

# **A Summary of the American Bar Association's (ABA) Jurisdiction in Cyberspace Project:**

## **“Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet”**

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### **Résumé**

Suite à plus de deux années de recherches, le projet de l'*American Bar Association* (ABA) concernant la juridiction du cyberspace, « *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet* », a été publié dans l'édition du mois d'août 2000 de la revue juridique *The Business Lawyer*. Ce rapport poursuivait deux objectifs distincts : Tout d'abord, effectuer une analyse globale des complexités potentielles entourant les conflits juridictionnels découlant du commerce en ligne. Ensuite, élaborer une liste exhaustive des solutions pouvant être utilisées pour résoudre de tels conflits. Le présent article se veut un résumé concis et accessible des trois grandes sections du « *Cyberspace Jurisdiction Report* » : (1) les solutions proposées aux problèmes juridictionnels découlant des conflits résultant du commerce électronique ; (2) afin d'appuyer les solutions proposées : l'utilisation d'exemples d'occasions où la technologie a déjà, par le passé, causé la métamorphose de certains paradigmes juridictionnels; et (3) afin d'appuyer les solutions proposées : l'utilisation d'un contexte doctrinal.

### **Synopsis**

In the August 2000 edition of the *Business Lawyer*, the American Bar Association's (ABA) Jurisdiction in Cyberspace Project "*Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*" was published following two years of research. The goal of the report was twofold. First to perform a global analysis on the potential complexities surrounding jurisdictional conflicts as a result of online commerce. Second to document the available solutions that should be employed to resolve such disputes. The following paper is a comprehensive summary of the three following sections of *Cyberspace Jurisdiction Report*: (1) proposed solutions to jurisdictional problems which arise from e-commerce disputes; (2) support for such proposed solutions: using examples of how technology has previously changed existing jurisdictional paradigms; and (3) support for such proposed solutions: using a doctrinal framework.

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## **Introduction**

1. Following the explosion of the Internet, millions of people all around the world are currently online seeking information, communicating with others, and performing commercial transactions, all at speeds never before seen. The increasing use of the Internet has in many ways served as an asset to both businesses and the common population. On the other hand, legislatures around the globe are growing increasingly concerned over the legal vulnerability people face as they welcome this technology into the social and economic fabric of their lives. A major source of this concern stems from the clear disparity found between rapid advances in cyberspace, and the recurring lag in the legal system's ability to adapt to such technological paradigms on time. In fact, in 1998, the American Bar Association (ABA) set off on a two year mission: to perform a global analysis on the potential complexities surrounding jurisdictional conflicts as a result of online commerce, and document the available solutions that should be employed to resolve such disputes. In answering this legal question, a report was formally compiled, entitled *Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet*.

2. The following paper summarizes three sections of this ABA report: (1) proposed solutions to jurisdictional problems which arise from e-commerce disputes; (2) support for such proposed solutions: using examples of how technology has previously changed existing jurisdictional paradigms; and (3) support for such proposed solutions: using a doctrinal framework. This summary reflects the personal, prescriptive and enforcement issues of jurisdiction that are primarily of a US perspective, with occasional references to certain European and Asian nations. Most importantly, this summary highlights the report's initiative to strive and build a practical, legal foundation for establishing certainty, predictability and order over the jurisdictional uncertainties arising out of online commercial disputes.

### **1. Solution for Global Consideration**

3. The Cyberspace Jurisdiction Report summarizes a list of suggestions designed for the purpose of laying down a foundation for future rules, standards, and policies that will govern jurisdictional matters arising from electronic commerce. This proposed set of criteria is characterized into four distinct sections. It is intended to be used by governments, interested organizations, businesses, legislatures, and courts, to consider as they encounter novel situations of jurisdictional questions arising from cyberspace.

#### **A. Jurisdictional Default Rules**

4. Section 1 outlines a set of six fundamental rules that should form the basis of any solution to a jurisdictional dispute arising from an e-commerce transaction.

5. The first rule states that every party on the Internet is subject to a personal and prescriptive jurisdiction. Similar to physical commercial transactions, e-commerce contracting parties may be subjected to multiple jurisdictions found in various states<sup>[1]</sup>.

