

# Determining Jurisdiction over E-Commerce disputes in India

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*In the past few years, e-commerce has seen an enormous boom. Everything from books to flats can be bought online these days. There is no standard definition for the term e-commerce as such, it is said to be used in the sense of denoting a mode of conducting business through electronic means distinct from the conventional physical means. Since, E-commerce involves more than two or more parties to a single transaction, it can be said that disputes are inevitable in the course of the life of such a business, whether online or offline. The business disputes which the enterprise may come across in e-commerce can be contractual like B2B and B2C or non-contractual like copyright dispute, defamation, etc. Henceforth, it is noteworthy that many of the issues such as jurisdictional issues, choice of law issue, high cost of cross-jurisdictional litigation issue, can arise in relation to the diverse categories of disputes. The traditional approach to jurisdiction invites a court to ask whether it has the territorial, pecuniary, or subject matter jurisdiction to entertain the case brought before it. But, with the internet, the question of 'territorial' jurisdiction gets complex mainly because it is borderless. Recognizing such a multifaceted concern, this paper throws light upon numerous theories, doctrines and principles developed by courts both in and outside India. Further, the paper also looks into the principles of Private International Laws concerning the issue. Furthermore, the paper also highlights the attempts made by The IT Act 2000 to change outdated laws and provides ways to deal with cyber crimes.*

## Introduction

India is witnessing a digital revolution with internet becoming an integral part of its population and availability of internet in the mobile phones. With the decrease in the prices for using internet, change in lifestyle in urban areas and the convenience that internet has brought has supported this revolution.<sup>1</sup>

It's an undisputed fact that E-Commerce has become a part of our daily life. E-Commerce, as the name suggests, is the practice of buying and selling goods and services through online consumer services on the internet. The 'e' used before the word 'commerce' is a shortened form of 'electronic'. The effectiveness of E-Commerce is based on electronically made contracts known as E-Contracts. Although E-Contracts are legalized by Information Technology Act, 2000 but still majority feels insecure while dealing online. The reason being lack of transparency in the terms & conditions attached to the contract and the jurisdiction in case of a dispute that may arise during the pendency of a transaction with an offshore site.<sup>2</sup>

E-contract is a contract modeled, specified, executed and deployed by a software system. E-contracts are conceptually very similar to traditional commercial contracts. Vendors present their products, prices and terms to prospective buyers. Buyers consider their options, negotiate prices and terms (where possible), place orders and make payments. Then, the vendors deliver the purchased products. Nevertheless, because of the ways in which it differs from traditional commerce, electronic commerce raises some new

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<sup>1</sup><http://www.mondaq.com/india/x/299686/IT+internet/Legal+Issues+In+ECommerce+Think+Before+You+Click>

<sup>2</sup> <http://www.legalserviceindia.com/laws/contracts.htm>

and interesting technical and legal challenges. For recognition of e-contracts following questions are needed to be considered.<sup>3</sup>

**Examples:** A person purchases a book on the Internet. An individual reserves a railway ticket over the Internet. A firm calls a toll free number and orders a computer using the seller's interactive telephone system. Trader orders merchandise using an EDI network or a supplier's extranet.

## Defining E-Commerce

The term E-Commerce stands for 'Electronic Commerce'. There is no standard definition for the term e-commerce as such, it is said to be used in the sense of denoting a mode of conducting business through electronic means unlike through conventional physical means. Such electronic means include 'click & buy' methods using computers as well as 'm-commerce' which make use of various mobile devices or smart phones.<sup>4</sup> The concept of E-commerce not only includes selling and purchasing of goods online but also its delivery, payments, supply chain and service managements.

**Example:** An individual visits retail store and purchases merchandise not currently in stock from a computer-enabled kiosk located inside the shop. An e-commerce transaction since agreement occurred over computer-mediated networks.

Electronic commerce covers all business conducted by means of computer networks. In recent years, advances in telecommunications and computer technologies have made computer networks a fundamental part of the economic infrastructure. Progressively companies are facilitating transactions over web. There has been incredible competition to target each and every computer owner, connected to the Web.

