INTERNATIONAL JURISDICTION IN CYBERSPACE: A COMPARATIVE PERSPECTIVE

AMIT M. SACHDEVA*

Cyberspace is a “borderless” world—a world of its own. It refuses to accord to the geopolitical boundaries the respect that private international law has always accorded to them and on which it is based. Therefore there is a need to have a different solution to this different problem. The solution lies neither in adopting a “hand-off” approach nor in simply extending mutatis mutandis the existing conflicts rules. Looking at the diurnal history of private international law, the present author proposes a treaty based international harmonisation model as the most ideal one where rules are certain and predictable and at the same time flexible in order to ensure that the potential benefits of this technology are meaningfully consumed by the human civilisation.

Introduction

When the traditional conflict of laws rules relating to jurisdiction of courts were being evolved, it was perhaps too nascent a stage in the development of science to contemplate a technological advancement which would deny and defy all notions of political and geographical boundaries. What science could not contemplate, law (perhaps rightly) did not provide for. This is the most discernible argument against the adequacy and appropriateness of extending mutatis mutandis the existing conflicts rules to govern cyberspace.

The claim for its appropriateness, as advanced by some, is contradicted by the very nature and concept of the conflict of laws. The claims of adequacy and appropriateness are also opposed to the Genesis and the process of evolution of the conflicts rules. The (traditional) conflict rules were evolved to address a category of disputes which involved legally relevant notions of political and geographical boundaries. What science could not contemplate, law (perhaps rightly) did not provide for. This is the most discernible argument against the adequacy and appropriateness of extending mutatis mutandis the existing conflicts rules to govern cyberspace.

The disregard of these views brings us to the need for the birth of a new set of rules. The problem of jurisdiction arises because it is only in the real world that there exist mechanisms to confer rights, immunities, privileges, etc. with no corresponding equivalent in the cyber world. In other words, rights are rights only vis-à-vis the real world. On account of the differences in the normative standards of conduct among the different political units in the real world, the question of jurisdiction becomes particularly important, for what may be legal in one legal system may be prohibited by another, and the same may be circumstantially justifiable in yet another.2

Fortunately, on account of the absence of a pluralist regime (or indeed any regime), there exists no such difference in the cyber world. In other words, the differentiation between legality and illegality is not maintained in the cyber world.1


2 The degree to which the exercise of the freedom of speech and expression is permitted in different legal systems is a glaring example of the aforementioned difference. For example, much of the freedoms guaranteed to individuals in the United States through the Constitution’s First Amendment is not available in many other states, particularly the Islamic and the Communist world. The recent controversy over the publication of a “cartoon of the Prophet” in a leading newspaper well illustrates the difference in the extent of freedom enjoyed.

* LL.M. Student, London School of Economics and Political Science (LSE), London; Advocate, High Court of Delhi; Diploma, The Hague Academy of International Law (2007); LL.B. (Hons.), Guru Gobind Singh Indraprastha University, Delhi (Gold Medallist); PGDSBL, Academy of International Law (2007); LL.B. (Hons.), Guru Gobind Singh Indraprastha University, Delhi (Gold Medallist). The author may be reached at msachdeva94gmail.com

The author wishes to extend his heartfelt thanks to Dr Andrew Murray, Dr Ravinder Pratap and Mr S. C. Mital for their guidance and comments. The author also wishes to thank Alejandro Torres, Anvind Sharma, Diarna Correa, Sachin Sachdeva and Yamini Mahajan for their fruitful discussions, support, assistance in research and thoughtful remarks. Usual disclaimer applies.
world, independent of the real world. In such a situation, when the real world actors become cyberspace entities, the exercise of jurisdiction by sovereigns will have to coexist with those of the real world. But, it is the recognition which one state allows within its territorial dominion and commission of acts made inevitable the relaxation, to some extent, of this presumption. Accordingly, the sovereigns are constrained in their exercise of jurisdiction over cyberspace entities. The extent and limit of each of the three types of jurisdiction covers within its ambit the authority of a sovereign to act in science and technology, growth of international trade and commerce, and the curse of abstraction in the jurisprudence of personal jurisdiction. The extent and limit of each of the three types of jurisdiction may ultimately be traced to the ability of a state, whether by use of coercive force or through bilateral or multilateral negotiations and treaties, to give effect to the name of state which puts them into force.5

By jurisdiction is meant the right of a state to prescribe, give effect to, and adjudicate upon violations of, normative standards for regulation of human conduct. It defines the legitimate scope of governmental powers.4 The term “jurisdiction” covers within its ambit the authority of a sovereign to act in legislative, executive and judicial character. In the legislative character, a state has power, exercisable as a constitutional discretion, to prescribe rules for regulating the conduct of persons. Enforcement jurisdiction is the power of a sovereign to effect implementation of its laws. Lastly, the power of the courts of a sovereign to hear and adjudicate upon certain matters in dispute is referred to as curial jurisdiction. The extent and limit of each of the three types of jurisdiction may ultimately be traced to the ability of a state, whether by use of coercive force or through bilateral or multilateral negotiations and treaties, to give effect to the name of state which puts them into force.5

Unlike its early understandings, modern sovereignty is not absolute nor unfettered. It is strongly confined to the territorial limits of its political borders. Flowing from “a realistic attribution of rights, power and reason”,3 the presumption regarding the absoluteness of control of the sovereign over all persons and things present within its territorial dominion was very strong particularly at a time when the concept of “nation state” was evolving. However, later developments in science and technology, growth of international trade and commerce, and a resultant increase in cross-border movement of persons and commission of acts made inevitable the relaxation, to some extent, of this presumption. Accordingly, the sovereigns accorded mutual recognition, under certain circumstances, to “multiple sovereign authority” over persons and conduct, otherwise located within the territory of one state. In this regard, the need for the exercise of “multiple sovereign authority”, based on principles of reasonableness and fairness, has been aptly summarised by Professor von Mehren9 in the following words:


7 Mann, ibid, 25.

8 Ryder, fn. 4 above, 209.

“as economies and societies become more complex and
interrelated, institutions, principles, procedures and roles
are needed to facilitate co-ordination and co-operation for
common purposes. The legal order today seeks not only to
prevent one person from interfering with another’s private
sphere, but also assists and regulates private ordering of
the individuals. Identifying the adjudications from whom relief
may be sought—as well as establishing the premises for their
work—can be relatively complex when one society is in picture-
completeness and difficulties multiply as controversies implicates
more than one group or society, especially where the groups or
societies differ in their values and institutions.”