However, as indicated by the second rule, personal or prescriptive jurisdiction should not be assigned to passive web sites that do not target any particular state.

6. According to the third rule, web content providers (sponsors), should be subject to the personal or prescriptive jurisdiction of a given state if the sponsor (a) is a resident of, or has its place of business in, that state, (b) purposefully targets<sup>[2]</sup> a state where his online content causes a dispute, or (c) is accused of causing a dispute resulting from an online transaction on its web site which, even if it does not target any particular state, encourages an interactive experience with the end user and is generally known to be commercially active in such a territory.

7. The fourth rule of default suggests that a sponsor's installation of disclosures, disclaimers, software and other technical blocking strategies used to prevent users from accessing his site or service, should be considered as measures of good faith, and thus protect the sponsor from being subjected to an end user's jurisdiction.

8. The fifth rule supports a closer connection between the rules of tax jurisdiction and the rules of prescriptive jurisdiction.

9. The sixth and final rule suggests that principles of international law should not be the only legal source that regulates personal and/or prescriptive and/or tax jurisdiction. Rather, issues such as the risk of legal conflicts as a result of the application of state laws, the potential hindrance of e-commerce trading, the gravity of the regulatory or tax benefits to be gained, and the interests of justice or convenience of the parties (*forum non conveniens*), are all significant factors that must receive consideration.

## **B. Contractual Choice of Law and Forum**

10. The second section contains a set of provisions that considers the ability of both parties to contractually choose the governing legal jurisdiction. Such agreements are known as *forum selection clauses* or *choice of law clauses* and are considered binding so long as there is an absence of fraud or other related abuses. In return for having agreed to adhesive contracts containing such clauses, judgments ruled in favor of the consumer will be respected and receive full sanction by the courts.

## **C. Hybrid Alternative**

11. The third section considers the safe harbor agreements between the U.S. and the European Union. This alternative would serve as a useful model from which to inspire a public law framework for Internet jurisdictional solutions.

## **D. The Future Global Agenda to Address Jurisdiction in Cyberspace**

12. The fourth and final section suggests the establishment of an international commission called the *Global Online Standards Commission (GOSC)*. The *GOSC* would serve to develop a set of universal standards and protocols in order to regulate jurisdictional

problems, which occur anywhere in Cyberspace. Its purpose would also be to keep a watchful eye on the efficiency of Internet government regulation, thus establishing protection without creating any negative foreign jurisdictional consequences. The *GOSC* would also spearhead an effort to encourage the establishment of new administrative organizations to resolve online dispute resolutions. An example of such an organization is the *Internet Corporation for Assigned Names and Numbers (ICANN)*, which has proven to be a very effective body in regulating trademark and domain name disputes.

## **2. Support for such Proposed Solutions: Using Examples of how Technology has Previously Changed Existing Jurisdictional Paradigms**

### **A. Jurisdictional Principles**

13. As modern technology shapes the world into a global marketplace and enables interstate contact to become a regular activity, traditional principles of personal and prescriptive jurisdiction have also been required to evolve. In the past, these principles were based on a sovereign state's ability to impose its authority strictly on defendants accused of committing an infraction within its own territory. Today, these principles have developed to assert jurisdiction over foreign parties who cause infractions from out of state.

### **B. The Relevance of Physical Location**

14. Over the last fifty years, courts and legislatures have attributed the physical location of a disputed act as a key element in determining extra-territorial jurisdiction. More specifically, the courts decided that the critical moment of an act takes place where the infraction occurs. Some examples of such locations are: where a negligent act or a related injury occurred, where a contract was formed or was to be carried out, the target of a service, etc. With the increasing availability of advanced technologies, foreign actors must no longer be physically present for their actions to produce effects in such distant *fora*. As a result, legislators must qualify the strength of legal relationship between the actor and the remote forum. Such qualification will determine the grounds for attributing personal and prescriptive jurisdiction.

