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Jurisdictional Issues and the Internet – A Brief Overview 2.0

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Introduction

Imagine a state proclaiming that it will claim jurisdiction[2] over, and apply its laws to, any website that can be accessed from a computer located in its territory. The response would perhaps be outrage from some. Others would point to the ineffective nature of such a rule, and yet others would perhaps view the model as infeasible. Indeed, when the Advocate-General's office of Minnesota in the mid-1990s issued a statement that '[p]ersons outside of Minnesota who transmit information via the Internet knowing that information will be disseminated in Minnesota are subject to jurisdiction in Minnesota courts for violations of state criminal and civil laws'[3], it was met with strong criticism.[4]

Against this background, persons unfamiliar with private international law might be surprised to find that many, not to say most, states' private international law rules do in fact provide for jurisdictional and legislative claims over any website that can be accessed in its territory, in relation to a wide range of legal matters. This is as true today as it was in 2003 when I first made this claim.

There is now a steady flow of journal articles, books and book chapters dealing with what broadly may be termed Internet jurisdiction. This is helpful, indeed necessary, as much remains to be worked out on this complex topic. In fact, despite the amount of attention directed at Internet jurisdiction these days, it may be fair to say that our rate of progress is painfully slow.

At any rate, one consequence of the flow of publications on Internet jurisdiction is that one cannot expect to get the opportunity to publish works that merely provide an introduction to the topic; after all, such works will, by necessity, fail to add to current knowledge.

However, I sometimes have the feeling that what we need are publications going 'back to basics', if not 'jurisdiction for dummies'. And I think this applies more broadly in the information technology law field. We are too often faced with a wealth of advanced materials without the necessary means to easily understand the basics.

I am writing this contribution with the aim to fill this gap as far as Internet jurisdiction is concerned. Hopefully, this article will be useful for those who teach courses in IT law, e-commerce law or the like, who are looking for an accessible overview of the relevant jurisdictional issues. But perhaps the article can also be useful more broadly for anyone looking to refresh their understanding of exactly what it is that people are struggling with in the field we may call Internet jurisdiction. At any rate,

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[2] The term 'jurisdiction' can have two different meanings. It can refer to the court's authority to hear a particular dispute, or to a particular law area. In this paper it will, however, only be used in the former meaning.

[3] Memorandum of Minnesota Attorney General as found in: Bernadette Jew, 'Cyber Jurisdiction – Emerging Issues & Conflict of Law when Overseas Courts Challenge your Web' (1998) Computers & Law 23.

[4] See eg ibid and Darrel Menthe, 'Jurisdiction in Cyberspace: A Theory of International Spaces' (1998) 4(69) Mich Telecom and Tech LR.

readers well versed in the intricacies of Internet jurisdiction need not concern themselves with reading this particular article.[5]

In writing this article, I draw upon a paper I published in 2003[6] – 15 years ago – with exactly the same purpose. This approach was neither chosen out of laziness nor out of some mistaken belief that time has stood still. Rather, by making reference to the state of affairs in 2003, I hope to be able to show more clearly what progress has been made and to highlight where we stand today.

In the text below, I go through the components of private international law (or as the discipline is referred to in Common Law systems: conflict of laws) and describe how they work in the Internet context. I refer to a number of key cases from around the world, and I highlight the difficulties we encounter. However, first of all, given that this is a special occasion, I want to start by saying a few words about what this exceptional journal – *Computer Law & Security Review* – has meant for me.

What CLSR means to me

I started writing about jurisdictional issues and the Internet in 2000 when I undertook a Master of Law at the University of New South Wales. One of my strongest memories from that period is spending time in the library and being unable to find ANY materials at all dealing with Internet jurisdiction. While there were only a few articles published on the topic back then, the reason for my research failures in the library was found in the fact that I, literally, could not even spell 'jurisdiction'! For good reasons, I have kept that a secret until now.

In 2001, I enrolled into the doctoral program and started working full time with my thesis on private international law and the Internet. And after a couple of months, I – for the very first time – had the pleasure of completing an article, submitting it to a journal and getting the both surprising and overwhelmingly joyful response that the article was accepted. The article was titled 'What should Article 7 – Consumer contracts, of the proposed Hague Convention, aim to accomplish in relation to e-commerce?'[7] and addressed the consumer protection provision of the, then proposed, *Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters* which has now re-emerged in a new version.[8] The journal for which it was accepted was CLSR (then *Computer Law & Security Report*), and the kind and supportive editor was Professor Steven Saxby. I remain forever grateful for him having given me the chance to publish in his excellent journal, and for the confidence that gave me.