Legislative jurisdiction

The argument that the legislative jurisdiction of a state is, in
principle, unlimited is not wholly correct, for no legislature
may be deemed to have intended to prescribe a conduct for
the enforcement of which it has no means or basis and whose
recognition beyond its own political frontiers is itself doubtful.
Any such legislation, laying down standards of conduct,
would interfere, to a great extent, with the corresponding
power of the other sovereign(s).

Thus the prescriptive jurisdiction of a state is generally
confined to persons and/or acts within its territorial
dominion.10 The jurisdiction is limited to acts and per-
sons properly subject to its sovereignty, notwithstanding
that the mandate may be contained in more comprehensive
phraseology.11 No state may be permitted to assert an unre-
stricted liberty to act in the field of private international law.

Enforcement jurisdiction

Enforcement jurisdiction concerns not the law prescribed by
a state to regulate acts outside its own territory, but the
lawfulness of the state’s own act to give effect to such
regulation.12 It is concerned with a state’s power to act in the
sense of exercising sovereign authority, i.e. ascertaining the
extent to which a state can act in another to give effect to its
own laws. Undoubtedly, the enforcement jurisdiction is not
unlimited since a state is “in principle under no duty
to tolerate the performance or execution of acts of sovereignty
of another state”.13 By its very nature, it is exercisable only
upon the existence of, though not necessarily coextensive
with, the legislative jurisdiction. However, the mere existence
of the former does not give, in all cases, sufficient basis to
conclude also the existence of the latter.

Adjudicative jurisdiction

“Adjudicative jurisdiction”14 concerns the power of a
sovereign, acting through its judicial organ, to bear disputes
and to render judgments binding upon the parties thereto. It
is the power of a court to determine the rights and obligations
of the parties to a dispute and to exercise any judicial power
in relation to it. Adjudicative jurisdiction defines the extent of
the authority of a court to administer justice prescribed with
reference to the subject-matter, pecuniary value and local
limits.15 i.e. to take cognisance of the matters presented in
a formal way for its decision.16 Thus a court must satisfy
itself of the simultaneous existence of the pecuniary, subject
matter as well as territorial bases for it to lawfully exercise
its jurisdiction.

A court will proceed to assume jurisdiction if only it
reasonably expects the terms of the decision to be carried
into effect. Beyond its political borders, where a state is
usually possessed of no coercive force and where the
likelihood of enforcement is contingent on the will of
another state, there is little reason for the court to assume
curial jurisdiction. Therefore, like enforcement
dominion, adjudicative jurisdiction is also essentially territorial.17

However, factors like the growing complexities of the
modern society, freer movement of men and goods and the
advent of the virtual world have forced courts to assume
jurisdiction even in cases where all the elements are not
domestic. In such a case, i.e. where the lit involves a foreign
element, curial jurisdiction refers to the ability of a judicial
tribunal to compel appearance of the defendant and adjudicate
upon the rights litigated with the object to enforce compliance
with the terms of the decision.

Even though curial jurisdiction is merely an emanation of
the international jurisdiction to legislate,18 unlike the latter,
the former has remained largely immune from the doctrine of
“closeness of contact”, and has continued with a near strict
adherence to the maxim actus sequitur forum rei,19 based on
the rationale of ease, and in some cases the only possibility, of
enforcement. Thus, in the international context, jurisdiction
primarily depends upon the territorial nexus of the defendant
or the cause of action. In other words, a court must, before it
can legitimately exercise curial jurisdiction, find at least one
domestic element in the dispute, which it has been called to
adjudicate upon.20

International jurisdiction and cyberspace21

Cyberspace, which constitutes a technology-driven imaginary
space, defies control by mechanisms evolved in the real
world essentially based on geopolitical boundaries. It is a
new social order, which cuts across cultures, civilisations,
relax the jurisdictional basis" to order. While some states have adhered to the requirement of facing litigation in any and every court. The courts are accordingly struggling to come up with a coherent doctrine of personal jurisdiction over a defendant requires a two-step process: does the defendant have assets within the jurisdictional reach of the forum on the other. The law of personal jurisdiction has changed over time reflecting changes of a more mobile society. The approach to which the US courts adhered for a long time was reformulated to allow jurisdiction over non-resident individuals and entities based on the "minimum contacts" of the out-of-state party. The two bases for a US court to exercise jurisdiction are discussed below:

**Territoriality**

Physical presence in a state is always a basis for personal jurisdiction. The exercise of jurisdiction is permitted over people and property within the territorial borders. In such a case, physical presence in a forum state is a basis for personal jurisdiction, even when an out-of-state individual enters the forum state for a brief time. Physical presence in a forum state satisfies the requirement of constitutional due process.

**Jurisdiction over out-of-state defendants**

Where the defendant is not physically present, a US court exercises jurisdiction through the "out-of-state statute" route. There are two requirements subject to which a court can exercise personal jurisdiction over an out-of-state defendant.

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27 Penoyer v Hoffman 95 U.S. 714 (1877); see also Philip Zurbain, "The Supreme Court, the Due Process and the In Personam Jurisdiction of State Courts: From Penoyer to Zurbain" (1988) 25 University of Chicago Law Review 369.


29 In Hess v Panduit 274 U.S. 352 (1927), it was held by the US Supreme Court that jurisdiction may be exercised over any non-resident who was operating a motor vehicle within the state and was involved in an accident.