Thus, the business activity conducted through electronic means falls within e-commerce. Though there is no specific definition provided in any statute, it encompasses all business conducted by computer networks, be it B2B, B2C, C2C, C2B or B2B2C. The services that are offered does not begin or end with providing an online platform but involves efficient delivery system, proper payment facilitation and an effective supply chain and service management. So, the business is not simple as it may seem and also involves a lot of legal issues.<sup>5</sup>

## Legal validity of E-Transaction

Electronic contracts are governed by the basic principles elucidated in the Indian Contract Act, 1872, which mandates that a valid contract should have been entered with a free consent and for a lawful consideration between two adults.<sup>6</sup> It also finds recognition under section 10A of the Information Technology Act, 2000 that provides validity to e-contracts. Accordingly, both Indian Contract Act, 1872 and Information Technology Act, 2000 needs to be read in conjunction to understand and provide legal validity to e-contracts. Further, provisions of the Evidence Act, 1872 also provides that the evidence may be in electronic form.<sup>7</sup> The Supreme Court in **Trimex International FZE Ltd. Dubai v. Vedanta**

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<sup>3</sup> *Ibid*

<sup>4</sup> E-Commerce in India, Legal, Tax and Regulatory Analysis, August 2013, Nishith Desai Associates

<sup>5</sup> *Supra* at 1

<sup>6</sup> The Indian Contract Act 1872, Section 10

<sup>7</sup> The Evidence Act 1872, Section 3

**Aluminum Ltd.**<sup>8</sup> recognizing the validity of e-transaction has held that e-mails exchanges between parties regarding mutual obligations constitute a contract.

The Indian Contract Act, 2000 vis-à-vis E-transactions

The ICA, 1872 provides that where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.<sup>9</sup> Consequently, in cases of dispute over e-contracts the entity carrying out the e-commerce will have the onus to establish that there was no undue influence.

Further, the Act also provides that the consideration or object of any agreement is unlawful when it is forbidden by law, or is of such a nature that if permitted, it would defeat the provisions of any law; or is fraudulent, or involves or implies injury to the person or property of another, or the Court regards it as immoral or opposed to public policy.<sup>10</sup> Thus, the entity is also required to keep these prerequisites in mind while entering into an E-transaction.

**Example:** A consumer visits a bookstore and inquires about the availability of an out-of-stock book. A bookstore employee downloads a digital copy of the book and prints it along with cover. It is not an e-commerce retail transaction since agreement to purchase did not occur over an electronic network. However, the right to access the digital archived copy is an e-commerce service transaction.

Section 13 of IT Act, 2000 vis-à-vis Section 4 of ICA, 1872

Section 13 of IT Act only explains and clarifies, inter alia, when the dispatch and receipt of electronic records<sup>11</sup> take place and is meant purely for ascertaining the time of dispatch and receipt of information, which is a relevant factor in many contracts. This Section, in fact, reflects the 'functional equivalent' approach adopted by the Model law, which does not seek to alter national law applicable to contract formation, but only aims to provide electronic communications with the same degree of legal certainty as paper-based communications.<sup>12</sup> Section 13 of the Information Technology Act, therefore, only offers a framework for understanding the formation of E-contracts in India. It does not, in any way, alter or modify the existing substantive law of contract. In order to ascertain the formation of electronic contracts, one has to read Section 13 together with Section 4 of the Contract Act which enunciates certain rules regarding the communication of proposals, acceptance and revocation.

Section 13 of the Information Technology Act comes in handy when applying these rules to E-contracts. For example, in the case of an acceptance made by an electronic record, a combined reading of the two sections will evolve the following rules. The communication of an acceptance is complete as against the offeror, when *the electronic record is dispatched such that it enters a computer resource outside the control of the originator (acceptor) and as against the acceptor, when the electronic record enters any information system designated by the offeror for the purpose, or, if no system is designated for the*

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<sup>8</sup> 2010 (1) SCALE 574

<sup>9</sup> The ICA 1872, Section 16(3)

<sup>10</sup> *Ibid*, section 23

<sup>11</sup> Section 2(1) of the Act defines an 'electronic record' as: 'data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

<sup>12</sup> Paragraph 78 of the Guide to Enactment of the Model Law on Electronic Commerce, available at <http://www.uncitral.org/english/texts/electcom/ml-ec.htm>

*purpose, when the electronic record enters the information system of the offeror, or, if any information system has been designated, but the electronic record is sent to some other information system, when the offeror retrieves such electronic record.*<sup>13</sup>

