CHAPTER II: JURISDICTION IN CYBER SPACE

Concept of Jurisdiction

‘Jurisdiction’ is the concept where by in any legal system, the power to hear or determine a case is vested in an appropriate court. The justice delivery system of any legal system operates through structures called ‘courts’ and the starting point of such functionality is that of ‘jurisdiction’ by which the verdict of the court becomes validated as a proper ‘judgment’ to be carried in accordance with law. The system of ‘Courts of Law’ needs to be understood to understand the principle of jurisdiction. Statutes create the institutions of Courts, which clothes them with appropriate power and jurisdiction. The Courts adjudicate and administer justice based on such powers conferred on them. In Indian context, the Constitution has provided for the creation of Supreme Court-the apex court for the country and a High Court in each State. Such institutions are conferred with original and appellate jurisdiction to adjudicate on any issue arising between citizen and the State, State and other States or between a State and the Union. The Courts are structured as civil and criminal on the basis of Jurisdiction, territory and monetary parameters. The Criminal Procedure Code provides for the creation of the Magistrate Courts- First Class, Second Class- above them Sessions Court in the district level. These courts have specific powers of punishment. These courts are subordinate to the High court of the State. The State Laws and Civil Procedure Code or Criminal Procedure Code will determine the setting up of the subordinate courts.

On the Civil side, the Civil Procedure Code will provide for the creation of Munisiffs Court, the Sub-Divisional Court, and the District Court. Here again the pecuniary and territorial jurisdiction will vary based on the hierarchy of the courts. Apart from these civil and criminal court set up there can be special courts for specific categories of adjudication like the Sales Tax Tribunals, Central Administrative Tribunal, State Administrative Tribunal, Motor Vehicles Compensation Tribunal and like others. The High Courts and Supreme Courts have civil, criminal and writ jurisdiction. The President with the advice of the council of ministers makes the appointments to the higher judiciary.
In this system the Civil Procedure Code determines the jurisdiction of the various court structures based on the nature of the claim, value of the subject matter and the territorial limits where the dispute arose. Such jurisdiction is clearly spelled out by specific laws and also expressly prohibits jurisdictions by specific laws. One such example is that of the Income Tax Tribunal are the only forums to decide about the disputes of income tax and hence special jurisdiction in that regard. The High Court of the State assumes jurisdiction over the entire State and the hierarchy of courts like the District Sessions Court in criminal side and the Civil Courts –District Judge on the civil side and the lower courts of Munsiff and Chief Judicial magistrate in respective civil and criminal sides will exercise jurisdiction based on the territories. The Courts also exercise jurisdiction based on the value of the suit decided by the Suits Valuation Act.

On the special courts or the tribunals, there could be formation new tribunals where the pending cases in the regular courts will be transferred if they are found fit to be adjudicated under the tribunal. These tribunals have judges and also subject specialists designated as ‘judges’ and are not bound by the procedures and technical requirements of the regular courts. On the criminal side, the jurisdiction operates on the basis of the authority and territorial demarcation conferred on the various courts by the Criminal Procedure Code. Certain judgments like the death penalty have to be confirmed by the High Court if passed by the sessions court.

Within a country the legal system operates through the process of jurisdiction, which can be classified as

a. Pecuniary jurisdiction
b. Subject matter jurisdiction
c. Territorial matter jurisdiction

Here the pecuniary jurisdiction denotes to the monetary limits involved in the dispute. Here the jurisdiction operates on a set monetary limit of the value of dispute and accordingly courts have to be approached. If the dispute is for a set amount the court to be approached will be the district courts and above such limits it will be the High Court of the State.

The subject matter jurisdiction specifies the nature of the jurisdiction based on the type of disputes that are involved. A company winding up procedure can be dealt only in the High Court and not a district court is an example. A family court will be place for initiating a dispute on divorce.

The territorial matter of jurisdiction involves the geographical factor where the dispute can be brought before a particular type of court.

Such criteria is based on the hierarchy of court structures of a legal system clothing power based on territory in its initial stages of contention of a dispute with rights of appeal gradually moving upwards towards the apex court. And again on criteria are set for magnitude and seriousness of the disputes to approach appropriate courts. Even if a court by oversight or wrong interpretation admits a contention to be dealt by the court there are provisions to challenge the same and render such a verdict null and void based on the principle of ‘jurisdiction’? In essence immaterial of the merits of a case, the process of resolving the dispute and enforcing the same will depend on the correct ‘jurisdiction’.