30 Some scholars believe that as disputes over conduct taking place on the internet increase in frequency, as they surely will, we may be returning to that relatively "primitive" condition, that is, precisely because of the overwhelming complexity of applying these diverse rules to internet conduct, the inquiry may return to a relatively simple set of questions: does the defendant have assets within the jurisdiction of the court or not?
The first test, the legislative sanction, relates to the inquiry whether there is a legislative authority authorising the court to exercise jurisdiction over the defendant? It may be founded either in the federal or state statutes. Some federal statutes thus authorise the court to exercise personal jurisdiction over any defendant located within the United States. If no specialised federal law provision exists, the Federal Rules of Civil Procedure direct the federal court to look to the “long-arm” statute of the state in which the court is located to determine whether or not it has personal jurisdiction over the defendant. All states have additional provisions, “long-arm statutes”; providing that their courts may, in certain circumstances, assert personal jurisdiction over non-residents also.22

The second test concerns the constitutional limitations. A statutory basis is not per se sufficient to lawfully exercise jurisdiction. It must further pass the test of constitutional limitations. In 1945, the landmark decision, the US Supreme Court, holding that the due process clause of the Constitution constrains the states in the exercise of personal jurisdiction over non-residents, observed that (1) “every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory”; and, (2) “no State can exercise direct jurisdiction and authority over persons or property without its territory”. These principles may have been adequate in the 19th century, when occasions for exercising personal jurisdiction across state lines were relatively infrequent. But, by the middle of the 20th century, the court relaxed the rule to include cases of “virtual” presence also.23

Minimum contacts

The Supreme Court in International Shoe v Washington24 first made lienent the rule to include the criterion of “minimum contact” on the reasoning that the due process requires only that in order to subject a defendant to a “judgement in personam [personal jurisdiction]”, if he be not present within the territory of the forum, he have “certain minimum connection” with it such that “the maintenance of the suit does not offend traditional notions of fair play and substantial justice”.25

However, the minimum contacts test, which formed the basis of jurisdiction in the International Shoe case,26 was not a mere mechanical test, but one that depended on the “quality and nature of the activity in relation to the fair and orderly administration of laws”.27 Thus courts must consider both the amount and nature of the party’s contacts with the state and the relationship between the contacts and the claims when determining whether the court can exercise personal jurisdiction over that party.

Reasonable anticipation

In order to further safeguard the rights of out of state defendants, a further caveat was added to the “quality and nature of minimum contacts test”. This was that the defendant’s contact with the forum state should be foreseeable,28 i.e. a court would not have jurisdiction unless it could be shown that the defendant had “purposely availed” himself of the privilege of conducting business in the forum.29 This “critical” test of “foreseeability” is not the mere likelihood that a product will find its way into the forum state, but required a reasonable anticipation of being haled into court there.30

Effects cases

In the “effects” cases,31 the Supreme Court based jurisdiction on the principle that the defendant knew that his action would be injurious to the plaintiff therefore he must be reasonably presumed to have anticipated being “haled into court where the injury occurred”. The “effects” cases are of particular importance in cyberspace because any conduct in cyberspace often has effects in various jurisdictions.

To summarise, the treatment of the issue of jurisdiction in the United States—based on the “minimum contacts” standard—is as follows:

- there must be “some act by which the defendant purposefully avails [itself] of the privilege of conducting activities with the forum state”;32
- the plaintiff must show “either that the defendant’s contacts with the forum are continuous and systematic, or that the suit arises out of or is related to those contacts”33
- the defendant’s conduct and connection with the forum state must be such that “he should reasonably anticipate being haled into court there”;34 and
- the exercise of personal jurisdiction must be “reasonable”.35

31 The Uniform Interstate and International Procedure Act (UIIPA), which is a model long arm statute that several states have enacted. For a typical example, see s.302 of the New York State’s long-arm statute (NY C.P.L.R §302).
32 The name “long-arm” comes from the purpose of these statutes, which is to reach into another state and exercise jurisdiction over a nonresident defendant. See generally C.M. Cerna, “Hugo Fitz v. Federal Republic of Germany: How Far does the Long-Arm Jurisdiction of US Law reach” (1995) 8(2) International Law and International Relations 297.
33 326 U.S. 310 (1945). The case involved a Washington corporation as the defendant over a corporation that was incorporated in Delaware and had a principal place of business in Missouri.
34 352 U.S. 310 (1949). The case involved a Washington corporation as the defendant over a corporation that was incorporated in Delaware and had a principal place of business in Missouri.
35 Above fn.35, 316.
Personal jurisdiction in cyberspace

A state governed by the rule of law and guided by adi jus ibi remedium would always permit some legislative powers in its judges. Faced with new situations, the judges either “create” new rules or “suitably modify” the existing ones.

In the field of international jurisdiction in cyberspace, the US courts seem to have taken principally the latter recourse. Having for long recognised that personal jurisdiction must adapt to progress in technology,47 the US courts have successfully applied the principles established in the International Shoe case54 to cases involving internet.5

A rather simple test of proportionality has been employed for the purpose. Simply put, it comes to this:

“the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet.”52

The nature and quality of commercial activity is determined on the basis of the test of “minimum contacts”. Once the threshold of “minimum contacts” is crossed, the courts in the United States assume jurisdiction. However, the twin requirement that the defendant must “purposefully avail himself of the privilege of conducting activities with the forum state” at times gives rise to serious problems.

The claim of “reasonableness” of exercise of personal jurisdiction is pitted against the rule of assumption of jurisdiction based on the universality of access of web pages.

The US courts balance these claims by a three-prong categorisation of all internet activities into (1) active websites; (2) websites permitting exchange of information; and (3) passive websites.51

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The response with respect to the first and the last categories is without much difficulty. The US courts exercise jurisdiction over defendants acting through active websites since this “involve[s] the knowing and repeated transmission of computer files over the internet”53. Ordinarily, jurisdiction is not exercised over those who merely supply information through passive websites, without anything more since doing otherwise would be “[i]nconsistent with traditional personal jurisdiction case law . . .”54

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by certain other traditional or offline acts, for example, advertising with the phone number, the same may not also give a court the jurisdiction in the cause.69 unless the offline activity is sufficient to produce the constitutionally imperative “reasonable minimum contact” with the forum state.70 In this category are the activities of a bilateral nature and if such a case is made out, the courts in the United States have been quick to assume jurisdiction. Another example of non-adherence by the United States to any singular criterion of cyber-jurisdiction is the adherence by the United States to any singular criterion of been quick to assume jurisdiction. Another example of non-adherence by the United States to any singular criterion of cyber-jurisdiction is the Insect Systems case,71 where specific jurisdiction was assumed by the court,72 contrary to the “generally accepted” position in the United States in the case of passive websites.