Since this occurrence in 2001, CLSR has remained one of my favourite journals, and I have sought to contribute one article roughly every year, this one being my 17th. However, this habit is by no means only sparked by loyalty. I have always found that articles published in CLSR reach a broad and

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[5] For such readers, there is a wealth of materials published on an almost daily basis, but I would like to take this opportunity to engage in some shameless self-promotion and direct attention to Dan Svantesson, *Solving the Internet Jurisdiction Puzzle* (OUP 2017).

[6] Dan Svantesson, 'Jurisdictional Issues and the Internet – A Brief Overview, Cyberspace 2003: Normative Framework' (October 2003) Brno Czech Rep. I also draw from and expand upon research presented in Dan Svantesson, *Private International Law and the Internet* (3rd edn, Kluwer Law International 2016) and in Svantesson, *Solving the Internet Jurisdiction Puzzle* (n 5).

[7] Dan Svantesson, 'What should Article 7 – Consumer contracts, of the proposed Hague Convention, aim to accomplish in relation to e-commerce?' (2001) 17(5) Computer L & Sec Rep 318-25.

[8] See further The Hague, 'The Judgments Project' <https://www.hcch.net/en/projects/legislative-projects/judgments> accessed 31 March 2018.

diverse audience, and indeed, my most cited article – by far – 'Privacy and consumer risks in cloud computing'[9] (231 citations as of 27 March 2018 according to Google Scholar) was published in CLSR. Some would say that the reason that this is my most cited article is that it was co-authored by Dr Roger Clarke (another long-term supporter of CLSR). But admitting that would provide my dear co-author with far too much satisfaction, so I will steadfastly deny any such suggestions.

General observations about Internet jurisdiction

As mentioned, this article examines the issues associated with the application of private international law to online activities. In doing so, the four interconnected elements of private international law: jurisdiction, choice of law, the courts' option of declining jurisdiction, and recognition and enforcement will be examined.[10] Examples and experiences will primarily be drawn from two different legal systems: the laws of the European Union (ie community instruments), on the one hand, and Australia[11] on the other hand.

The first thing to note, in relation to private international law, is that each state makes its own private international law rules (ie the private international law rules are part of the domestic law of each state). However, as is exemplified eg in the European Union's *Brussels I bis Regulation*[12] and various instruments initiated by the *Hague Conference on Private International Law*, states are of course free to enter into international arrangements regarding their private international law rules.

Further, it is to be noted that the private international law rules are part of the states' procedural rules (ie the laws regulating procedural issues such as the manner in which the court should act), as contrasted to the states' substantive laws[13] like contract laws, defamation laws or intellectual property laws. While courts may apply foreign substantive laws, they will only apply their own procedural rules. Finally, it is important to be aware of the distinction between civil matters (ie matters relating to the interaction of, and relationship between, individuals, businesses and organisations)[14] and criminal matters (ie matters relating to the laws regulating what acts are punishable as crimes)[15]. While jurisdictional issues arise both in civil and criminal contexts, private international law rules are only applicable in civil matters.[16]

Finally, by way of introduction, before looking at jurisdiction, choice of law, the courts' option of declining jurisdiction, and recognition and enforcement in more detail, it is useful to briefly consider:

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[9] Dan Svantesson and Roger Clarke, 'Privacy and consumer risks in cloud computing' (July 2010) 26(4) Computer L & Sec Rev 391-397.

[10] Tradition would have us recognise three categories only. However, in my view, we do well to recognise the courts' option of declining jurisdiction as something separate to the question of when a court may claim jurisdiction. See further Svantesson, *Private International Law and the Internet* (n 6) at 16/17.

[11] While state legislation varies within Australia, the regulations of concern in this paper are similar in most states. However, the Australian examples used will be drawn from the state of Victoria.

[12] Regulation (EU) No 1215/ 2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[13] 'The branch of the law which creates, defines, and regulates people's rights, duties, powers, and liabilities': P Nygh and P Butt, *Butterworths Concise Australian Legal Dictionary* (Butterworths 1998).

[14] Typical civil matters include, for example, contractual disputes, defamation disputes and intellectual property disputes.

[15] Typical criminal matters include, for example, prosecutions of theft and murder.

[16] While the jurisdictional issues involved are basically the same also in criminal matters, different rules and, to an extent, different considerations apply.

what is the aim of private international law rules? Elsewhere,[17] I have suggested that good private international law rules live up to legitimate party expectations (thereby ensuring predictability as well as justice in the individual case) and the fulfilment of the underlying policies behind the substantive law. Good conflict of laws rules are effective and as simple as possible. In addition, it is desirable that private international law rules are drafted at a suitable level of generalisation, and that they are abuse resistant. Good conflict of laws rules ought not to violate public international law and ought to be drafted in forum-neutral language. Finally, good private international law rules are widely acceptable to the relevant stakeholders and are not anchored in concepts and terminology stemming from substantive law.

