establishes the requirements for
electronic signature certificates and certification services throughout the EU and includes mechanisms for cooperation with third countries on the basis of mutual recognition of certificates, bilateral and multilateral agreements.

2.3 E-commerce Law Literature

The literature relating to international e-commerce law is very modest. Contemporary writers (e.g. [3; 5; 16; 18; 23; 24]) generally study e-commerce law from the perspective of a national legal system, thus ignoring its supranational character, and as a result do not contribute to the development of a global legal framework for international e-commerce. These works almost all look at the implications of the use of computers from the perspective of domestic intellectual property laws, privacy laws, competition laws, contract laws, laws of negligence and tax laws. In addition a frequent assumption is that Internet transactions take place in country A, between parties from country A and in front of the court in country A. Consequently, these works are more useful to a country-wide Internet community than the international Internet merchants.

3. Custom as a source of law

The concept of international commercial and non-commercial custom will be explained with reference to the existing legal literature. The two main sources for this concept are the international public law literature, which provides an excellent treatment of various theories of international custom as a source of law in inter-state relations [1; 6; 7; 9; 10; 19; 37; 42; 44] and international trade law, where international commercial custom has traditionally played a very important role [12; 14; 15; 20; 21; 25; 30-32; 35; 36; 38; 40].

3.1 Custom in municipal legal systems

Custom is the natural foundation of any legal order on the globe. It is through the long-lasting process of recognition of certain human behaviours as desirable or mandatory and observance of those practices by other members of the society that human communities have managed to develop legal orders. However, as humankind progressed, old customs where gradually codified. The 19th century industrialisation saw the introduction of statutes as the main regulatory instrument at the national level [13]. Those statutes in turn, incorporated many customary rules formerly not codified. In consequence, the legislative role of custom in municipal systems has been diminished to the extent that one could claim that nowadays custom’s role, as a source of national law is marginal.

3.2 Custom in international legal orders

However, custom is an important source of legal obligations both in international public law and in international trade law. Article 38 of the Statute of International Court of Justice enlists international custom as a second source of inter-state law after treaties [41]. Its crucial role in international public law is the sea, law of the treaties, law of outer space, law of human rights and law of diplomatic and consular relationships has been often expressed in the literature and in International Court of Justice judgments, e.g [1; 7; 8; 10]. It is important to realize however, that international public law deals only with official inter-state relations, and as a result, the theory of international custom there defined cannot be directly applied to either traditional or digital commerce. It is argued, however, that after necessary modifications, the theory can be successfully re-used in defining the concept of transnational e-commerce custom.

On the other hand, the importance of commercial customs in traditional international trade is well known among merchants, mainly as a result of having been codified by the International Chamber of Commerce mercantile practices (e.g. International Commercial Terms INCOTERMS or Uniform Customs and Practice for Documentary Credits) [13; 34; 38; 39].

3.3 The Potential of custom in international electronic commerce

It is argued here that custom is an important component of the international legal systems because the essential features of those regimes are lack of central governance and, relative to modern legislatures, underdevelopment. Similarly, the Internet with its bottom-up governance and, at this stage, lack of any globally binding laws seems to be a very similar environment which could utilize the idea of custom as a global source transnational e-commerce law.

Custom may turn out to be a very important source of international Internet law because it petrifies and rises to the level of law commonly recognized and observed practices. In a fast changing digital world its ability and flexibility in recognizing globally binding e-commerce practices, may prove to be the best “regulatory” option available. At the same time, the concept of custom does not contradict other regulatory developments at national and international level because it can be assumed that
custom will be overruled by any contrary treaty, statute or agreement.

Hence, the possible legislative role of a custom appears to be a good solution before, in the next phase of the development of international electronic commerce law, some explicit conventional regulations materialize. It appears that in the near future, the international community will not see any major global regulations attempting to govern Internet transactions. Instead, the international community will have to rely on its own resources, through the careful use of contracts and, as argued here, utilisation of commercial customs. Nevertheless, the codification of existing and emerging customary rules in relation to electronic trade will be necessary in the long run, in order to allow commercial parties to ascertain their rights and obligations.

But the role of a custom is much broader than just an interim regulation of some of the aspects of the e-market. Custom plays, and will play, an important role in interpreting contract clauses. Also, its capability of modifying existing or future concurrent sources of e-commerce law like conventions or contracts should be stressed. Furthermore, custom can widen the scope of applicability of international conventions. Finally, a custom will remain the best “filler” of the gaps left by formal e-commerce related legislative works.