While there are requirements of “minimum contacts” and reasonableness and the breadth categorisation of all websites in different sets based on the degree of activity, there is enough case law to show that these two criteria have not always been adhered. The US law, in this area, manifests, at its best, its common law fabric and design: there are legal rules for basing jurisdiction, but the number of rules and their field of operation is so limited and unpredictable that it leaves much (or rather everything) at the judge’s discretion. It sometimes leads to, as is the case in all common law traditions, leaves much (or rather everything) at the judge’s discretion. It sometimes leads to, as is the case in all common law countries, unpredictable and unexpected solutions. But, the common law has always preferred “justice in each case” over any “claim of predictability”. All this, of course, is subject to the prevailing constitutional order. The United States just seems to follow this common law thinking.

The position in England and Europe

Personal jurisdiction

The English conflict rules73 have more or less adhered to the rule of territoriality as the basis of an adjudicative jurisdiction. In England,

“It is generally understood by what may be called the ‘traditional rules’, though in a growing proportion of cases, they are replaced by the ‘Common rule’.” 74

The rules of international jurisdiction of the EC Member States are now governed by a Community instrument, Regulation 44/2001. This substitutes the Brussels Convention, which, after March 1, 2002 ceases to operate between the Parties to that Convention, except in their relations to Denmark.75 The Regulation is binding in its entirety and directly applicable to the Member States.76 The Regulation is binding on and applicable to the United Kingdom also as a result of the exercise by the United Kingdom of the “opt-in” option. Since there remains no difference between the UK law and that of the other Member States, in the second half of this section, a survey of the jurisdiction rules in the European Union States will be done after a survey of the traditional jurisdiction rules in the United Kingdom.

The traditional rules

The traditional rules permit an English court to exercise jurisdiction when (1) the defendant is present within England and the writ is served upon him, (2) he submits to the jurisdiction of the court77; or (3) he is served, at the discretion of the court, with the writ, in accordance with the Rules of the Supreme Court78 outside England. This was a shift from the earlier position where English courts founded jurisdiction based on the location of the assets or nationality or presence of the defendant.

In other words, if the defendant is informed or is put on notice of an action, an English court would exercise jurisdiction over him. More physical presence of a person, for however short a period,25 within the territorial limits of England makes him liable to the service of the writ, and consequently, makes him amenable to jurisdiction. In certain cases, the court may also permit substituted service.79

The Brussels (I) Regulation

The traditional rules on jurisdiction in the United Kingdom (and elsewhere in Europe) underwent a substantial modification with the coming into force of the EC Treaty and the respective accession by the states thereto. This happened on account of two specific treaty provisions contained in the EC Treaty: first, Art.249 of the EC Treaty which provides for taking of measures including adoption of directives and regulations in matters over which the Community has competence; and secondly, amendment of the EC Treaty by the Amsterdam Treaty, as a result of which matters concerning “cooperation in civil jurisdiction” stood transferred from the third to the first pillar.80 Articles 65 and 293 of the EC Treaty

77 Deverell v Grant Advertising, Inc [1955] Ch. 111.
79 Rules of the Supreme Court, Ord.11, r.1(1), replacing ss.18 and 19 of the Common Law Procedure Act 1852.
80 See also Art.25 of the German Code of Civil Procedure and Art.14 of the French Civil Procedure Code.
81 Maharanee of Baroda v Wildenstein [1972] 2 Q.B. 283, where during a temporary visit, a writ was served upon the defendant, who was a French resident, in respect of contract, concluded in and is governed by the law of France, in an action brought by the plaintiff who was also a resident of France. The court held that it had jurisdiction, since that writ was served of Cité Industries, see v Sadie [1966] 1 W.L.R. 440.
underwent amendment and the competence was therefore divided between the Community and the Member States. This gave the EC competence to take measures in accordance with Art.249. The Council of European Union, thus complying with Arts 61(6) and 67(1) of the EC Treaty and considering the Commission’s proposal and the opinions of the Parlia-

The Regulation aims at providing highly predictable and well-defined rules on jurisdiction in order to maintain an area of freedom, security and justice ensuring free movements of persons, sound operation of the internal market and administration of justice. The Regulation therefore applies in “civil and commercial matters whatever the nature of the court or tribunal”. The general rule is the rule of jurisdiction based on domicile of the defendant, i.e. “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State”. The “domicile-jurisdiction” rule is not, however, an absolute one and admits of a number of exceptions provided for under Arts 3 to 7.

The Regulation, taking particular care of situations where the parties’ bargaining power can be assumed to be unequal, provides for much flexible bases of jurisdiction in favour of the weaker party. Of these, the rules governing consumer contracts are of interest to our discussion here. Section 4 of c.II of the Regulation provides for special jurisdiction rules in respect of consumer contracts. To provide a strong protection regime to the consumer, the Regulation permits a consumer to sue in a Member State based on there being a branch, agency or other establishment in a Member State even where the actual party to the contract is not domiciled there. A consumer may also sue in the Member State of his domicile. A protection against any contradictory operation of the principle of party autonomy is also excluded except where the provisions are sought to be derogated from by an ex post facto agreement or in case of ex ante agreement on choice of courts, only where both the parties are habitually resident in the same Member State.

Besides this broad category of rules creating favourable rules for weaker parties, another set of rules are particularly relevant to the discussion. These are contained in Art.5, which provides for additional “special jurisdiction” rules in cases inter alia of contracts and torts. Place of performance of the “obligation in question”, determined as the place of delivery of goods or rendering of services, furnishes a basis for jurisdiction in cases of contracts. For all delictual or quasi-delictual claims, the courts at the place of occurrence of the harmful event have jurisdiction. The jurisdiction rule under Art.5(3) gives effect also to the principle of ubiquity and therefore includes the place of the event giving rise to the harm apart from the place where the damage actually occurred. However, to the defamation claims, this rule applies with the following clarification: the place of event giving rise to the harm is the place of issuance and putting into circulation of libellous material, i.e. the place where the publisher is established.