### **Example:**

- (a) A proposes, by e-mail, to sell a house to B at a certain price. The communication of the proposal is complete when B receives the mail.
- (b) B accepts A's proposal by an e-mail. The communication of the acceptance is complete, as against A when the e-mail is sent; as against B, when the mail is received by A.
- (c) A revokes his proposal by an e-mail. The revocation is complete as against A when the e-mail is sent. It is complete as against B when B receives it.  
B revokes his acceptance by an e-mail. B's revocation is complete as against B when the e-mail is sent, and as against A when it reaches him.

The Supreme Court of India, recognizing the distinction between 'postal rules' and 'receipt rules' as elaborated in **Bhagwandas v. Girdharilal**,<sup>14</sup> following the English decision in **Entores Ltd v. Miles Far East Corporation**<sup>15</sup>, had held that Section 4 is applicable only in non-instantaneous forms of communication and does not apply to instantaneous forms of communication.<sup>16</sup> Therefore, it may be noted that this method is useful only for non-instantaneous forms of communication like contracts concluded by E-mail and may be inapplicable in instantaneous forms like 'web click' contracts. In the case of instantaneous forms of communication, it has been held that a contract is formed when the offeror receives the acceptance. Therefore, in the virtual world, an offer or acceptance is complete when the addressee is in receipt of the electronic record as defined in Section 13(2) of the Information Technology Act, 2000.

### **E-Commerce Dispute**

Disputes are usually settled within the physical territory where one or both of the parties are located. However, with an online enterprise, customers could be located anywhere in the World. Now the biggest question that comes to one's mind is that how does an enterprise cope up with such broad exposure. To verify the consumer's location is virtually impossible. A consumer may even be able to pay for services anonymously using the digital equivalent of cash e.g. e-Cash. It is pertinent to note that where goods require a physical delivery, an online enterprise can restrict its customer base to those jurisdictions where it is delivered but with digital goods and services that are delivered online, this is almost impossible, and the enterprise may have to rely on the truthfulness of the customer's information regarding their location.<sup>17</sup>

**Example:** A motor vehicle manufacturer makes several online transactions such as buying tires, glass for windscreens, and rubber hoses for its vehicles. If the supplier fails to perform its obligation within the stipulated time limit this may lead to an e-commerce dispute.

### **Types of E-commerce Dispute**

<sup>13</sup> C. M. ABHILASH, E-Commerce Law in Developing Countries: An Indian Perspective, Information & Communication Technology Law, Vol. 11, No. 3, 2002, Carfax Publishing

<sup>14</sup> Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas and Co., AIR 1966 SC 543

<sup>15</sup> [1955] 2 QB 327

<sup>16</sup> Murray, Andrew (2000) Entering into Contracts Electronically: The Real W.W.W., in Lillian Edwards & Charlotte Waelde (Eds), Law and the Internet—A Framework for Electronic Commerce (Oxford, Hart).

<sup>17</sup> <http://cyber.law.harvard.edu/ecommerce/disputes.html>

Electronic commerce brings both comforts and discomforts to its users. The comforts include on the spot sales and purchase, competitive costs, convenience, saving of time, etc. The discomforts include frauds and cyber crimes committed against e-commerce users. At times there are disagreements and dissatisfactions as well among buyers and purchasers that cannot be resolved using traditional litigation methods.<sup>18</sup> Thus, it can be said that disputes are inevitable in the course of the life of a business, whether online or offline. The business disputes which the enterprise may encounter in e-commerce are:

#### A. **Contractual disputes**<sup>19</sup>

Disputes that arise out of some non-fulfillment of any contractual obligation are said to be known as *Contractual Disputes*. There are numerous kinds of contractual disputes existing in the corporate arena, some of which are:

- *Disputes between the enterprise and the Internet Service Provider (ISP)*  
These are the dispute that arises between the enterprise and the Internet Service Provider (ISP) or web-hosting services provider, including disagreements over interruptions in service, breach in data security etc. **Example:** if A, an ISP, contracts with an enterprise, B, to provide an uninterrupted web hosting service to B. But A fails to provide the same. This may lead to a dispute between A and B.
- *Business-to-business (B2B) disputes*  
These kinds of disputes usually take place between the enterprise and its suppliers such as non-performance of contractual obligations, misrepresentations, and complaints from customers regarding services provided by suppliers. **Example:** an automobile manufacturer makes several B2B transactions such as buying tires, glass for windshields, and rubber hoses for its vehicles. If the supplier fails to perform its obligation within the stipulated time limit this may lead to a B2B dispute.
- *Business-to-consumer (B2C) disputes*  
These disputes are common between the enterprise and its customers such as non-payment for goods or services, non-performance of contractual obligations, poor performance of contract, misrepresentations, breach of the privacy policy, and breach of security of confidential information. It is between the enterprise and its customers that lies the greatest possible scope for disputes. **Example:** The final transaction (in the previous example), a finished vehicle sold to the consumer, is a single (B2C) transaction. If the consumer finds any defect in the vehicle then this may lead to a B2C dispute.

#### B. **Non-contractual disputes**<sup>20</sup>

Non-contractual disputes are basically those disputes that arise due to non-observance of any statutory obligation on part of the parties to the transaction. These are the common kinds of non-contractual disputes that may arise in an online enterprise.

- *Dispute over Copyright*  
The enterprise might be liable for copyright infringement if it uses copyrighted material in excess of fair use, and without permission.<sup>21</sup> **Example:** An enterprise provides an online English- Hindi dictionary Facility to the users. Another enterprise subsequently published another online English-Hindi dictionary Facility. The former enterprise can sue the latter for infringement of copyright under section 51 of the Copyright Act, 1957.
- *Failure in Data protection*

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<sup>18</sup> <http://odrindia.in/tlceodri?p=21>

<sup>19</sup> *Supra* 17

<sup>20</sup> *Ibid*

<sup>21</sup> Under the provisions of Copyright Act, 1957

The enterprise may be liable for sharing or revealing confidential data on customers, as discussed in the segment on Privacy.<sup>22</sup> **Example:** if the services provided by an enterprise are of such a nature that the law mandates that it is the duty of the enterprise to provide data protection to the customers. Failure in observing such a mandate may give rise to a liability under the IT Act, 2000.

- Right of free expression

The enterprise may be subject to defamation suits for defamatory material posted online. **Example:** if an enterprise publishes any defamatory statement on its website concerning a person of repute, Mr. X. Mr. X has all the right to sue the enterprise for defamation under the provisions of IPC, 1908.

- Competition law, Domain name disputes

The enterprise may be subject to trademark infringement suits if it infringes a registered or otherwise legally recognized trademark.<sup>23</sup> **Example:** In US, if the enterprise has registered a domain name which corresponds to a registered or common law trademark, it may be subject to a complaint under ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP), or the U.S. federal Anti cyber squatting Consumer Protection Act.<sup>24</sup>

Henceforth, it is significant to note that although many of the issues such as jurisdictional issues, choice of law issue, high cost of cross-jurisdictional litigation issue, which arise in relation to the different categories of disputes, are similar, the difficulties are perhaps more pronounced in respect of B2C transactional disputes which are often of small monetary value. Traditional methods of resolving cross-jurisdictional commercial disputes, such as international commercial arbitration, are often too costly, inconvenient and burdensome in the context of consumer disputes.

### **Jurisdiction over E-Commerce Disputes**

The traditional approach to jurisdiction invites a court to ask whether it has the territorial, pecuniary, or subject matter jurisdiction to entertain the case brought before it. With the internet, the question of 'territorial' jurisdiction gets complicated largely on account of the fact that the internet is borderless. Therefore, while there are no borders between one region and the other within a country there are no borders even between countries.<sup>25</sup>

#### Basis of Jurisdiction under Indian Law

E-commerce websites operating in India are required to follow many laws of India including the Information Technology Act, 2000. As per the IT Act, 2000 these e-commerce websites operating in India are Internet intermediaries and they are required to comply with cyber law due diligence requirements as well.<sup>26</sup>

Further, the legal requirements for undertaking e-commerce in India also involve compliance with other laws like contract law, Indian penal code, etc. Further, online shopping in India also involves compliance with the banking and financial norms applicable in India.