While I maintain the relevance of all these qualities, I have grown increasingly convinced that I have – until now – overlooked what perhaps is the most important aspect of good conflict of laws rules. In a book published at the end of 2017, I made the claim that:

> the ultimate goal of international law is to help ensure the survival of the human species. Thus, its sub-goals include matters such as ensuring peaceful coexistence, environmental protection, human rights, etc. The Internet can help by building links between different countries through cross-border communication, but can also be unhelpful when used as a new arena for international conflict. At any rate, given this […], jurisdictional rules must work towards this the ultimate goal of international law too.[18]

In the light of the significant overlap between private international law and public international law, as far as jurisdiction is concerned, I have come to believe that also the ultimate goal of private international law is to help ensure the survival of the human species by contributing towards securing a peaceful coexistence. After all, disputes governed by private international law rules may also cause tense international relations escalating into conflict.

Writing in March 2018 – influenced by matters such as the Canadian *Google v Equustek* case,[19] Australia's *X v Twitter*,[20] the *Microsoft Warrant* case before the US Supreme Court[21] and the *Google France* case coming before the Court of Justice of the European Union's (CJEU)[22] – I think that the biggest challenge facing Internet jurisdiction is the current trend of the ends justifying the means; that is, there is an increasingly widespread view that the pursuit of the policies behind the substantive law (the goals) justify the stretching of jurisdictional rules (the means), both in the context of private and public international law.

This is an extremely dangerous development, and I use both this and other publications to raise a warning flag cautioning us not to forget the goal of jurisdictional rules contributing towards securing a peaceful coexistence. If all we wanted was to secure the greatest possible reach of our substantive laws, we would hardly need any sophisticated private international law rules. We would merely proclaim that our laws always apply, that our courts always can claim jurisdiction and that our court orders must be enforced all over the world. Simple and predictable, but also destructive and utterly misguided – this is clearly not what we want.

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[17] Svantesson, *Private International Law and the Internet* (n 6) 94-95.
[18] Svantesson, *Solving the Internet Jurisdiction Puzzle* (n 5) 10.
[19] *Google Inc v Equustek Solutions Inc*, 2017 SCC 34.
[20] *X v Twitter Inc* [2017] NSWSC 1300.
[21] *In the Matter of a Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation* <http://www.scotusblog.com/wp-content/uploads/2017/07/17-2-petition.pdf> accessed 31 March 2018.
[22] C-507/17.

Jurisdiction

Ordinarily, the first issue a court will consider in a cross-border dispute is whether or not it has jurisdiction to hear the dispute. A court must have both subject-matter jurisdiction (ie jurisdiction over the type of dispute concerned) and personal jurisdiction (ie jurisdiction over the parties involved in the dispute). In practise, the subject-matter jurisdiction criterion often simply means that a plaintiff cannot, for example, turn to the family court in relation to an intellectual property dispute. Another example would be that a party must initiate the proceedings at an appropriate court level; one can ordinarily not turn to the highest court of a state on an initial level. The criterion of personal jurisdiction, on the other hand, can give rise to more complex issues and is therefore the focal point for the discussion of jurisdiction here.

The rules regulating jurisdictional claims are, to a great extent, location focused. For example, the court might query where the disputed contract was formed,[23] where the contract was broken,[24] where the contract was performed,[25] where the tort was committed[26] (which may of course be determined in a variety of ways), where the damages were suffered,[27] where the server is located[28] and where the defendant is located, domiciled or habitually residing.[29] Many of these grounds for jurisdiction are difficult to apply online, and some of them have quite simply lost their logical basis, and indeed appeal, when applied in the online environment. Consider, for example, jurisdiction based on the location where the disputed contract was formed.

Any determination of a location of contract formation is, by necessity, arbitrary and a legal fiction when the parties are not at the same place at the time of the contract formation. So, what then makes that place the proper focal point for determining the question of jurisdiction? One can picture a situation where two parties exchange offers and counter-offers only to come to an agreement after several rounds of counteroffers. In such a situation, the place of formation and thereby the jurisdictional (and choice of law questions) may be determined rather by coincidence under a rule focused on where the last act necessary to make the contract binding occurs. On a more general note, it could be said that grounding jurisdictional rules, or indeed choice of law rules, on concepts stemming from substantive law areas such as the concept of contract formation, is associated with the risks of: (1) inheriting any and all of the substantive law rule's weaknesses and (2) the substantive law concept developing and thereby taking on a new direction which the private international law rule has to follow.