Where a contract contains a choice of court clause, the normal rule, based on the recognition of the principle of party autonomy, is in favour of enforcement of such a clause. While the Regulation provides that where the chosen court is a “court of a Member State” such court “shall have jurisdiction”, there is however no provision by which any other court is prohibited from assuming jurisdiction on any basis provided for elsewhere in the Regulation. In other words, there is a positive basis but no corresponding negative mandate. What, however, there is in the Regulation, is a provision barring jurisdiction of “any court other than the court first seised” of the proceedings, i.e. a lis pendens provision. The existence, on the statute book, of these two provisions therefore leads to the question whether the rule of lis pendens applies also to a case where the parties have made a choice of court.

Contrary to what was logical and perhaps obvious for some like the United Kingdom, the European Court of Justice, maintaining its position of the mandatory nature of Art.2, gave precedence to the rule of lis pendens over the rule endorsing enforcement of choice of court agreements. That Art.2 of the Regulation is mandatory and that the jurisdiction, once assumed on a basis provided in the Regulation, can not be declined by resorting to the municipal law gives rise to an acute difficulty in a situation where the chosen court is one not in any of the Member States since this runs the risk of irreconcilable judgments, at least at the international, if not the European Union level.

Personal jurisdiction in cyberspace

In England, cases raising the issue of jurisdiction in cyberspace have been limited in number and confined to

100 Regulation 44/2001 Art.23, under the section entitled “Frogration of Jurisdiction”. In this regard, it must be distinguished from a more widely used phraseology “exclusive jurisdiction”, which expression is used by the Regulation in the sense of non-deducible exclusive jurisdiction, of certain courts to try specific matters, as conferred and arising out of the Regulation itself.
101 Regulation 44/2001 Art.23.
103 Erich Gauser GmbH v ABT Saf Gay Case 116/02, December 9, 2003. The reasoning of the court was predominantly based on (1) the principle of mutual trust and (2) the mandatory nature of the lis pendens rule. The court’s reasoning also had shades of the objectives of “internal market” and “uniformity and harmonization”. Based on these high-sounding slogans, the court disregarded that the long delay in the Italian court was detrimental to the plaintiff since the probability of a quick disposal in chosen court was very high.
104 See generally Kurt Schérer, “European Private International Law and Non-European Countries” in Becker and Zekoll (eds), above fn.83, p.299.
particularly to matters of defamation and cyber crime. 110 There will be no great difficulty in finding a basis for the assertion of jurisdiction by the English courts in most cases involving defamation via the internet. The publication of the defamatory material within the jurisdiction of a court is a basis for the exercise of jurisdiction under the traditional rules, the Conventions and the Regulation since this constitutes the place where the harmful event occurred. 111

The place of publication is at the very heart of the cause of action for defamation. The fact of publication in the jurisdiction of court is therefore highly relevant. 112 Since for the purpose of the defamation law, material is published at the place(s) where it is read, heard or seen, rather than the place from which it originates, 113 a separate publication occurs, or and a separate cause of action accrues each time the material is read, heard or seen. This furnishes the basis for jurisdiction to virtually all places in the world because of the publication to a global audience. An English court in such a case would therefore be tempted to consider the plea of forum non conveniens. The differences in the possibility of the publishers to limit the circulation of materials published mark the difference between internet publications and the more traditional publication such as newspapers and magazines. There is therefore force in the argument in cases involving internet publications that a rule like the English doctrine of forum non conveniens should be more readily exercised.

With regard to the contracts entered into through cyberspace, there is little reason to assume that a different and rather flexible treatment would be accorded to such contracts. Any argument in favour of a treatment any more favourable than that accorded to a non-electronically concluded contract is expected to be dismissed by the ECJ considering the present mood, trend and objective of ECJ, which seems to be “one Europe”. In such a case, expecting that the court would dilute its regime and puncture its harmonisation drive merely to respond to a technological advancement seems too improbable. 114 Secondly, if in respect of e-contracts the jurisdiction regime is sought to be made less rigid, it may provide the parties to act contrary to the spirit of the Regulation even while complying with form; and all this merely be opting for cyberspace as the “place” of contracting.

The position in India

Personal jurisdiction

The principle of lex fori is applicable with full force in all matters of procedure. No rule of procedure of foreign law is recognised. It was held in Ramanathan Chettier v Soma Sundaram Chettier 115 that India accepts the well-established principle of private international law that the law of the forum in which the legal proceedings are instituted governs all matters of procedure.

In India, the law of personal jurisdiction is governed by the Code of Civil Procedure 1908 (the Code). The Code does not lay any separate set of rules for jurisdiction in case of international private disputes. 116 It incorporates specific provisions for meeting the requirements of serving the procedure beyond territorial limits. 117 In matter of jurisdiction what is treated differently is the question of subject-matter competence and not of territorial competence, i.e. the question of territorial jurisdiction arises in the same way in an international private dispute as in a domestic dispute.

The Code provides general provisions regarding jurisdiction on the basis of pecuniary limit, subject matter and territory. Sections 16 to 20 of the Code regulate the issue of territorial jurisdiction for institution of suits.

Rules as to the nature of suit

Based on the subject-matter suits are divided into three classes: (1) suits in respect of immovable property; (2) suits for torts to persons or movable property; and (3) suits of any other kind.

Suits of immovable property must be filed within the local limits of whose jurisdiction the property situated. 118 It incorporates specific provisions for meeting the requirements of serving the procedure beyond territorial limits. 119 In suit of personal jurisdiction what is treated differently is the question of subject-matter competence and not of territorial competence, i.e. the question of territorial jurisdiction arises in the same way in an international private dispute as in a domestic dispute.

Suit of any other kind are dealt with under s. 20 of the Code which is the “default rule” providing for all others cases not covered by any of the foregoing rules. Under s. 20, a court can exercise jurisdiction in actions involving persons where:

(a) the defendant, or each of the defendants where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, as aforesaid, acquiesce in such institution; or
(b) any of the defendants, where there are more than one, at the time of commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case with the leave of the court has been obtained or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
(c) the cause of action wholly or partly arises.

110 A discussion of jurisdiction in case of cyber crimes is outside the scope of the present article, and the same is not addressed or dealt with here.

111 Under the Conventions and the Regulation, the damages are however limited to the injury within that state, unless the defendant is a domicile in that state.