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<sup>22</sup> Under the provisions of IT Act, 2000

<sup>23</sup> Under the provisions of the Trademarks Act, 1999

<sup>24</sup> Berkman Center Online Lecture & Discussion Series by Diane Cabell, "Using ICANN's UDRP"(Website)

<sup>25</sup> Justice S. Muralidhar , Jurisdictional Issues in Cyberspace, VOLUME 6, The Indian Journal of Law and Technology, 2010

<sup>26</sup> The Information Technology (Intermediaries guidelines) Rules 2011, Rule 3

## Indian Statutes and E-commerce Jurisdiction

In short, the highly profitable e-commerce segment of India must be explored only after complying with the laws governing the respective e-commerce segment. There is no single set of laws and regulations that govern all e-commerce segments and every e-commerce segment is governed by different laws.

### Information Technology Act, 2000 vis-à-vis E-Commerce

The objectives of the Information Technology Act, as outlined in the preamble, are to provide legal recognition for E-commerce transactions, facilitate Electronic Governance and to amend the Indian Penal Code, 1860; Indian Evidence Act, 1872; the Bankers' Book Evidence Act 1891 and the Reserve Bank of India Act, 1934. The Act also establishes a regulatory framework for cyber laws and lays down punishment regimes for different cyber crimes and offences.

The provisions of this Act enables the act applicable also to those offences or contraventions committed outside India by any person irrespective of his nationality if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.<sup>27</sup>

**Example:** Mr. A, a person residing in America, provides an online service to the consumers all over the world. If Mr. A commits an offence under the IT Act, 2000, then also he can be sued in Indian Courts.

The IT Act 2000 attempts to change outdated laws and provides ways to deal with cyber crimes. Let's have an overview of the law where it takes a firm stand and has got successful in the reason for which it was framed<sup>28</sup>.

1. The E-commerce industry carries out its business via transactions and communications done through electronic records. It thus becomes essential that such transactions be made legal. Keeping this point in the consideration, the IT Act 2000 empowers the government departments to accept filing, creating and retention of official documents in the digital format. The Act also puts forward the proposal for setting up the legal framework essential for the authentication and origin of electronic records / communications through digital signature.<sup>29</sup>
2. The Act legalizes the e-mail and gives it the status of being valid form of carrying out communication in India. This implies that e-mails can be duly produced and approved in a court of law, thus can be regarded as substantial document to carry out legal proceedings.<sup>30</sup>  
**Example:** If, Mr. A offers Mr. B to provide transport services via e-mail and Mr. B subsequently in his reply affirms the same via e-mail itself, then this can be considered as valid means of carrying out communication.
3. The act also talks about digital signatures and digital records. These have been also awarded the status of being legal and valid means that can form strong basis for launching litigation in a court of law. It invites the corporate companies in the business of being Certifying Authorities for issuing secure Digital Signatures Certificates.<sup>31</sup> **Example:** Mr. A, enters into an online contract (along with a attached Digital Signatures Certificate) with Mr. B to provide transport services to Mr. B. if Mr. A makes a default in providing such facility to Mr. B, then in such a case Mr. B can produce such document in court of law.

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<sup>27</sup> The IT Act, 2000, Section 75

<sup>28</sup> <http://www.cyberlawsindia.net/2sides.html>

<sup>29</sup> The IT Act, 2000, Section 6

<sup>30</sup> *Idbi*, Section 10A

<sup>31</sup> *Idbi*, Section 3A, section 5 & section 10

### The Indian Penal Code, 1908

The Act provides for punishment of offences committed beyond the four walls of India, but which by law may be tried within, India. It states that any person liable, by any Indian law to be tried for an offence committed beyond India shall be dealt with according to the provisions of this Code for any act committed beyond India in the same manner as if such act had been committed within India.<sup>32</sup>

There does not seem too much jurisprudence in India on the issue of jurisdiction in cases of e-commerce. However there are some instances where in the courts had in the preliminary stages assumed jurisdiction over a matter.

**Example:** In the case of **SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra**<sup>33</sup>, the Delhi High Court assumed jurisdiction where a corporate reputation was being defamed through e-mails.