At any rate, while the jurisdictional grounds in contractual disputes often point to the court in one of the contractual parties' home states, the jurisdictional grounds relating to torts are extremely wide

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[23] Eg *Uniform Civil Procedure Rules* 1999 (Qld), Reg 124(g)(i).
[24] Eg *Uniform Civil Procedure Rules* 1999 (Qld), Reg 124(h).
[25] Eg Regulation (EU) No 1215/ 2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 7(1)(a).
[26] Eg Regulation (EU) No 1215/ 2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 7(2); *Uniform Civil Procedure Rules* 1999 (Qld), Reg 124(k).
[27] Eg *Uniform Civil Procedure Rules* 1999 (Qld), Reg 124(l)(i).
[28] Eg *Interpretation of the Supreme People's Court on Application of Laws When Trying Dispute Cases Concerning Computer Network Copyright*, 22nd of November 2000, The Supreme People's Court, Article 1.
[29] Eg Regulation (EU) No 1215/ 2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 4; *Uniform Civil Procedure Rules* 1999 (Qld), Reg 124(d).

when applied in the Internet context. For example, damages stemming from the tort of defamation can occur virtually anywhere, which means that a defendant in a defamation proceeding might be subjected to a wide range of jurisdictional claims. In the light of this, it is unsurprising that courts have explored options for grounding jurisdiction in anchor points such as the location of a person's 'centre of interests'.[30]

It is also common for the question of jurisdiction to be regulated in contracts (choice of forum clauses).[31] The issues associated with such practise are discussed below in relation to the also very common choice of law clauses. Here it is sufficient to note that restrictions may be placed on the validity of choice of forum clauses. For example, Section 4 (Articles 17-19) of the relevant European instrument, the *Brussels I bis Regulation*,[32] overrides choice of forum provisions and, a little simplified, provides protection for a consumer, under certain circumstances, to the extent that the consumer may sue the seller in the consumer's home state while, at the same time, the business can only sue the consumer in the consumer's home state.

For the parties, the question of jurisdiction is important for several reasons. Typically, a party may want the dispute to be heard in its home state for practical reasons: for example, due to confidence in, or familiarity with, the local court system, or to minimise that party's own expenses while increasing the other party's expenses.

Often, however, a more important consideration is the fact that the choice of forum determines which court will adjudicate the matter, which in turn decides which choice of law rules will apply, which in turn determines the applicable law, and of course the substantive law being applied determines which party will win the dispute. Thus, when a party disputes a court's jurisdiction, it often does so with the applicable law in mind. As a matter of fact, it seems reasonable to suggest that, while forum-shopping[33] involves the choice of forum, the underlying motivation is frequently a desire to have a certain law applied in the adjudication of the dispute. The, now classic, dispute between Victorian businessman, Joseph Gutnick, and US publishing company, Dow Jones, illustrates this point.[34]

Dow Jones had published an article allegedly defamatory of Mr Gutnick. The article was available both in a magazine and online, and was mainly read in the US. However a small number of copies of the magazine were distributed in Victoria, and the website containing the article had a small number of subscribers in Victoria. No exact number of readers could be established for either the web or magazine version of the article, but it was suggested that important Victorian business people had in fact read the article. Mr Gutnick sued Dow Jones in the Supreme Court of Victorian (VSC) seeking

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[30] Cases C- 509/ 09 *eDate Advertising GmbH v X* and C- 161/ 10 *Olivier Martinez and Robert Martinez v MGN Limited*.

[31] For an example of Australian rules providing for such choices, see *Uniform Civil Procedure Rules* 1999 (Qld), Reg 124(i); see also Regulation (EU) No 1215/ 2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 25 for the European position.

[32] Regulation (EU) No 1215/ 2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[33] Defined as 'Selection by a plaintiff of a court of justice best suited to the plaintiff's needs by reason of commercial, legal, or personal advantage.' Nygh and Butt (n 13). Forum shopping is often regarded as undesirable almost to the extent of 'foul play'. However, as pointed out eg by Bogdan, in the majority of cases, forum shopping is not inappropriate conduct but rather completely legitimate conduct that contributes to procedural efficiency: M Bogdan, *Svensk Internationell Privat- och Processrätt* (8th edn, Norstedts Juridik AB 2014) 32.

[34] *Dow Jones & Company Inc v Gutnick* [2002] HCA 56.

damages for defamation. Dow Jones responded by claiming that the court lacked jurisdiction over the dispute, that in the case the court should find it has jurisdiction, it should decline to exercise its jurisdiction[35], and if the court was to decide the dispute, US law should apply.