114 The Code s.20.


118 See ss.9 and 10 of the Code of Civil Procedure 1908.

119 See Odd, 24.2 to 26.

110 The Code ss.16 and 17.
Rules enforcing “agreement of parties”

It is well-established law in India that where more than one court has jurisdiction in a certain matter, an agreement between the parties to confer jurisdiction only on one to the exclusion of the other(s) is valid.116 The Indian law therefore recognises and gives effect to the principle of party autonomy. However, this extent of autonomy does not travel far enough so as to confer jurisdiction on a court which it inherently lacks.117 Party autonomy is also subject to the maxim ex adeoque male non arbitror actu.118

Thus the position of law on the point is that first, a choice of law agreement is permissible; and secondly, the agreement operates only in respect of a court which does not otherwise inherently lack jurisdiction. In any such case, the courts also consider the balance of convenience and interests of justice while deciding for the forum.119

Thus, in India, the principle is well settled that residency in the territorial limits of a court furnishes a ground for exercise of jurisdiction.120 Similarly, conduct of business by a defendant in a forum also gives to the forum court to jurisdiction on the basis of territorial nexus with the cause of action.121 The reason perhaps is that residents in jurisdiction in cyberspace have been decided by the superior courts in India.122 The Indian law therefore lacks.117 Party autonomy is also subject to the maxim ex adeoque male non arbitror actu.118

125 Though there are a few cases on cyber crimes and domain name disputes. See for example, Madhusudan Babu v Cty Public

Personal jurisdiction in cyberspace

Unfortunately, only a very few cases concerning personal jurisdiction in cyberspace have been decided by the superior courts in India.123 The reason perhaps is that residents in cyberspace in India have not yet accepted or adapted themselves to this new technology as a fit mechanism to undertake legal obligations (coupled with an extremely slow justice delivery system). The approach adopted is similar to the “minimum contacts” approach of the United States coupled with the compliance of the proximity test of the Code.126

Considering the present rules of international jurisdiction and the tendency of the Indian courts to “suitably modify”, the existing domestic rules to international situations in other areas of private international law may be analysed. The reaction of the court would much depend on whether the contract contained a choice of court clause or not.

Case I: where the contract contains a choice of court clause. In such a case, the Indian courts would normally give effect to such a clause subject only to a survey of forum non conveniens particularly when the same would result in foreclosure of its own jurisdiction.

Case II: where the contract does not stipulate an agreed forum. In a case of this sort, the Indian courts would be inclined to apply the test of s.20 CPC since none of the other provisions seem to be of much assistance. The court would make a twin inquiry: place of habitual residence of the defendant and proximity of the cause of action to the forum, where even an “in part” cause of action may furnish sufficient basis to exercise jurisdiction. Thus the Code provides for the tests of both objectivity and proximity to base its jurisdiction. While the legal system favours exercise of jurisdiction on the basis of proximity of cause of action, its exercise based on the residence of the defendant is also accepted for three reasons: (1) ease of enforcement; (2) compliance with forum non conveniens; and (3) the (dacion in rem) law of contempt of courts in India (as in most other common law countries).

For the purpose of determining whether the cause of action arose in the local limits of a court, the courts generally go into the question of place of conclusion of the contract.127 However, it seems that the place of conclusion of contract, while deciding for the forum, would neither apply nor lend much support in reaching a reasonable solution in contracts entered into through the internet.

Thus the Indian position as may also be inferred from the trend of the Indian courts may be summarised as follows: an Indian court would not decline jurisdiction merely on the ground that the international contract in entered through the internet. It examines the two bases of jurisdiction: domicile of the defendant and proximity to cause of action. Even if one is found to be satisfied, the Indian court it seems would assume jurisdiction. However, it would be for the plaintiff to prima facie also convience that the courts elsewhere do not

118 ABC Laminart (P) Ltd v AP Agencies AIR 1989 SC 1239. See also Ananda Mohan v Ram Kishan (1886) 13 IA 160 (PC).
120 Kaushush v Anant ILR (1899) 54 Bom. 407; Fernandez v Ray ILR, (1897) 21 Bom. 375; see also Srinivas v S.V. Ayayangar ILR (1906) 29 Mad. 239; M. Madanakar v Andappa Pillai AIR 1935 Mad. 32.
121 Charudutta Kastushand v Bandgaps Dongappa AIR 1951 Bom. 320.
122 Frontier Bank Ltd v Shriram Prakaswati Bath ILR (1965) Punj 635.
123 Ram Bhai v Shankar Baswan ILR (1902) 25 Bom. 528; V.E. Smith v Indian Yesticle Co. AIR 1927 All 413; Godaveri R blessing State Railway v Shibly Habibullah AIR 1954 All 740; Patel Rau Bchra v Priti Mohan Bhamat AIR 1955 Bom 16.
125 See generally Oda III, V of the First Schedule to the Code.
126 The test laid down in this case is that in cases of means of instantaneous communication, the contract is said to be concluded at the place where the acceptance centres to the knowledge of the proposer.

128 The unanswerable question concerning jurisdiction on the court where the contract was concluded has ceased to be operative in almost all legal systems today, India, unfortunately, continues with this outdated rule.
129 See [Indian] Contract Act 1872 4 &
130 Above fn.127; the test laid down in this case is that in cases of means of instantaneous communication, the contract is said to be concluded at the place where the acceptance centres to the knowledge of the proposer.
have a better basis of jurisdiction since the Indian courts in such a case may also feel tempted to analyse the issue of jurisdiction from the stand point of the doctrine of forum non conveniens as also anti-suit injunctions and thus decline to exercise jurisdiction even where there existed legal basis to do so.151

The solution

There exist irreconcilable differences in what different scholars consider to be solution(s) to the problem of jurisdiction in cyberspace. The vast spectrum of diversity has at one end, a suggestion that there exists no reason to be “panicky” about cyberspace as the new world132 and that it merely requires a “straightforward application”133 of existing conflict rules, whereas the scholars at the other extreme suggest a need for a “fundamental re-examination”134 of the working of jurisdiction and creation of an entirely new set of rules.135 The difficulty in agreeing upon potential solution(s) arises and is deep-rooted in the very understanding of cyberspace, whether as a place, a means of communication, technological state of mind, etc.136 For the purpose of an analytical study of the topic, the different suggestions may be considered. There are four basic competing as we were pointed out above, the global net135; simple extension (with adjustments) of the existing rules of international jurisdiction136; a multilateral treaty based establishment of new and uniform jurisdiction rules137; establishment of a new international organisation to propose a set of rules appropriate for cyberspace jurisdiction; and, an optimism of emergence of individual decentralised decisions by various actors and stakeholders.