Having explained the concept of jurisdiction, in the context of ‘cyber space’ the territorial jurisdiction assumes the importance in terms of challenges posed by Internet operations. Such jurisdiction is determined by the relevant civil procedure code where various possibilities depending the subject matter in which the issue of ‘jurisdiction’ has to be decided. For example if it is a property issue, what jurisdiction will apply will be part of the civil procedure code enumerating the various options of courts to be approached based on the complexity of the property involved in terms of its location. Similarly the issue of ‘jurisdiction’ of a contract drawn
can be decided on the options of: a. particular choice of legal action decided by the parties themselves or b. based on the principles of ‘cause of action’ or the where the plaintiff resides.

Here ‘cause of action’ means of a bundle of rights to the plaintiff to prove the place where the ‘cause of action’ arose for him or her to seek judicial remedy on which the courts can assume jurisdiction. On the other hand if the plaintiff proves no such fact however partial, the defendant will succeed in the judgment on the grounds of jurisdiction of such effort by the plaintiff. Such ‘cause of action’ to be proved is based on the facts of the individual case.

Here again such concept of ‘jurisdiction’ assumes greater importance on the fate of the case in the legal system like United States where each state has its own sets of laws itself complicating the efforts of the plaintiff and where as Indian context it is less cumbersome as the laws are uniform through the length and breadth of the country and only issue being approaching the appropriate courts. The issue of jurisdiction will assume complex proportions in case of multiple parties a part of the plaintiff with multiple defendants and the dispute involving different places of operations. Here the courts will have to look carefully to assume jurisdiction or to abandon the same.

**UNIFORM AND VARIED JURISDICTION**

In Indian context, the jurisdiction issue is uniform as the statutes are enacted for the entire country and for all states. But in countries like United States of America which is also a federal set up like India, each state has its own laws and hence jurisdiction assumes importance. In situation of conflict on the issue of jurisdiction, United States Courts apply various principles based on the claim of property, tort, contract etc. In case of the tort cases the courts apply the principle of *lex loci delicti* or the “the law of the place of the wrong”. In case of the claim for a property - the jurisdiction issue is approached based on the first restatement principle of *lex situs* - “the law of the physical location” later enlarged by the principle of second restatement of law in 1971 – “when faced with the choice between jurisdictions court should apply the law of the jurisdiction with the significant relationship to the litigation.” On contractual claims the courts apply the principle of “minimum contacts” for corporations as well as individuals. This principle is based on the obligations arising out fair play and substantial justice on the transaction and its relationship to the forum state. Thus the issue of jurisdiction has varied interpretations and expansions based on developments in industrial transactions affected by the technological revolution.

**INTERNET JURISDICTION**

In the context of internet or cyber transactions, jurisdictions pose a major challenge in interpretations in countries like United States where there is a conflict of laws as it is not uniform through out the country and States having their own laws. As we already saw “Internet” and transactions happening through the Internet has multiple parties residing in various territories. Let us take for an example of simple transaction in Internet of ordering a book. A orders a book advertised for a price X in a website B. The Website is operated by Y who resides in another country C. The website is launched through a server located in country D operated by Z. A finds his credit card statement showing money paid but did not receive the book and now decides to take auction. In this case Y who operates the site is in a neighboring country and implicates the server provider Z for faulty configuration, which has caused the problem to A. How, does A proceed to sue for his losses? Or in another example the Police in Hyderabad come across objectionable material in a website which is launched by someone in Pakistan but hoisted from Italy through a server? Under which jurisdiction can the offence be brought?

Those who argue that jurisdiction as a major issue in the Cyber Space and Internet argue that the traditional method of assessing such jurisdiction is complicated in Internet transactions. In a
traditional contract, the jurisdiction is arrived at 1. The place the defendant resides and 2. Where the cause of action arose? In illustrations as above they argue it is complex to understand jurisdiction. Especially for those who run in commerce through Internet may land up in different jurisdictions when sued by the consumers around the world. On the other hand it is also argued that the hapless consumer will also be left without any defense in cases where the service providers and intermediaries in cyberspace are spread out in various jurisdictions.