4. The definition of custom

4.1 Definition of international custom in international public law

Article 38 of the Statute of the International Court of Justice defines international custom as “evidence of general practice accepted as law” [41]. This definition distinguishes two constituent elements of international custom: general practice and acceptance of this practice as law by international law subjects [1; 9]. Moreover, this definition does not accentuate the longevity of practice as an essential element of custom. This approach reflects the interesting fact, which will be addressed below, that due to a rapid development of technology in the 20th century international custom can be formulated faster than in the past.

4.2 Definition of international custom in international trade law

According to Schmitthoff, international trade law is derived from two sources: international legislation and international custom. Describing international commercial custom, he stated: "International custom consists of commercial practices, usages or standards, which are so widely used that businessmen engaged in international trade expect their contracting parties to conform with them and which are formulated by international agencies, such as International Chamber of Commerce, or United Nations Economic Commission for Europe, or international trade associations." [33]

There are three striking elements in this definition of custom. First, as in the previous definition, custom does not need to have a long tradition in order to be binding, and commercial practice needs to be widely used and accepted as a binding norm. Finally, formulation of custom by various international trade associations seems to be the necessary condition of a successful formulation of custom.

4.3 A proposed definition of international e-commerce custom (e-custom)

An international e-commerce custom (e-custom) can be defined as a legally relevant practice of trading on the Internet, which is sufficiently widespread as to justify the expectation that it will be observed.

This concise definition hides some important issues that should now be expanded upon. The mercantile practice must be of legal importance. For example an Internet practice of using a certain type of font is legally unimportant and hence non-binding. Also, this definition does not require e-custom to be a long lasting practice. As will be argued below, custom can develop nowadays within couple of months in so quickly changing environment as electronic commerce. What is important is that a practice must be widespread, meaning established within a reasonable time frame, be it couple of months or couple of years, intensive in terms of number of transactions within a given time period, and confined to one industry or geographical region or the whole world. Expectation as to the observance of the practice means that parties willing to deviate from it must have a very good reason to do so. The next two sections are devoted to justifying all aspects of this definition.

5. Does international custom need to have a long tradition?

5.1 New meaning of the time factor in custom

The ordinary meaning of the term “custom” presupposes the existence of widespread practice for a very long time. This notion of the term has changed in international law. Since the Second World War it has been accepted that international custom can be
recognized after a short period of time, since developments in society, particularly in commercial or technology law, take place at a quicker pace [7; 10; 44].

As one of the judges of International Court of Justice put it "... the speedy tempo of present international life promoted by highly developed communication (...) had minimized the importance of the time factor and has made possible the acceleration of the formation of customary international law. What required a hundred years in former days now may require less than ten years" [17].

Those findings are of paramount importance to the concept of e-custom. Certain e-mercantile practices can become binding within a very short time frame. If 30 years ago, it could take less than ten years in international public law to develop binding practices it can also take less than 10 years to develop binding e-commerce practices nowadays. In fact, given the enormous tempo of the digital revolution, one could argue that binding e-commerce practices could develop in much shorter time frame, arguably less than a year.

5.2 Volume of transactions

The traditional understanding of the concept of custom implies longevity of practice as the necessary condition of its existence. This one-dimensional, “horizontal” approach does not take into account other potential measures for assessing the practical importance of a given routine like the intensity of certain practices within a given time frame (“vertical” measure). For instance, 200 years ago there could be 100 instances of adherence to one commercial practice within one year. Nowadays there can be 100 instances of adherence to one commercial practice within one day. Another words, one day nowadays can be as important as 1 year in the past as far as formation of a custom is concerned.

This paper challenges the traditional understanding of the concept of custom as it is argued that, in the case of electronic commerce custom, it is also the volume of the transactions that can contribute to the faster formation of international e-customary norms. The electronic commerce environment provides a unique opportunity to measure the number and type of transactions that took place in a given time frame, thus providing an excellent proof of mercantile adherence to certain practices. For instance, transaction logs might provide information about the intensity of certain types of transactions that might contribute to the faster formulation of e-custom.

6. What constitutes a custom?

6.1 The objective element of custom

Discussion of what constitutes a custom has a very long tradition, dating back to ancient Rome. In modern legal theory the majority of scholars agree that a custom consists of two elements: objective and subjective.