None of these models is free from difficulty. Each has merits and demerits of its own. However, the model endorsing the conclusion of a multilateral treaty based establishment of new and uniform jurisdiction rules seems most appropriate for several reasons. One factor which favours such a model over all others is the story of evolution and development of private international law. We began from a stage when there was no “foreign element” in disputes before municipal courts. The gradual increase in interest of persons and goods necessitated private international law rules. Owing to limited means and resources, different legal systems answered the same set of foreign elements in their own unique way, which was in some instances strikingly different from one another. This resulted in different set of conflicts rules in different countries. Upon realising that such diverse conflict rules actually hampered, rather than promoted, international trade and movement of persons and goods, the world wake up to a harmonisation drive. Fortunately, this drive has not so far been successful in most areas of conflicts. In context of cyberspace, we are at much the same stage as we were centuries back when international trade had just begin to open up. To allow sovereigns to develop their own rules of cyberspace jurisdiction without having made an endeavour to reach a treaty based solution would mean rewinding to centuries back and to ignore the wisdom and experience we gained during all these years. The mistakes that we committed by compulsion centuries ago should not be committed by choice now.

Since cyberspace is a global phenomenon which transcends, ignores and bypasses geo-political borders, solutions likely to be appropriate must also be global, or in any case multilateral. In other words, the likelihood that a proposed scheme or arrangement would resolve the issue of jurisdiction effectively increases with the increase in multilateral basis. Therefore, despite its dement of being a slow process and a generalised approach, it seems that international harmonisation—whether in the form of prospective voluntary convergence of national regulatory laws or of a treaty adopting a uniform international standard or by “soft” co-operation among national enforcement agencies—would
be the most promising and feasible solution, provided that the scheme of the treaty admits of limited reservations and establishes an international regulatory body and a dispute resolution system.

Besides being a charter of a uniform international standard, a treaty may also specify the outcome characteristics of particular transactions; state general governmental policy objectives; or establish international choice-of-law rules that specify which nation’s law governs particular transactions. At the same time, one can not afford to lose sight of the fact that any legal doctrine that gives the right of regulation of the net to one country (or state, county or city) must give that right to all sovereigns. Therefore, all States must decline to exercise jurisdiction unless they consider it equally permissible for other states, in similar circumstances, to assume jurisdiction.

Even if the present state of knowledge and understanding of cyberspace and legal issues related thereto does not permit a detailed agreement on intricate technology based issues, a more policy based framework convention would only form a strong foundation for the future harmonisation and guide the municipal courts in this regard. Thus, to whatever extent agreement is possible, a convention may be negotiated and drawn up. However, for aspects on which no consensus may be reached, an international monitoring or regulatory body with some binding authority may be assigned the task of analysing, etc. rules of cyber jurisdiction. Such a body may, on the lines of UNCITRAL, UNIDROIT, etc. may propose and adapt certain model laws for the states to base their municipal legislations on.

Still other aspects may have to be inevitably left to the municipal courts to rule upon since it is only in a real factual situation that issues which could not be contemplated will arise, requiring courts to adjudicate upon the legitimate interests of the parties. Expecting a comprehensive treaty based solution on all possible issues is unrealistic and also undesired for cyberspace is only a few decades old and a number of more complex issues are yet to surface. And, to decline to act merely because a comprehensive agreement looks difficult is to act contrary to the collected wisdom from the past.

Some proposed rules of jurisdiction

Considering the complexities of the cyber world and conscious that the presently known complexities are only the tip of the iceberg, as well as realising that disputes have and will continue to arise, it is a considered view that the following may form reasonable and acceptable bases of jurisdiction for an international convention. However, since disputes would arise even before a certain degree of international harmonisation is reached, compelling the courts to render judgments, the following are the suggestions on the issue of personal jurisdiction in cyberspace to municipal courts.

Domicile-jurisdiction rule

The nearly universally accepted rule of founding jurisdiction on the basis of the domicile of the defendant may constitute a good general rule for cyberspace also. The territorial nexus of the defendant is not expected to produce much disagreement or opposition. A Brussels Regulation Art.2 type rule may find quick agreement. However, the definition of the expression “domicile”, unlike in the Regulation, should not be left to the municipal regimes.

At the same time, territorial nexus must not be confused for mere casual presence and for a very short period of time. Most legal systems, including England, have abdicated this rule in favour of a rule of domicile and/or habitual residence. However, physical territorial presence at the time of the commission of an act so as to facilitate its commission may also form a just basis for jurisdiction.

Rule of proximity to cause of action

Since physical territorial presence is often inconsequential to a wrongful act in cyberspace and mostly difficult to trace, an extended meaning may be assigned to “presence” as “contextual presence”. Presence must thus be presence for the purpose of and in relation to the cause of action. Proximity to the cause of action may serve as a reasonable basis for exercise of what Americans understand to be “special jurisdiction”.

Even so, proximity must not be sought to be determined in terms of “minimum contacts” or any other municipal law expression to ensure a highest degree of uniformity. Whether or not there is an actual proximity to the cause of action may be, instead, best left as a “question of fact”, to be determined by application of the judicial mind to the facts of each particular case. This approach is expected to meet criticism of some of the sceptics and would ensure that each state imparts justice in each individual case in accordance with its own notions of constitutional rights and obligations. This approach has the merit of adequately blending legal predictability (of the basis of jurisdiction) with flexibility (of its exercise) in each individual case. This would also partly accommodate the concern of the United States to give necessary choice to the parties to determine whether or not they wish to become connected to (and consequentially, subject to the laws of) any given sovereign in respect of a cause of action.


141 A good example of a treaty that establishes an international choice-of-law regime is the Rome Convention on the Law Governing Contracts.