Against this argument, many jurists and cyber law experts argue that the complications of jurisdictions are blown out of proportions and can be resolved by simpler yardsticks of existing principles of jurisdiction. They argue that issue of jurisdiction is either mistakenly or mischievously exaggerated, as what ever transactions are taking place it takes place on physical locations with physical sellers and buyers and only the links are more in such transactions. They argue that firstly, most complications are avoided if there are explicit provisions among the contracting parties on their choice of law governing such contracts secondly, in cases of contracts which are silent in respect of the choice of the law, the courts have come to grips with the situation and thus the intent, purpose and other factors of the websites will decide the jurisdiction rather than anywhere or everywhere jurisdiction phobia.

Countering this others argue that it is finally left to the pattern of judgments of the courts which will decide the issue of jurisdiction where the private international law cannot play any meaningful and constructive role. In this background the international efforts of jurisdiction assumes significance in cyberspace, which will be dealt in the subsequent modules.

JURISDICTION- INDIAN CONTEXT

As discussed earlier the jurisdiction of Civil Courts in India is based on pecuniary, subject matter and territorial aspects where the pecuniary aspect is based on the valuation of the dispute in terms of money, subject matter deals with specified disputes allocated to specified courts and territorial aspect is based on the ‘residence’ and ‘cause of action’ but again subject to the pecuniary and subject matter parameters of the dispute to be adjudicated. In this context due to the unitary and uniform structure of laws throughout the country one can easily dismiss the complexity of Internet Jurisdiction issues as it is dealt in United States. However, Internet being a global phenomenon the jurisdiction issues of those who reside outside India and vice versa of those who reside in India will assume importance in case of adjudication and effectiveness of the same.

Let us look at some important provisions in this regard to understand the Jurisdiction issues and its operation in the Indian legal system:

1. s.13 of Civil Procedure Code (CPC)- this section deals on foreign judgments-

A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

- a. Where it has been pronounced by a court of competent jurisdiction;
- b. Where it has been given on the merits of the case;
- c. Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
- d. Where proceedings in which the judgment was obtained are opposed to the natural justice;
e. Where it has been obtained by fraud;

f. Where is sustains a claim founded on a breach of any law in force in India.

By these provisions it is implied that foreign judgments are binding if the above exceptions are taken care in the adjudication. Here again any explicit acceptance of the jurisdiction of any foreign court by an Indian citizen or a corporation is bound by that as the individual or corporation has taken.

JURISDICTION BY CONSENT

If the contracting parties consent specifically to have a jurisdiction of a particular country, it would be binding on the parties and cannot later turn the argument that the court has no jurisdiction on general grounds. Connected to this is the general principle that the court cannot pass an ex-parte decree against a party who did not appear or contest in such litigation. This often leads to the notion that mere non-appearance will allow the defendant to get away with the proceedings. But there are various instances where Indian Courts have interpreted s 13(d) of CPC to uphold natural justice and thus mere procedural loopholes cannot be taken as excuse for violation of substantial aspects of natural justice to let the offender to get away and has enforced jurisdiction in such cases.

Added to this s 13 CPC states that a judgment of a foreign court is in violation of the Indian Law it cannot be sustained, in substance it can be stated that any judgment of the foreign court on an Indian citizen if it satisfies s 13 of the CPC can be upheld in Indian Courts. Such a analysis leads to the conclusion that any legal transaction carried out in Internet has the potential of litigation in the country where such services are provided and are subject to the legal regime of such country. It can take effect in Indian jurisdiction as long as they meet the requirements stipulated in s 13 of the CPC.