The fact that Dow Jones did appear before the courts in Australia to dispute the courts' jurisdiction seems to suggest that what the defendant, Dow Jones, was trying to achieve by all this was to ensure that US law was applied to the dispute, rather than for more practical reasons trying to avoid the matter being heard in Australia. If the dispute was heard in the US, a US court would have applied US law, and Dow Jones would have enjoyed the protection of freedom of speech provided by the First Amendment of the US Constitution.

All that has been said so far fits neatly within traditional notions of jurisdiction. However, in addition to the matters of personal jurisdiction and of subject-matter jurisdiction, it is now clear that we must take account of a third category of jurisdiction, what we may refer to as 'scope of (remedial) jurisdiction'.

Scope of jurisdiction relates to the appropriate geographical scope of orders rendered by a court that has personal jurisdiction and subject-matter jurisdiction. This question has gained far less attention to date. Yet, while this third dimension often is overlooked, clear examples can be found of its articulation. One such example is found in the following quote from the CJEU's *eDate* decision, commenting on the EU's Brussels Regulation's approach to jurisdiction in torts cases:

> Article 5(3) of the Regulation must be interpreted as meaning that, in the event of an alleged infringement of personality rights by means of content placed online on an internet website, the person who considers that his rights have been infringed has the option of bringing an action for liability, in respect of all the damage caused, either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seised.[36]

This statement outlines rules of personal jurisdiction in stating eg that an action can be taken 'before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based'. But it also delineates the scope of jurisdiction. For example, it makes clear that, if you sue at the defendant's place of establishment or where you have your centre of interests, the relevant scope of jurisdiction is global, while if you sue in a different country, the relevant scope of jurisdiction is just that member state.

There can be no doubt that the question of the scope of jurisdiction is becoming increasingly important, not least as we see more and more litigation aimed at Internet intermediaries such as search engines, social media operators and video hosting platforms. The reason is obvious: such intermediaries allow us to 'kill a mosquito with a nuclear bomb' – we can achieve global removal of content based on that content being contrary to the law of one single state.

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[35] This is a common approach for a defendant wishing to avoid having a dispute heard in the forum in question. Note, however, that option of asking the court to decline jurisdiction is mainly available in common law courts (see further below).

[36] Cases C- 509/ 09 *eDate Advertising GmbH v X* and C- 161/ 10 *Olivier Martinez and Robert Martinez v MGN Limited*, para 69.

There are more and more examples of courts ordering Internet intermediaries to block/remove/delist content globally in response to the content arguably violating local law. These are clearly matters of scope of jurisdiction, and given that there are strong reasons to think that these types of questions will only grow in prominence, it is time we recognise the distinct issues involved in this third dimension of jurisdiction.[37]

From a normative perspective, the jurisdictional dilemma is of course that too wide jurisdictional claims are unjust towards the defendant, and too narrow jurisdictional claims might deprive the plaintiff of legal remedies.

Choice of law

If a court finds itself to have jurisdiction, it will turn to the question of which law should be applied. As the applicable law is the standard that ultimately decides which party is successful, the choice of law question could, from a certain point of view, be said to be the most important question. Either way, also the choice of law rules focus primarily on locations as is exemplified in the widely spread choice of law rule in torts, *lex loci delicti* (ie the law of the place of wrong).[38] While the detailed manner in which *lex loci delicti* rule is applied varies somewhat from state to state, a common feature is that it often favours the *lex fori* (ie the law of the forum).

We find an illustration of this in the Australian law as it stood at the time of the previously mentioned *Gutnick* case.[39] While the *lex loci delicti* rule may have appeared 'neutral' as it simply pointed to the place of wrong, the underlying rules of defamation law as they stood were biased towards the *lex fori*; that is, since the tort of defamation was deemed to have been committed where the defamatory material entered the mind of a third person, it was fairly easy to ensure that the *lex loci delicti* pointed to the *lex fori* – all you needed to do is show that somebody within Australia (or more exactly the desired Australian state) read or heard the defamatory material.[40]

Perhaps even more common than the choice of forum clauses mentioned above is contractual regulation of the applicable law (so-called choice of law clauses). Websites, for example, commonly include so-called 'click-wrap' agreements (ie non-negotiated contracts of adhesion which normally are entered into when one party clicks on the 'I agree' or 'Accept' button on the website).