The concept “practice” is generally taken to refer to physical acts [10]. However, a debate exists concerning whether other acts like statements, negotiating positions or declarations may constitute party’s practice. Most authors insisted that only physical acts constitute practice (for example, writing a computer program), which from the purely logical point of view seems to be right [9; 10; 44]. However, this approach seems to be too restrictive, since the physical deeds are usually triggered and fuelled by previous oral or written declarations (e.g. political declarations, codes of good practice) that subsequently were to be fulfilled in practice. It is argued then, that in the case of electronic commerce the term practice embraces not only physical acts but also declarations as to what an e-company intends to do.

Moreover, there is an ongoing discussion in the literature as to whether abstention or lack of positive acts can create prohibitory customary norms [10]. There seems to be no definitive answer to this question. It should be pointed out, however, that allowing creation of law based on lack of practice is very risky, since lack of certain activities does not imply prohibition to act in that way in the future.

6.2 The subjective element of custom

The second element is of psychological nature. According to the majority of scholars practice alone is not a sufficient element to form the legal rule. What is also required is a special psychological attitude towards the practice that could be described as a feeling of being bound by the norm that could be inferred from this practice. As a logical consequence, a person violating the custom should be aware of the fact that he/she is breaking the rule of law that is binding him/her.

The idea of a psychological attitude towards some practice is problematic, especially when the parties are not people as may indeed be the case in electronic commerce. It is interesting to see how international lawyers try to deal with the requirement of a psychological element. As Michael Akehurst wrote in relation to states “there is clearly something artificial about trying to analyse the psychology of collective entities such as states. … the modern tendency is not to look for direct evidence of a state’s psychological convictions, but to infer opinio iuris (acceptance of practice – added by authors) indirectly from the actual behaviour of states.” And further: “Permissive rules can be proved by showing that some states have acted in a particular way … and that other states, whose interest
6.3 Whose practice generates custom?

The requirement of a practice gives rise to the question of whose practice contributes to the formation of a customary rule. Since we are dealing with international e-commerce law, the major players in the development of customary rules would be companies. Besides, the subjects of international e-commerce law would be physical persons engaged in e-commerce, but possibly also international organizations and states acting as a party in e-trade environment.

6.4 General and local custom

Since a custom may be either general or local [11; 44] even a practice of two companies would be sufficient to form a local custom that would bind them. Of course, if other companies then follow the electronic practice of these two companies, this could lead to enlarging the scope of the application of a particular customary rule, or maybe even to the formation of the general customary rule. In international public law, authors who require both practice and its acceptance as law to form a custom, state that conduct of even one state, tacitly accepted as a legal right or duty by another, can lead to the formation of a custom.

6.5 Does practice need to be constant?

As Michael Akehurst stated referring to the 1951 Fisheries Case “Major inconsistencies in the practice (that is a large amount of practice which goes against the ‘rule’ in question) prevent the creation of a customary rule. Minor inconsistencies (that is a small amount of practice which goes against the rule in question) do not prevent the creation of customary rule, although in such cases the rule in question probably needs to be supported by a large amount of practice, in order to outweigh the conflicting practice” [1]. In addition, previously existing custom formation requirements have been relaxed [11] so it seems nowadays that custom no longer needs to be constant, voluntary, certain or reasonable.

6.6 Other issues

The question of whether all general practices, even ones prima facie irrelevant from legal point of view, create customary norms and the question of whether a practice that is not morally desirable creates customary norms, are difficult from the legal point of view.

The view taken here is that not all practices even if generally followed will automatically create legally binding norms. As an example, the practice of sending e-mails written using Times New Roman font will never create customary norm stating “All e-mails should be written using Times New Roman font”. It is common
sense that will allow judges or arbitrators to ascertain whether a particular practice is legally relevant or not. Similarly, an undesirable practice even if generally followed (for example, sending unsolicited e-mails) will not create legally binding rules. However, in this case the theoretical justification is even more difficult. One will have to adhere to some other sources of law that will have to have a higher ranking than the custom. It could be argued that a general practice that violates general principles of law cannot generate customary rules. This argument creates some uncertainty in regards to the existence of the customary rule in question and puts the burden of ascertaining the existence of a customary rule on judges and jurisprudence. But in the end, it is no different to the problems associated with the ascertainment of the existence of a custom consisting of both objective and subjective elements. In both situations the judge will have to verify that the general practice is morally desirable one.