### **C. Targeting**

15. Targeting is the purposeful act of an actor to specifically access a chosen forum. It is also considered to be a significant factor for the justification of personal and prescriptive jurisdiction. The Internet has proven to be an efficient tool for web site sponsors to target foreign audiences. Even though web sites naturally can be accessed by anyone around the world, such a quality does not necessarily mean that it has a targeted audience. In order to constitute if a web site is indeed targeting a particular public, one must compile sufficient evidence to demonstrate the web site sponsor's true intent. This intent may be determined from (a) messages that explicitly indicate the web site's target, (b) the installation of filters or (c) other blocking devices used to exclude certain territories from accessing the web site.

The approval of past transactions with particular *fora* is also a reliable indicator of such intent for web sites of a commercial nature.

#### **D. Power Parameters**

16. The development of today's jurisdictional rules for matters of commercial transactions reflects the presumed need to protect the consumer from a more advantaged seller. Such is believed to be the case as sellers actively target specific consumer *fora* and utilize adhesive contracts. However, it can be argued that the Internet is responsible for providing the consumer with a more powerful role at the expense of the seller. Unlike traditional business practices, some in fact believe that on the Internet, it is the consumer who targets the seller, and not vice versa. With a simple connection to the Internet, a consumer can access any web site they wish with one click of the mouse. In comparison to the traditional marketplace, where the consumer is bound to the local seller, the Internet empowers the consumer by offering him the tools to explore countless new vendors in foreign markets. Small businesses are increasingly embarking on the Internet in order to cut costs and take advantage of affordable multinational sales through online commerce. This trend serves to increase consumer choice, and therefore aggravates the seller's weakened position in Cyberspace. The Internet also offers the consumer the advantage to buy goods at lower costs. By enabling the consumer to shop directly from some manufacturers, the Internet removes the need for a middleman. Finally, technological advances have devised practical mechanisms to combat the informational overload which consumers face online. However, in practice, as will be discussed in the proceeding section with regard to *choice of forum* and *law clauses*, the traditional presumption of the consumer's disadvantaged position, although weakened by the Internet, remains an entrenched principle of law.

#### **E. Contractual Choice**

17. Often, e-commerce transactions are concluded with contracts that include *forum-selection clauses* or *choice of law clauses*. If a commercial contract is formed with a consumer, a presumption is held that the consumer lacks equal bargaining power in relation to the seller. If the seller is the sole draftsman, all stipulated provisions in the contract are considered adhesive in relation to the consumer. As a result of this inequity, it is possible for consumers to be subjected to inconvenient and even harmful legal jurisdiction. In response to such injurious possibilities, the European Union has decided that it will honor *choice of forum* and *law clauses* only if they function to consumer's advantage. The United States applies a similar protection should such clauses have an unreasonable application with regard to the consumer.

#### **F. The Intersection Between Jurisdiction and Substantive liability for Intermediaries**

18. As a result of the difficulty of enforcing judgments taken against foreign defendant-actors, substantive law of various jurisdictions have at times held local third parties or intermediaries liable. For example, as is applied in Britain, servers who host defamatory material have an obligation to remove such content should anyone file a complaint. Should a notified server ignore such a complaint, it can be held liable. Such intermediary liability

was determined in a recent case in Germany, where a court held *AOL Europe* liable for permitting one of its subscribers to download copyrighted music. On the other hand, seeking intermediary liability against servers is not an action that is universally executed. For example, the United States' *Communications Decency Act* and *Digital Millennium Copyright Act*, and Australia's proposed *Copyright Amendment Bill 1999*, protect ISPs (Internet Service Providers) from liability resulting from harmful or illegal content that they passively host.

### **3. Doctrinal Framework**

#### **A. Personal Jurisdiction**

19. In the United States, according to classic jurisdiction doctrine, assertions of jurisdiction are related to the defendants' quality and nature of *minimum contacts* made in a particular forum, so long as traditional notions of fair play and justice are respected. This classic doctrine also assumes that the defendant has physically entered the contacted state forum. As indicated in *Hanson v. Denckla*[3], when a *defendant purposefully conducts his activities in a chosen state, he inherently benefits from all the privileges and protections of laws found in this jurisdiction*. For example, claims related to services performed by a defendant in a state legally connect such a defendant to the state's protections via its assertion of jurisdiction over the dispute. Such assertion of jurisdiction must however be considered "reasonable"[4].