142 “So far, international harmonization of issues of jurisdiction is relatively limited. Various international conventions dealing with the harmonization of specific areas of law contain provisions on jurisdiction over disputes arising in the specific field. However, as regards jurisdiction and the enforcement of foreign judgments in general, a widely accepted multilateral instrument—which would also cover intellectual property disputes—does not yet exist.” WIPO, Report on International Harmonization of Jurisdictional Issues, available at http://www.wipo.int/aboutus/publications/2002/.../2002/en/.../2002.pdf

143 The UNIDROIT Model Law on Arbitration sets a valuable precedent as it forms the basis for domestic legislations in a number of states, including India.
“Effects” as a basis of jurisdiction

If the mere contact, on the basis of which jurisdiction is sought to be assumed, is the “effects” of an online act, its exercise must be declined unless the effect is itself an essential ingredient of the wrongful act or unless there exists no other more appropriate forum for redress to the plaintiff. In such a case, the place where the harm occurred or its effects surfaced may form an acceptable jurisdictional basis.

Special rules in cases of consumer contracts

In the context of consumer contracts, a rule favouring a very strong protectionist regime may not be suitable for cyberspace. Any overambitious rule akin to the Brussels I Regulation Art.15 is likely to lose sight of the market self-regulation approach of the United States. The latter seems to be a more appropriate rule for consumer contracts concluded through cyberspace.

While the inappropriateness of the rule can be best understood by examining the implications, if such a rule is hypothetically adopted. Consumers are generally spread across jurisdictions and the deliberations one makes while deciding in favour of or against concluding a consumer relationship is far less than in a B2B contract. The possibility of negotiation is much less in consumer contracts and whatever little there is, is often excluded by the municipal laws of different countries, sometimes in the name of “public policy”, sometimes in the name of “mandatory rules” and sometimes under the banner of “constitutionally guaranteed fundamental rights”. This would expose a potential seller/service provider to the risk of litigation in almost all countries of the world. Any temptation to be guided by an emotion to protect the “weak consumer” must therefore be resisted in favour of the need to prevent the hindrance in the development of the internet as a means of entering into legally binding relations. Such a rule may further, in some cases, lead to a denial of an effective compliance of the rule of audi alteram partem.

Nevertheless, since the consumer needs to be given at least some protection considering his weak bargaining power, it may be reasonable to adopt a rule conferring jurisdiction on the courts of the state where the consumer is domiciled if the other party also has an office, branch, agency or other establishment etc within the territorial limits of the same state. Similarly, jurisdiction may be exercised when it is made out on the basis of proximity of the cause of action. Some of the rules referred to in the previous section may be of great assistance in an effort to reach a treaty on international jurisdiction in cyberspace. These rules have been chosen and proposed on a two prong criterion: (1) the degree of acceptance and (2) reasonableness. A balance must therefore be made between the necessary “liberty” for technology and the need to check its possible abuse. While a strict view on cyberspace jurisdiction runs the risk of its unbridled and unchecked misuse, a rather casual view of jurisdiction may mean fighting the wrong enemy with the wrong weapons in the wrong battlefield. This may indeed retard the potential growth of the internet. Thus each court must properly weigh and address the competing claims of the parties before giving effect to one over the other, keeping in view also the possibility of enforcement. It is here that the necessity of international harmonisation steps in. Since all international harmonisation is a compromise, an overambitious agenda to have a comprehensive and perfect set of rules may be detrimental to the whole exercise.

Summary and conclusions

In a matter which is as unknown to a judge as a legislator, it is difficult to suggest whether a common law or a civil law approach should be the preferred one. To favour the view “to learn with experience and time” would mean allowing the common law courts enough time to decide a good number of cases and attract the application of their doctrine of stare decisis. This would jeopardise the harmonisation process at a later stage. To favour the other approach of laying down some inflexible rules (purporting to be comprehensive) comes with the risk of compromising justice.

While the desired harmonisation is not reached and/or the states do not legislate on the basis of the “model laws” referred to above, the difficulty will remain paramount for the courts. It is there that the important question will arise: in the absence of statutory and international guidelines on cyber jurisdiction, how far would resorting to private international law norms, as prevalent in different legal systems, be justified and/or feasible? This inquiry has a twofold concern: the inevitability of municipal courts decisions and the inappropriateness of conflicts rules being related to cyberspace.

It must be understood and realised that the rules of jurisdiction, just as any other concept of private international law, were framed or evolved in order to address the then existing circumstances, political order, sense of justice and the targeted social order. No rule of law can be fit for all ages even in identical set of circumstances; a change in time, accompanied by changing circumstances, socio-political order, therefore calls for modification, and in some cases, abdication of the old in favour of a new rule. Thus, when any of the factors that contributed to the formulation of a rule changes, so must also the response of law to them.

The main problem lies in attempting to extend to this “virtual world” the existing rules of private international law, which were evolved to best suit the transactions of a “traditional politically divided real world”. The new world is almost completely free from elements that led to the evolution of conflict rules. The only sustainable solution then seems to lie in framing new rules, which answer the problems considering the peculiarities of this new world that the courts are confronted with today.

In such a case, a different approach may have to be devised, unique to each legal system and in accordance with its own constitutional scheme and notions of fairness and justice, in order to exercise jurisdiction over non-resident online users. To expect or require a municipal court to uphold and apply an international norm of jurisdiction in complete disregard of the notions of its own constitutional rights and wrongs, is double impolitic and unrealistic. Undoubtedly law, being a social science, cannot grow at the pace at which science and technology grow. Nevertheless, every endeavour must be made to keep pace with their growth. It is possible only when law modfies itself to the light of new developments in science and technology, progressing at both a micro, issue-by-issue, level as well as a broad, trans-substantive level.
No single model solution is sufficient in itself to adequately address the problem. Cyber jurisdiction can be addressed only by a proportionate contribution from all the models, complementing and supplementing each other.

But, before adopting any one model or any combination of different models, it must be remembered that the internet is here to stay, and so is its potential to commit and facilitate unlawful acts, and the resultant litigation. Therefore it is necessary for each state to participate in every attempt to harmonise the rules of jurisdiction and to codify such rules into domestic legislations, even where no international harmonisation is reached. This will ensure that both sides of a cyber litigation will be faced in a predictable forum with certain legal consequences the prior knowledge of which would enable them to act accordingly.