Further, the Act also provides for extension of the Code to extra-territorial offences. The provisions of this Code apply also to any offence committed by any person in any place without and beyond India committing offence targeting a computer resource located in India. It further defines the word “offence” includes every act committed outside India which, if committed in India, would be punishable under this Code.<sup>34</sup>

**Example:** Mr. X, a person residing in America, provides an online service to the consumers all over the world. If Mr. X commits an offence targeting a computer resource located in India under the IPC, 1860, then he can be held liable under the Act.

### The Civil Procedure Code, 1908

The Act gives the discretion to the plaintiff to file a suit for compensation for wrongs to person or movables, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of the said Courts.<sup>35</sup>

**Examples:** Mr. A, residing in Delhi, publishes on his website in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Delhi.

The Act further provides that every suit shall be instituted in Court within the local limits of whose jurisdiction the any of the defendant resides or the cause of action arises.<sup>36</sup> It further explains that a

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<sup>32</sup> The IPC, 1860, Section 3

<sup>33</sup> Suit No. 1279/2001. This case is still pending. Sited from “Ascertaining Cyber Jurisdiction in Cyber Space: Jurisprudential Understanding and A Comparative Analysis” published by AIR Journal and available at <http://www.allindiareporter.in/articles/index.php?article=1022> and orders available on Delhi High Court website [http://www.delhihighcourt.nic.in/dhc\\_case\\_status\\_list\\_new.asp](http://www.delhihighcourt.nic.in/dhc_case_status_list_new.asp)

<sup>34</sup> The IPC, 1860, section 4

<sup>35</sup> The CPC,1908, Section 19

<sup>36</sup> *Ibid*, Section 20



corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.<sup>37</sup>

**Example:** A is a tradesman who updates his website in Calcutta; B carries on business in Delhi. B buys goods of A, online and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen or in Delhi, where B carries on business.

Furthermore, it also makes a foreign judgment to 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 under certain specified conditions.<sup>38</sup> Talking about the presumption as to foreign judgments the provisions of the Act states that the Court shall presume upon the production of any document purporting to be a certified copy of a foreign judgment that such judgment was pronounced by a Court of competent jurisdiction, unless the contrary appears on the record; but such presumption may be displaced by proving want of jurisdiction.<sup>39</sup>

**Example:** A is a tradesman who maintains his website from USA; B is a resident of India. B buys goods of A, online and requests A to deliver them to his address in India. A, fails to deliver the goods on time, B suffers a heavy loss. B sued A in an American Court, court decided in favor of B orders A to compensate B for the same. B filed a petition in Delhi HC for the enforcement of the same. The Delhi HC will consider the American Judgment as a conclusive as to any matter thereby.

### Rem vis-à-vis Personam Jurisdiction

Jurisdiction as Oliver Wendall Holmes said whatever else or more it may mean, is *jurisdictio*, in its popular sense of authority to apply the law to the acts of men. Ordinarily jurisdiction is exercised over defendants residing or carrying on business or personally working for gain within the territorial jurisdiction of the court. With the growth of e-commerce and commercial activity over the World Wide Web, it has become possible for business to be conducted across the globe without actual presence in every place. The present case, inter alia, involves the question of jurisdiction in such a situation.<sup>40</sup>

In **Nehring v. S.S. M/V Point Vail**,<sup>41</sup> the court held that a valid *in rem* maritime claim carries the right to satisfaction from the vessel, since the claim constitutes a lien. By contrast, an *in personam* maritime claim carries no such right. Process in *rem* is founded on a right in the thing, and the object of the process is to obtain the thing itself, or a satisfaction out of it, for some claim resting on a real or quasi proprietary right in it.

The phrase in *rem* denotes the compass, and not the subject of the right. It denotes that the right in question avails against persons generally; and not that the right in question is a right over a thing... The phrase in *personam* is an elliptical or abridged expression for "*in personam certam sive determination*". Like the phrase in *rem*, it denotes the compass of the right. It denotes that the right avails exclusively against a determinate person or against determinate persons.<sup>42</sup>

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<sup>37</sup> *ibid*

<sup>38</sup> The CPC, 1908, section 13

<sup>39</sup> *Ibid*, section 14

<sup>40</sup> (India TV) Independent News vs. India Broadcast Live and Ors , MIPR 2007 (2) 396, 2007 (35) PTC 177 Del. *Para* 1

<sup>41</sup> 901 F.2d 1044 (11th Cir. Fla. 1990)