20. How does classic jurisdiction doctrine resolve disputes, which involve defendants who contact foreign states yet who never physically enter such territories? Such a problem is often demonstrated by commercial transactions that take place over the Internet. Naturally, web sites can be accessed in all state forums around the world using a standard Internet connection. However, if a party in a state forum accesses a web site for a service, which eventually leads to a dispute, is it considered reasonable for the state to assert jurisdiction over the defendant, if the defendant has never physically entered that state? The Supreme Court has responded affirmatively to this question for three separate situations involving web sites, which satisfy *Hanson's minimal contact* requirement, thus availing the defendant to the jurisdiction of the forum state.

#### **a) Jurisdiction based on indirect economic benefit**

21. The first situation where a defendant can be subjected to forum's jurisdiction without ever having been physically present in its territory, is inspired by a specific doctrine known as "stream of commerce". Developed in *Gray v. American Radiator and Standard Sanitary Corp.*[5], the "stream of commerce" doctrine allows a consumer who buys a product in a particular forum, to assert jurisdiction over the manufacture of such a product if the product is defective and causes an injury to the consumer. The logic behind this doctrine lies in the notion that if one benefits from the protections offered by the distinct forum from which an economic gain from a sale is received, it also follows that one must also be subject to the forum's same jurisdiction when a dispute arises from such commercial transactions. In order to establish the necessary *minimal contacts* required for jurisdictional assertion, the

manufacturer must purposefully direct his commercial activities toward a particular forum. These same principles can be applied to web sites which are naturally viewed from anywhere in the world. However, it has been determined by the court that the simple accessibility of a passive web site in a forum is not considered sufficient contact to assert jurisdiction on the defendant web site owner[6].

### **b) Jurisdiction Based on Intentional Causation of Effect**

22. A defendant can also be subjected to a forum's jurisdiction without ever having to physically enter its territory if it is demonstrated that he had an intention to cause damage within that forum. This principle is recognized in international law and was constitutionally supported in the classic libel case, *Calder v. Jones*. This principle is also relevant in asserting jurisdiction involving disputes relating to intellectual property[7], and cyber-squatting[8]. Nevertheless, should it be proven that the defendant had in fact targeted the forum in the absence of demonstrating any intention to cause injury, the assertion of the forum's jurisdiction onto the defendant can remain justified.

### **c) Jurisdiction based on International Affiliation**

23. The third situation where a defendant can be subjected to a forum's jurisdiction without ever having been physically present in its territory involves the defendant's intention to affiliate himself with the forum state. Such was the case in *Burger King Corp. v. Rudzewicz*[9], where the defendant, who was accused of breaching a contract, was found to have intentionally affiliated himself with the state of Florida, thereby invoking the benefits and protections of Florida law and satisfying *Hanson's* requirement of minimal contact. However, as indicated by the Sixth Circuit Court in *CompuServe, Inc. v. Patterson*[10], further pertinent factors, which characterize the parties' relationship, in addition to the contract of affiliation, may be required to sufficiently satisfy *Hanson's* minimal contacts test.

24. In the precedent setting decision, *Zippo Manufacturing Co. v. Zippo Dot Com, Inc*[11], the court determined the necessary criteria required to subject a defendant e-commerce sponsor to the jurisdiction of a forum he contacted over the Internet. The court held that assertion of personal jurisdiction was related to a web site's significant degree of interactivity and exchange of commercial information. The court's assertion, that a web site's commercial interactivity is related to jurisdictional questions is supported by the premise that jurisdiction results from an apparent contractual relationship between defendants and the *fora* that they wish to engage with[12]. For example, sponsors of interactive commercial web sites have the choice to select which *fora* can engage with their site. Should the sponsor passively allow e-commerce to take place on his web site with all *fora*, it can be presumed that the site sponsor has consented to the possibility of forming future connections across all these territories.