On the flip side, of the jurisdiction of the Indian Courts over Foreign residents or citizens again, can be dealt under the section 19 of the CPC. It is understood that in cyber transactions the damage or injury is caused to the movable property. Here under s 19 of CPC, allows for filing a suit for the compensation of the wrong done to the person or to the movable property. Such a suit is instituted either at the place of residence or the place of business activity of the defendant or at the place of the wrong committed. The specific clause of such suit and its jurisdictions is spelled out in s20 of CPC, which is as follows:

20. Other suits to be instituted where the defendant resides or cause of action arises: -

Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction –

a) The defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain: or

b) Any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

c) Where the cause of action, wholly or in part, arises.
In interpreting the above three components of the section, the first and second components are much clearer and in case of the Internet specially, the third component of the ‘cause of action’ needs to be analyzed. A cause of action whether wholly or partly will determine the validity of the suit under s 20 (c) of the Code of Civil Procedure. If interpreted the following points will emerge:

1. Cause of action as a complete bundle of material facts for the plaintiff to institute a suit and failure to produce such facts will fail the case of the plaintiff.

2. Cause of action will constitute even the smallest fact constituting such an action and not necessarily any defined portion of the cause of action

3. Cause of action will constitute the facts and circumstances of each case.

4. Cause of action if arises partially in different places, the plaintiff is vested with the choice to initiate and claim for jurisdiction

5. Cause of action based on the principle of some part of it arising in India will lead to the jurisdiction of Indian Courts over a non-resident foreigner.

We shall discuss the application of such jurisdictions in the chapter on Contracts in detail. Further to the above provisions such executions of decrees outside India assumes importance and the following sections have to be borne in mind:

S 45. Execution of decrees outside India. - So much of the foregoing sections of this Part as empowers a court to send a decree for execution to another Court shall be construed as empowering a Court in any State to send a decree for execution to any Court established by authority of the Central Government outside India to which the State Government has by notification in the Official Gazette declared this Section to apply.

S 44A. Execution of decrees passed by Courts in reciprocating territories. -

(1) Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as it had been passed by the District Court.

(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of s 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of s 13.

Explanation 1. - ‘Reciprocating Territory’ means any country or territory outside India which the Central Government may by notification in the Official Gazette, declare to be a reciprocating territory for the purpose of this section; and ‘Superior Courts’ with reference to any such territory, means such courts as may be specified in the said notification.

Explanation 2. - ‘Decree’ with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes
or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award in enforceable as a decree or judgment.

On the criminal side of jurisdiction the following sections are pertinent to analyze the implications of cyber crimes, which will be dealt in detail in the fourth module. The important sections to be kept in mind at this stage are:

1. Section 177 of Criminal Procedure Code: Ordinary place of inquiry and trial:
   Every offence shall ordinarily be inquired into and tried by a court whose local jurisdiction it was committed.

2. Section 178 of Criminal Procedure Code: Place of Inquiry or trial:
   (a) When it is uncertain in which of several local areas an offence is committed, or
   (b) Where an offence is committed partly in one local area and partly in another, or
   (c) Where an offence is a continuing one, and continues to be committed in more local areas than one, or
   (d) Where it consists of several acts done in several different local areas, it may be inquired into or tried by a Court having jurisdiction over any of such local areas.

3. Section 179 of Criminal Procedure Code: Offence triable where act is done or consequence ensues. - When an act is done by reason of anything, which has been done, and of a consequence, which has ensured, the offence may be inquired into and tried by a court within whose local jurisdiction, such thing has been done or such consequence has ensued.

4. Section 182. - Offence committed by letters. - (1) Any offence which includes cheating may, if the deception is practiced by means of letters or telecommunication messages, be inquired into or tried by any Court within whose local jurisdiction such letters or messages were sent or were received: and any offence of cheating and dishonestly inducing delivery of property may be inquired into or tried by a Court within whose local jurisdiction the property was delivered by the person deceived or was received by the accused person.

JURISDICTION AND IT ACT 2000

On the jurisdiction of the Internet or cyberspace IT Act of 2000 section 13 is of relevance. The sub-sections (3) (4) and (5) deal with the cause of action clause, which is of significance in Internet transactions to determine the jurisdiction.

S 13 (3)- Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.

S 13 (4) -The provisions of sub-section (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under the sub-section (3)

S 13 (5)- For the purposes of this section:

   (a) If the originator or the addressee has more than one place of business, the principal place of business shall be the place of business;
(b) If the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;

(c) "Usual place of residence" in relation to a body corporate, means the place where it is registered."