Typically, the person is presented with an extensive list of clauses and has to, without the opportunity of negotiations, either accept or decline to proceed with whatever the contract relates to. There is only a limited amount of case law on this type of contracts of adhesion, and different courts have taken different approaches. Sometimes the click-wrap contract is held to be valid, and

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[37] See further Dan Svantesson, 'Jurisdiction in 3D – "scope of (remedial) jurisdiction" as a third dimension of jurisdiction' (2016) 12(1) J Private Intl L 60-76.

[38] The *lex loci delicti* rule is for example applied in Australia (see *Regie National des Usines Renault SA v Zhang* [2002] HCA 10).

[39] Since 2006, all Australian State and Territories have adopted a uniform defamation law, subject only to a few differences. Each of these statutes has a choice of law provision pointing to the law of the Australian jurisdictional area with which the harm has its closest connection (see eg *Defamation Act 2005* (Qld) s 11(1–4)). However, these provisions only contemplate publication within 'Australian jurisdictional areas'.

[40] As is discussed in relation to the courts' option to decline jurisdiction (below), it is common for the plaintiff to limit the claim to damages suffered within the forum. In addition to the consequences this has in relation to the courts' option to decline jurisdiction, it also insures that the *lex fori* is applied to the entire dispute.

sometimes not.[41] That is no different than with other forms of contracts. What is important to remember is that there is no general rule against this way of forming contracts. The problem, however, is that more often than not, people in general—and arguably consumers in particular—simply do not take the time to read the agreement and do not have the knowledge to adequately understand the implications of the agreement (perhaps particularly choice of forum and choice of law clauses). In, now dated, research done on this topic, 90% of the respondents indicated that they never read the whole agreement; while at the same time 64% indicated that they always click 'I agree'. Furthermore, 55% did not believe that they entered into a legally binding contract when clicking 'I agree'![42] I doubt these figures have changed much.

At the same time, it must of course be acknowledged that click-wrap contracts represent an effective way of concluding mass-market contracts. The question is whether they are too effective, at the expense of fairness. Certainly, it is not uncommon to find mandatory rules, overruling choice of law clauses, particularly in consumer contracts.[43]

An interesting recent discussion can be found in a decision by the Supreme Court of Canada. In a judgment on 23 June 2017, it ruled that Facebook Inc's forum selection clause was unenforceable in a case involving the application of British Columbia's *Privacy Act*.[44] The long-term value of that judgment is, however, questionable given that the Court was split 4-3, with one of the judges (Abella J) deciding against Facebook and doing so on a different basis to the other three who ruled against Facebook.

More generally, the normative dilemma in relation to choice of law could be said to be that each state has a legitimate interest in applying its laws to acts done, or having a real or potential effect, in their respective territory. As different states have different laws, this creates a confusing patchwork of laws that actors on the Internet might have to consider and adjust their conduct to.

Declining jurisdiction

While the jurisdictional tests and the choice of law often are structured in very similar manners in different states, the courts' discretion to decline jurisdiction varies considerably from state to state. Generally speaking, the courts of states following the civil law tradition have less discretionary power to decline jurisdiction than their common law counterparts.[45] In common law countries, courts have the option of declining to exercise jurisdiction under the doctrine of *forum non conveniens*. The interpretation of this doctrine, however, varies greatly. In most common law countries, a court will decline jurisdiction if there is another more appropriate forum, while under Australian law, a court will decline jurisdiction only if the court is a clearly inappropriate forum.

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[41] The available case law is mainly from the US. For a discussion of some of the issues involved in this type of contracts, see, for example, the Australian Copyright Law Review Committee's report, *Copyright and Contract* (30 April 2002).

[42] A Gatt, 'The Enforceability of Click-wrap agreements' (2002) 18(6) Computer L & Sec Rep 408.

[43] Eg *Australian Consumer Law* (Cth) s 67, and the European Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I'), Article 6.

[44] [RSBC 1996] Ch 373 as cited in *Douez v Facebook, Inc* 2017 SCC 33.

[45] For further information on this, refer to J Fawcett, *Declining Jurisdiction in Private International Law* (Clarendon Press 1995).

There is no single factor that determines whether or not a common law court will decline jurisdiction under the doctrine of *forum non conveniens*. For example, while one of the factors taken into consideration is the applicable law, case law shows that the mere fact that an Australian court will have to apply foreign law does not make it a clearly inappropriate forum.[46] A range of factors may be taken into account in determining the issue of *forum non conveniens*. In broad terms, the following categories of factors are of relevance:

- The connection between the selected forum and the subject matter of the dispute as well as the parties;
- Judicial, practical and economical advantages and disadvantages for the parties;
- The availability of alternative forums and
- The substantive law to be applied.