25. In order to resolve the possibility where multiple states attempt to regulate an interactive commercial web site that transacts with all *fora*, attention must be redirected to the web site's actual use. Deliberate and repeated commercial transactions with a particular



forum demonstrates the consented will of a sponsor to engage his web site with such a forum, thus forming a contractual relationship with it. As a result of this contract, the contacted forum acquires an interest in the commercial web site and makes it less likely for other *fora* to subject their jurisdiction.

## **B. Prescriptive Jurisdiction**

26. If a forum in the United States is unable to apply its laws to assert jurisdiction over a defendant, either due to the imminent deprivation of due process or to the incompatibility of its law in the dispute, such a forum will be obliged by the U.S. Constitution's *full faith and credit clause* to recognize and apply the substantive law of a capable state. Such third party assertion of jurisdiction is known as *prescriptive jurisdiction*. Prescriptive jurisdiction may only occur however, if the acquiring state demonstrates an interest in the dispute[13]. According to the Restatement (Third) of Foreign Relations Law of the United States Report[14], International law clearly sets forth the requirements needed for a state to demonstrate its interest in prescriptive jurisdiction: conduct within a nation's territory, nationality, effects within a nation's territory, protective jurisdiction and universal jurisdiction. However, as indicated in the detailed list stipulated in section 403(2) of the Restatement (Third), assertion of jurisdiction is prohibited if its implementation proves to be unreasonable. A problem arises however when multiple states, who each legitimately have a right to exercise prescriptive jurisdiction, draw opposing conclusions from their respective legal systems. Should such a conflict of laws occur, choice law doctrine regulates that the forum can select the solution that best fits its legal system.

27. The usage of contractual choice of law varies across many nations. In the United States, contractual choice of law is regulated by sections 186-188 of the Restatement (Second) of Conflicts of Laws[15]. Such clauses are considered valid and enforceable, unless (a) the chosen governing state has no interest in the parties or the dispute, or (b) the assignment of jurisdiction to another state is unreasonable or is against the public policy of the forum. Japan and the *Rome Convention on the Law Applicable to Contractual Obligations* [16] also respect choice of law clauses. However, according to these regimes, should one of the contracting parties happen to be a consumer, state mandatory rules, whose purpose is to protect the consumer, can take effect and override any contractual stipulation.

28. If no choice of law clause is included in the contract, section 188 of the American Restatement stipulates that the state with the most significant interest should apply its laws to the dispute. When considering the degree of state interest, attention must be paid to the location of contract formation, the destination of contractual performance, the contractual subject matter, and the residence of the parties.

29. In comparison with section 188 of the American Restatement, article 4 of the Rome Convention provides a similar analysis with regard to contracts that do not include choice of law clauses. Article 4 stipulates that the state that is most closely associated with the disputed contract should have the right of prescriptive jurisdiction. Such a relationship between the acquiring state and the contract will take into account either the residence or

the principal place of business of the defendant, who is held to perform his contractual obligation.

### **C. Enforcement Jurisdiction**

30. To enforce judgments against defendants, states must have the ability to seize assets belonging to defendants in order to remunerate plaintiffs for their loss. Difficulties however, can arise if these assets are situated in foreign states. In such situations, the forum state, which must now enforce its judgment, will require the participation of other states to seize the defendant's assets. As stipulated in the *full faith and credit clause* of the U.S. Constitution, each U.S. state must respect and enforce judgments of other U.S. states, which demonstrate their personal jurisdiction over a dispute. Should a defendant wish to successfully appeal the forum state's ruling, he must do so in such a forum state and argue that it lacked personal jurisdiction over the dispute.

31. How does a nation determine whether it should recognize and enforce a foreign court's judgment? Recognition in the United States depends on local statutory law or comity. Typically the foreign court's judgment is recognized, unless violations of procedural due process, absence of personal jurisdiction or breaches in the public policy of the recognizing state have occurred.

32. In practice, state requirements for recognition and enforcement of foreign judgments vary across nations. International agreements between states, such as the draft Hague Convention<sup>[17]</sup>, can be an effective means for outlining inter-state requirements, thus leading to a more efficient legal system that results in dutiful recognition of court rulings.