JURISDICTION ISSUES IN INTERNATIONAL PERSPECTIVE:

Interpreting these clauses it is abundantly clear that it is not mere jurisdiction the issue the effect of such jurisdiction and enforcing the decrees needs reciprocal arrangements. Apart from this on the issue of arbitration in Internet, the Foreign Awards (Recognition and Enforcement) Act of 1961 based on the New York Convention of 1958, by India allows arbitration and recognition of foreign awards.

The issue of jurisdiction in international private law currently is addressed by the Hague Convention on jurisdiction.

The general framework for the convention is as follows.

1. Countries which sign the convention agree to follow a set of rules regarding jurisdiction for cross-border litigation. Nearly all civil and commercial litigation is included.

2. So long as these jurisdiction rules are followed, every country agrees to enforce nearly all of the member country judgments and injunctive orders, subject only to a narrow exception for judgments that are "manifestly incompatible with public policy", or to specific treaty exceptions, such as the one for certain antitrust claims.

3. A judgment in one country is enforced in all Hague convention member countries, even if the country has no connection to a particular dispute.

4. There are no requirements to harmonize national laws on any topic, except for jurisdiction rules, and save the narrow Article 28(f) public policy exception, there are no restriction on the types of national laws that to be enforced.

5. All “business to business” choice of forum contracts are enforced under the convention. This is true even for non-negotiated mass-market contracts. Under the most recent drafts of the convention, many consumer transactions, such as the purchase of a work related airlines ticket from a web site, the sale of software to a school or the sale of a book to a library, is defined as a business to business transaction, which means that vendors of goods or services or publishers can eliminate the right to sue or be sued in the country where a person lives, and often engage in extensive forum shopping for the rules most favorable to the seller or publisher.

6. There are currently 49 members of the Hague Conference, and it is growing. They include: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Chile, China, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, Former Yugoslav Republic of Macedonia, France, Germany, Greece, Hungary, Ireland, Israel, Italy, Japan, Republic of Korea, Latvia, Luxembourg, Malta, Mexico, Monaco,
Morocco, Netherlands, Norway, Peru, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Suriname, Sweden, Switzerland, Turkey, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Venezuela.

James Love of the CPT (Consumer Protection Technology) addresses certain issues on the efforts of the Hague Convention and the following excerpts are reproduced highlighting the salient features of the convention “negotiations for a new treaty that seeks to strengthen the global enforcement of private judgments and injunctive relief in commercial litigation. While the convention would clearly have some benefits, in terms of stricter enforcement of civil judgments, it would also greatly undermine national sovereignty and inflict far-reaching and profound harm on the public in a wide range of issues.

The treaty is called the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, and is being negotiated under the little known Hague Conference on Private International Law. The treaty is complex and far reaching, but is effectively unknown to the general public.

The Consequences of Global Enforcement of Non Harmonized Laws

The early discussions on the current convention began in 1992, largely in the context of judgments where businesses would be the defendants, for disputes involving physical goods or traditional services. Only recently has there been recognition of the far-reaching consequences of using the treaty framework for addressing disputes involving the Internet, or litigation involving intellectual property claims or information in general.

The Internet issues deserve special attention. The treaty gives nearly every member country jurisdiction over anything that is published on or distributed over the Internet. If the treaty (as written) is widely adopted, it will cripple the Internet. The reason is fairly straightforward. The Hague framework begins with the notion that there will not be harmonization of substantive law, only harmonization of rules regarding jurisdiction and enforcement of laws. So it is a fundamental part of the Hague treaty that laws that are very different from each other will be enforced, across borders.

For example, under the treaty, different national laws concerning libel or slander will give rise to judgments and injunctions, as will different national laws regarding copyright, patents, trademarks, trade secrets, unsolicited email, unfair competition, comparative advertising, parallel imports of goods, and countless other items. As a consequence, people well find that activities that are legal where they live are considered illegal in a different country and that under the treaty, the foreign country will likely have jurisdiction, and their laws will be enforceable in all Hague member countries.