Another difficult question is who should be given powers to confirm the practice in question. It seems reasonable to assume that it will be arbitration tribunals, although scientific and legal writings might have a profound effect on acknowledgment of the existence of a reasonable to assume that it will be arbitration tribunals, although scientific and legal writings might have a profound effect on acknowledgment of the existence of a routine under debate as well. This matter requires a further research.

7. Example of e-commerce customary norms

7.1 A new custom in banking?

It is the common practice nowadays that nearly all banking transactions on the Internet are secured, mainly through the use of cryptography. The permanent presence of computer hackers that browse the Internet in order to intercept valuable financial data made the e-commerce a highly risky and vulnerable environment. On the other hand there is no international regulation that would force IT developers to use cryptography or other security techniques in order to protect the flow of information over the Internet channel.

Although this paper doesn’t attempt to provide detailed analysis of online banking, it simply observes that a new banking custom has emerged that states: ‘All Internet banking transactions should be appropriately secured’. The term “appropriate safeguarding of transactions” is vague and could be interpreted that state-of-the-art security technology should be used both by banks, as primarily responsible, and end-users of these programs.

As a consequence, a party acting on the Internet as a professional end-user should be obliged to use well-encrypted messages. Also, this party should have a right to expect that its correspondent partner, the international bank, will also provide strong cryptography or similarly secure technology in order to safeguard their transactions. As a result, if either of these parties were to break this rule, the other could expect compensation.

According to the case being made here, this e-custom would become the implied term that could be incorporated in any e-commerce software license agreement.

7.2 Hypothetical case.

In order to better illustrate how the idea of e-custom could be of use in an e-commerce setting, consider the following somewhat simplistic hypothetical example.

A software development company produces for a large international bank and its global clients a system for sending sensitive trading data or transactions electronically between the bank and the customer using client server technology and using the Internet as the message transport medium. The issue of message encryption was not explicitly discussed in the system specification stage between the bank and the developer. Also the software licence agreement between the client and the bank does not address the issue of transaction security. In this product the messages are unencrypted or weakly encrypted. An international client’s message is intercepted and there occurs a loss of business value due to the breach in security. Negotiations with the bank do not give results and the client initiates arbitral proceedings. Can the client successfully sue the bank for damages?

In order to solve this problem we can make use of the idea of custom. What is required however is evidence that there exists a customary rule stating that “all banking transactions on the Internet should be appropriately secured”. In order to do this one should evidence the general and worldwide practice of using state-of-the-art Internet security precautions, by on-line banks. Visiting banks’ web pages could be one way to gather the necessary information. There is usually information available on-line regarding security features that their software provides. If the product uses encryption, it can then be verified by running the software and checking in the browser’s status bar as to what level of encryption it provides. Outcomes of electronic surveys and opinions of banking security experts could also strengthen the evidence of widespread current practice that nowadays on-line banks provide 128-bit encrypted sessions.

As a result, successfully evidencing the alleged customary rule would in consequence imply a term into the banking software license agreement stating that the transaction session should be secured using state-of-the
art technological precautions. Consequently international customer’s claim would be considered justified.

7.3 Consequences for IT industry

As can be seen from the example, e-commerce customs could play a very significant role in e-commerce development. Since this role is based on adding legal value to certain practices it can force IT companies to design carefully their products and processes, use the state-the-art technology and constantly upgrade their knowledge.

Best practices have the greatest influence on custom formation and it is arguably mainly larger companies engaged in e-commerce that create these practices. Those practices are being developed quickly but at the same time are also followed by the vast majority of e-commerce companies. The consequence is that IT companies may, through adherence to certain practices and standards, directly influence the development of international and national law in this area. This is a very important privilege. But it also means a greater responsibility for IT companies as far as the development of the Internet is concerned.

8. Conclusion

This paper has introduced the concept of custom as a source of e-commerce law. It is argued that custom can fill the gap produced by the lack of international legislation, and the inadequacy of national legislation, in regulating the use of the Internet for commerce, particularly where this use crosses national boundaries. Despite difficulties in applying custom, it is nevertheless an important source of legal norms to which international society should abide in the early days of e-commerce. This concept of e-custom is also likely to prove to be a major legal source even if, or when, official conventions incorporate some of these customary norms into their texts. The paper has set out the main issues in implementing this idea, and analysed them using sources from international public and trade law where the use of custom as a source of law has some history and research. There are many issues that remain to be researched including how e-customs can be evidenced and how the Internet itself may be used to do this.

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