### **Conclusion**

33. The *ABA Global Cyberspace Jurisdiction Project* provides businesses and consumers with a wealth of information that explains how commercial transactions on the Internet can fall under the laws of distant states through the assertion of personal and prescriptive jurisdiction. Defendant sponsors, who operate web sites that satisfy *Hanson's* requirement of *minimal contact*, face the personal jurisdiction of the impacted forum, especially if a resulting injury was intended. Sponsors of commercial web sites that target selected *fora*, must be prepared to assume the consequences of being tried in foreign courts should they have a transactional history with various *fora*, or if they have encouraged such interaction. Web site sponsors, who make an effort to filter certain locals from interacting with their web sites, may be exempt from facing personal jurisdiction in these territories. Businesses and consumers can also determine which jurisdiction will govern over future disputes by agreeing to *forum-selection clauses* or *choice of law clauses* in their commercial contracts. Many countries will however, interpret these clauses by protecting the best interests of the consumer.

34. The substantive law of a third party state, which demonstrates their valid interest in a dispute, can acquire prescriptive jurisdiction and provide the legal framework for the contacted forum to prosecute a foreign defendant. In situations where multiple states justly

claim prescriptive jurisdiction, choice law doctrine will empower the contacted forum to select the substantive law that best fits its legal system. Tensions between states that claim prescriptive jurisdiction can be reduced with efforts to globally harmonize substantive law.

35. The harmonization of jurisdictional substantive law is an inevitable development, as new technologies foster an increase in the number of private international disputes. Naturally, harmonization will take time to develop, as many states will surely have different priorities for their respective populations. Yet, the benefits of establishing internationally agreed upon jurisdictional standards will continue to fuel the desire to achieve inter-state cohabitation, and serve as the primary purpose towards overcoming any legal differences that presently exist.

## Notes

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[1] The ABA, for the purposes of this report, has defined a ‘state’ as “*a nation-state (country), a confederation of nation-states, or a separate governmental entity within a nation-state that constitutes a forum which may apply or enforce laws and/or adjudicate disputes*”, p. 1820, footnote 51.

[2] ‘Targeting’ in the context of the Global Cyberspace Jurisdiction Project, refers to the “*technological practices that sponsors use to purposefully avail themselves of the commercial benefits of the targeted state*”, p. 1821, footnote 52.

[3] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)

[4] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)

[5] *Gray v. American Radiator and Standard Sanitary Corp*, 176 N.E. 2d 761 (Ill. 1961).

[6] *Bensusan Restaurant Corp. v. King*, 937 F. Supp. 295 (S.D.N.Y. 1996), *aff’d*, 126 F.3d 25 (2d Cir. 1997).

[7] *Roberts-Gordon, LLC v. Superior Radiant Products, Ltd.*, 85 F. Supp. 2d 202 (W.D.N.Y. 2000), *Bailey v. Turbine Design, Inc.*, 86 F. Supp. 2d 790 (W.D. Tenn. 2000), and *Nutrition Physiology Corp. v. Enviros Ltd.*, 87 F. Supp. 2d 648 (N.D. Tex. 2000).

[8] *Panavision Int’l, L.P. v. Toeppen*, 938 F. Supp. 616 (C.D. Cal. 1996), *aff’d*, 141 F.3d 1316 (9<sup>th</sup> Cir. 1998).

[9] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

[10] *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6<sup>th</sup> Cir. 1996).

[11] *Zippo Manufacturing Co. v. Zippo Dot Com, Inc*, 952 F. Supp. 1119 (W.D. Pa. 1997).

[12] *World-wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

[13] *Allstate Insurance Co. v. Hague*, 449 U.S. 302 (1981), p. 334.

[14] Restatement (Third) of Foreign Relations Law of the United States Report 403 (1986) [hereinafter Restatement (Third)].

[15] Restatement (Second) of Conflicts of Laws 6 (1971), [hereinafter American Restatement].

[16] The Rome Convention on the Law Applicable to Contractual Obligations, June 19, 1980, 80/EEC, 1980 O.J. (L 266) 2, art.4 [hereinafter Rome Convention].

[17] Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (May 5, 1992) [hereinafter draft Hague Convention].