To be more concrete, note that under different national copyright laws, authors can liberally use quotations from other authors in some countries, but not in others. Software engineers can decompile or use other reverse engineering techniques to find out how to make software programs work together (be interoperable) in some countries, but not in others. In some countries school teachers can distribute newspaper stories and other copyrighted materials in class rooms as a fair use, but such distribution would be illegal in other countries. Some countries allow the use of parody as an exception to copyright or trademark laws, while other countries do not. In some countries it is permissible to disparage products or publish comparative price advertisements, while in other countries it is not. In some countries it is permitted to publish leaked memorandums and documents that embarrass governments or corporations, but in other countries this would be considered a violation of copyright laws (as in the UK David Shayler case), or a wrongful disclosure of proprietary business information. Rap music that legally uses “sampling” of music under US law will violate certain European copyright regimes where this is illegal. In some countries a failure to obtain permission to hyper-ling to a web page or use a meta-
tag with the name of a business is considered an infringement of intellectual property, while in other countries it is not. This list of examples could go on and on.

There are fundamental problems with enforcing every country's national trademark laws on the Internet, because different firms sometimes claim the same mark in different countries, and what may be a generic term in one country is a proprietary mark in another country. These are important and difficult conflicts and it is useful for policy makers to seek solutions to these jurisdictional disputes, but a "solution" that simple enforces everyone's laws on everyone is really no solution at all.

In the patent area, the Hague convention would force European governments to begin enforcing judgments and injunctive relief from US software and business methods patents, even though software and business methods cannot be patented in many European countries. As the rest of the world is forced to pay for US software and business methods patents, they will enact their own anti-competitive and poorly managed software and business method patent systems, and US citizens will have to pay for those too.

The Internet related cases are the most obvious areas where the Hague Convention will cause problems, but hardly the only cases.

As noted above, under all current drafts of the convention, "business to business" choice of court clauses must be enforced, even those involving mass marketed non-negotiated contracts. In the Edinburgh drafts, business to business contracts are defined as everything that does not involve personal work related purchase, will be considered business to business transactions, and even click on or shrink wrapped licenses with choice of court clauses must be honored. This is spelled out in Article 4 of the proposed Convention.

In an earlier attempt to negotiate a treaty on jurisdiction, this choice of court provision was not mandatory in all contracts, and in particular, there was good language to exempt contracts that were abusive or unfair. The 1965 text, which has *NOT* been used in the current treaty negotiations, read: "The agreement on the choice of court shall be void or voidable if it has been obtained by an abuse of economic power or other unfair means." With the elimination of the safeguards against unfair and abusive contracts, you now have a mandatory choice of court clause in Article 4. This will have a huge effect on national sovereignty, because any publisher or seller of any product can simply shift jurisdiction, by contract, to a different country.

One effect will be in the area of books or videos, where publishers can use contracts to shift jurisdiction to countries (there are many in Europe) that do not recognize the "first sale" doctrine which permits zero royalty lending by libraries or video stories. The South Africa victory over the pharmaceutical companies for parallel imports of medicines could be undermined by choice of forum contracts that select courts that did not recognize the first sale doctrine. Airlines, banks and any number of institutions can use these choice of court agreements to change the country where disputes are heard. Any seller can use Article 4 to shop for favorable national laws, and also to deny the public the opportunity to seek redress or defend actions in the countries where they live, which is a huge burden for most people and small businesses and non-profit organizations.

The contracts can also shift jurisdiction on software to countries that do not permit reverse engineering. Web pages that have terms of service agreements on such issues as hypertext linking or use of company or brand names in meta-tags, or that require prior approval for reviews of products, or any number of other clauses, all of which exist today, would be much stronger because companies could simply point the choice of court to the jurisdiction most likely to actually enforce these provisions. The free software movement would be particularly vulnerable to these provisions, as well as the expanded reach of overly broad national laws on software patents and trade secrets.
The Significance of Mandatory Enforcement of all Sui generis Intellectual Property Laws on Markets for Data, Music, Movies, Pharmaceuticals and Biotechnology.

Sui generis systems for protecting intellectual property are those that are special systems – one of a kind – that fall outside of traditional IPR regimes like copyright, patents or trademarks. For example, the US has a sui-generis regime to protect data from clinical trials on pharmaceutical drugs. Europe is implementing national sui generis legislation on databases, and several African, Asian and Latin American countries have sui generis regimes on traditional learning and culture, and there are quite a few efforts to create sui generis regimes on genetic and biological resources, to mention only a few areas where sui generis regimes are being discussed.