It is hard to think of instances where conditions specific to cross-border Internet contacts would give rise to other considerations than the ones mentioned above. However, it should be noted that technological advances in the court systems may work to mitigate some of the practical barriers to cross-border litigation, which in turn may impact the calculation of whether a court declines to exercise jurisdiction based on the doctrine of *forum non conveniens* or not.

Finally, attention should be drawn to the potential relevance of the doctrine of *forum non conveniens* in the Internet context. In the High Court hearing of the Australian Internet defamation case between Dow Jones and Joseph Gutnick, Justice Kirby noted:

> It seems to me […] that that [the issue of *forum non conveniens*] is the place in which the Internet problem is going to be solved in the world. Countries are going to say, 'Of course we've got jurisdiction. The damage happened here or some other - we can serve here but it is much more convenient that this matter be litigated in another place'.[47]

This quote should make clear the important role the doctrine of *forum non conveniens* plays in common law countries. Yet, at a first glance, the current trend of suing only in relation to local damages would appear to negate the value of the doctrine. For example, the courts in the *Gutnick*[48] case, the *Harrods*[49] case, the *Breeden v Black*[50] case and the *Investasia*[51] case found no reason to decline jurisdiction since the plaintiffs' actions related only to harm suffered within the respective states, and which court could be more suitable to determine a dispute relating exclusively to damages suffered within state X than the court of state X?

This line of reasoning certainly has a logical appeal, but at the same time it could perhaps be described as a simple trick by which the plaintiff circumvents the doctrine of *fourm non conveniens*. However, the plaintiff does so at the expense of only being awarded damages for harm done within the state where the court is located. Consequently, even though the doctrine of *forum non conveniens* might not protect a foreign defendant from being sued in a certain forum, it might have the effect of preventing the plaintiff from seeking world-wide damages.

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[46] *Regie National des Usines Renault SA v Zhang* [2002] HCA 10.
[47] Transcript of High Court hearing, points 1484 – 87.
[48] *Dow Jones & Company Inc v Gutnick* [2002] HCA 56.
[49] *Harrods Ltd V Dow Jones & Company Inc* [2003] EWHC 1162 (QB).
[50] [2012] SCC 19.
[51] *Investasia Ltd and Another v Kodansha Co Ltd and another* HKCFI 499 (18 May 1999).

Recognition and enforcement

While the focus of literature, relating to jurisdictional issues and the Internet, often is placed on the strongly connected, and often entwined, issues of jurisdiction and choice of law, the recognition and enforcement is a vital and decisive component of private international law and must not be overlooked. After all, it is often of little use for a party to know, for example, that a Czech court can claim jurisdiction and will apply Czech law if the subsequent judgment cannot be enforced in a forum where the other party has assets.[52] Getting a judgment recognised and enforced in a foreign forum is seldom easy, and in a sense, the general complexity of getting foreign judgments recognised and enforced in a forum in which the defendant has assets works as a protection for defendants in international litigation. In this context, it should be noted that there is an inbuilt balance in that: while larger actors (eg multinational corporations) may have assets in several states, and thereby have a larger risk exposure, they also have more resources (eg access to sophisticated legal advise) to protect themselves; while small actors (eg private individuals) have little or no means to protect themselves, they often also have limited assets (which might make it uneconomical to sue them) and these assets are ordinarily in one state only, thereby limiting the risk exposure.

In the absence of international agreements,[53] the circumstances in which a state will recognise and enforce foreign judgments are often limited and do not correspond with the circumstances under which courts of that state can exercise jurisdiction. We can here talk about a gap between what is seen as reasonable grounds for jurisdictional claims and what is seen as reasonable grounds for the recognition and enforcement of foreign judgments. For example, while Australian courts may claim jurisdiction on a variety of grounds, in the absence of agreements, they will only recognise and enforce foreign judgments if the foreign court had jurisdiction based on the presence or residence of the defendant being within the foreign forum or based on the voluntary submission by the defendant to the foreign court. Thus, it may be important for a plaintiff to carefully evaluate on which grounds he/she should ask the court to base its jurisdiction. In other words, the connection between jurisdiction and the potential of recognition and enforcement must be acknowledged. In contrast, there are no similar implications of the choice of law. Ordinarily, only if the choice of law offends 'natural justice'[54] would there be any connection between the choice of law and the recognition and enforcement.[55]

The mentioned gap was clearly illustrated in the dispute between the US Internet company, Yahoo,[56] and two French associations, La Ligue Contre Le Racisme et L'Antisemitisme (LICRA) and L'Union Des Etudiants Juifs De France (UEFJ). This – perhaps the most 'famous' Internet jurisdiction case –

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[52] Also, of course, a judgment that cannot be enforced can have a moral value. For example, a judgment in favour of a plaintiff in a defamation case might very well carry great value as 'evidence' that the defamatory material was untrue. However, this sort of moral value should be kept separate from the legal value discussed in the text above.