There is no doubt about the status of sui-generis IPR regimes in the Hague convention – they are all enforceable, regardless of what they are. At present these laws are often controversial, because they push protections into new areas, that would otherwise be in the public domain. But under the convention, countries could get enforcement of judgments globally, even if no other country had a similar regime.

For example, if Cuba enacted a sui generis regime and declared that the Cuban “beat” was intellectual property, it could get a judgment in Cuba against US record companies that were engaged in cultural “piracy,” and demand for example, 5 percent of the revenues from global sales of music that use the Cuban beat. Other countries could do the same thing. These judgments would be enforceable globally, under the Convention. So too would bio-piracy judgments against US and European biotechnology and pharmaceutical companies, for “stealing” traditional knowledge, or exploiting without benefit sharing a variety of biological and genetic resources. The motion picture industry could be hit with new sui generis IPR liabilities by countries that give rights in history. Countries like China, which is a member of the Hague Conference, could use this to limit who could actually make films about China. The Hague convention would instantly create a legal framework to legitimatize all of these new IPR claims, and it would not even matter if the “infringing” party did business in the country at all, since the judgments would be enforceable globally, in any Hague member country, and the claims could be based upon shares to global (rather than local) revenues of products.

Some would consider this a positive feature of the Convention, because it would give the developing countries opportunities to “tax” the rich countries, under new and controversial IPR regimes. But of course, the rich countries could and will also enforce their own regimes, including, for example, the European Union sui generis regime on database protection. The US and EU would probably modify their sui generis regimes on pharmaceutical registration data to make it illegal for developing countries to rely upon those data for registration of generic products in poor countries, an approach already included in the new US-Jordan “Free Trade” agreement. And in general, would one observe is a new dynamic of everyone trying to create their own “rights” in everything, until the public domain shrinks if not disappears altogether.

The Hague negotiators have never been willing to explore and discuss the merits of including national sui-generis laws regarding intellectual property in the Convention.

The Article 28f Public Policy Exception Fails to Protect the Public, and the Convention Undermines Common Carrier protections for ISPs

In discussions regarding the treaty, we have brought to the attention of the delegates all of the issues and many others as well. We have indicated the treaty will shrink the public’s rights to only those that exist in every country, which of course is smaller than what exists in "any" country – a frightening outcome, and we have pushed to have intellectual property or e-commerce removed from the convention, and we have pushed for a variety of more minor fixes, such as to improve Article 4 or Article 7 or to exempt the first sale doctrine. In these discussions, the Hague Negotiators frequently refer sale doctrine. In these discussions, the Hague Negotiators frequently
refer to the so-called public policy exception, which provides that judgments need not be enforced if:

28(f) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.

This provision is of course quite important, but it should not be used to justify a convention that is fundamentally the wrong approach. Moreover, its usefulness is much undermined by the fact that judgments will be enforced in *any* Hague member country – the so-called “you can run but you can’t hide” provision. Moreover, for Internet related disputes, the ISP will typically be used, both because it has deep pockets and because it has assets in many countries. In those cases, the IPS will only escape the judgment if *every* country finds the judgment “manifestly incompatible public po9licy.” And the plaintiff need only find one country that is willing to enforce the judgment. Also, there are all sorts of creative ways that suits can bring in parties that are vulnerable to enforcement. In addition to suing ISPs like AT&T or Verizon that clearly have assets all over the place, one could sue an IPS that had a peering relationship with another ISP, and refused to block bits from an offending site. ICANN could be hit with cross border injunctive requests to remove IP numbers or domains. Lots of things are possible.

Moreover, it is not at all clear that it will be easy to get countries to refuse to enforce judgments under Article 28f, because they will want their own judgments enforced, particularly countries like the USA or in Europe, that are anxious to have intellectual property infringement cases enforced globally. All of this the practical effect of undermining the common carrier status of IPSs, because they will likely not be considered a common carrier in all countries where they have assets. This will lead to content regulation by IPSs, Who will fear liability in countries with restrictive laws. A Chinese lawsuit against a US citizen who criticizes a Chinese official, might be undertaken in China, but enforced against AT&T in Korea, Romania or anywhere else, creating a limitation on speech in the USA that would never involve a US judge. Indeed, this could happen even if the USA does not sign the convention, if other countries do.”