[53] Such as the Regulation (EU) No 1215/ 2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (discussed above).

[54] 'The right to be given a fair hearing and the opportunity to present one's case, the right to have a decision made by an unbiased or disinterested decision maker and the right to have that decision based on logically probative evidence': Nygh and Butt (n 13).

[55] A court would ordinarily not enforce a foreign judgment if that judgment offends 'natural justice'.

[56] Note that this was essentially a criminal matter and different rules apply in relation to the recognition and enforcement of judgments in criminal matters, as compared to judgments relating to civil disputes. Note also that the company name is actually 'Yahoo!', but the exclamation mark will be left out in this paper.

stemmed from Yahoo operating a website which, amongst other things, contained an auction service where Nazi memorabilia/junk was frequently on offer.[57] LICRA and UEFJ attempted to have Yahoo remove the Nazi material from the auction service, in accordance with French penal Code;[58] Yahoo refused. When a French court ruled that Yahoo must take steps to prevent French Internet users from accessing the sections of the auction site containing Nazi memorabilia,[59] Yahoo turned to a US court seeking a summary judgment to the effect that US courts would not enforce the French decision. While acknowledging France's right to make law for France, Justice Fogel decided in Yahoo's favour, granting the summary judgment, declaring that the 'First Amendment precludes enforcement within the United States of a French order intended to regulate the content of its speech over the Internet'.[60] It is submitted that it might not be unreasonable for a French court to exercise jurisdiction over an act violating French law in France, and it might not be unreasonable for a US court to refuse to recognise and enforce a foreign judgment infringing a US company's freedom of speech as protected by the US Constitution, in relation to an act done by that company exclusively in the US – herein lies one of the greatest normative challenges, a challenge that is most recently showcased in the aftermath of the *Google Canada* case.[61]

Concluding remarks

I opened the 2003 paper that this article is based on with a quote from a 1998 publication: 'As long as different countries have different laws and cultures, there are no good principles for jurisdiction. Only less bad ones. Every nation wants unity, but no nation wants to give up any of its traditions.'[62]

Little, if anything, has changed in this regard in the 20 years since this was written. Different countries still have different laws and different cultures. Indeed, with the greater diversity of populations represented online today, the Internet of today is clearly characterised by even stronger differences in laws and cultures. Furthermore, we have not witnessed any revolution in the 'tools of the trade' when it comes to Internet jurisdiction. In fact, this is perhaps the greatest cause for disappointment – in all these years we have only managed to put forward a handful of 'new' approaches, and many of these novelties are little more than twists on traditional approaches.

In addition, the above should have illustrated that the problems private international law must address in the online context are not, as was frequently said in earlier literature,[63] that Internet interactions occur *nowhere* and thereby fall outside the legal systems; rather, what causes the difficulties is that Internet interactions potentially occur *everywhere* and come under the jurisdiction and laws of a very large number of legal systems. While there are limiting factors, such as enforcement difficulties, those who place material on the Internet are currently exposing themselves to the jurisdiction and laws of a wide range of states. Indeed, it seems that many, not to say most, states' private international law rules provide for jurisdictional and legislative claims over any website that can be accessed in its territory, in relation to a wide range of legal matters.

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[57] However, the auction service was not at all specifically designed for the purpose of auction Nazi material.
[58] Section R645-1.
[59] *International League Against Racism & Anti-Semitism (LICRA) and the Union of French Jewish Students (UEJF) v Yahoo! Inc* High Court of Paris, 20th of November 2000.
[60] *Yahoo!, Inc v La Ligue Contre Le Racisme et L'Antisemitisme*, 169 FSupp 2d 1181 (ND Cal 2001), at 22.
[61] *Google LLC v Equustek Solutions Inc*, 2017 WL 5000834 (ND Cal Nov 2, 2017).
[62] T Carlen-Wendels, *Nätjuridik* (Norstedts Tryckeri AB 1998) 38 (author's translation).
[63] Eg D Johnson and D Post, 'Law And Borders--The Rise of Law in Cyberspace' (1996) 48 Stan L Rev.

Much work lies ahead, but all that remains for me here is to take this opportunity to congratulate Professor Steven Saxby on his extraordinarily successful work with CLSR. I owe him a lot, and I am not the only one. Through his relentless, focused and always professional work with CLSR he has made an invaluable contributed to our discipline.