<sup>42</sup> Austin, cited in Stone, 1968 p151

## Personam Jurisdiction

It has been observed therein that personal jurisdiction as distinguished from subject matter jurisdiction is the power of the court to require a party (usually the defendant) or a witness to come before the court. States have enacted long arm statutes by which courts can exercise jurisdiction over a business entity or individual located outside the state if for example such entity or individual regularly does business in the state or transacted business with the plaintiff in the state. Personal jurisdiction over non-residents is however limited by the constitutional requirements of due process. A defendant not served with process within the state in which the court sits must have sufficient level of business or personal contacts within the state so that the defendant can reasonably be expected to be sued there.<sup>43</sup>

**Example:** A, a non-resident, is a tradesman offers numerous goods via a website, server located in USA; B is a resident of India. B buys goods of A, online and requests A to deliver them to his address in India. A, fails to deliver the goods on time, B suffers a heavy loss. B has all right to sue A in Indian Courts.

The expressions personal jurisdiction, in personam and in personam jurisdiction are defined as under:

- a. *In personam against the person* means an action seeking judgment against a person involving his personal rights and based on jurisdiction of his person, as distinguished from a judgment against property (i.e. in *rem*). It is a type of jurisdiction or power which a court may acquire over the defendant himself in contrast to jurisdiction over his property.<sup>44</sup>
- b. In *personam* jurisdiction the power which a court has over the defendant himself in contrast to the courts power over the defendants interest in property (quasi in *rem*) or power over the property itself (in *rem*). A court which lacks personal jurisdiction is without power to issue an in personam judgment.<sup>45</sup>

The Apex Court in **Modi Entertainment Network and anr v. W.S.G. Cricket Pvt. Ltd.**<sup>46</sup> held that It is a common ground that the courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. This is because courts of equity exercise jurisdiction in *personam*. However, having regard to the rule of comity, this power will be exercised sparingly because such an injunction though directed against a person, in effect causes interference in the exercise of jurisdiction by another court.

From the above discussion the following principles emerge:-

1. In exercising discretion to grant an anti-suit injunction the court must be satisfied of the following aspects:
  - (a) the defendant, against whom injunction is sought, is amenable to the personal jurisdiction of the court;
  - (b) if the injunction is declined, the ends of justice will be defeated and injustice will be perpetuated; and
  - (c) the principle of comity respect for the court in which the commencement or continuance of action/proceeding is sought to be restrained must be borne in mind.
2. In a case where more forums than one are available, the court in exercise of its discretion to grant anti-suit injunction will examine as to which is the appropriate forum (forum *conveniens*) having

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<sup>43</sup> *Ibid*, Para 29

<sup>44</sup> *Ibid*, Para 28

<sup>45</sup> *Pennoyer v. Neff*, 95 U.S. 714 : 24 L. Ed. 565

<sup>46</sup> AIR 2003 SC 1177

regard to the convenience of the parties and may grant anti-suit injunction in regard to proceedings which are oppressive or vexatious or in a forum non-conveniens.

### Purposeful Availment Test

The 'purposeful availment test' has been used whether a company can be sued in a specific jurisdiction in the case of Internet companies.<sup>47</sup> Courts specifically look at three factors-

- (1) availment of a company to another jurisdiction
- (2) whether the act was done in another jurisdiction and
- (3) whether the jurisdiction is reasonable for the defendant to be expected to defend himself there.

**Example:** The B.C. Court of Appeal decision in **Braintech v. Kostiuk**<sup>48</sup> gives us some idea of when a court will enforce the judgment of another jurisdiction. Kostiuk was alleged to have used the Internet to transmit and publish defamatory information about BrainTech. Braintech obtained a default judgment in a District Court in Texas against Kostiuk and then commenced an action on this judgment in the Supreme Court of British Columbia. After a summary trial Braintech obtained a favourable judgment which was appealed. It is interesting to note that the Texas Court took jurisdiction despite the tenuous link to that State, it is also worth noting that had there been a real and substantial connection with Texas, under Canada's Morguard rule that provides for deference for foreign judgments, and the B.C. court would have enforced the judgment of the Texas Court.

### Forum Convenience Test

The basic principle is that a stay will be granted on the ground of forum non convenience where the court is satisfied that there is some other available forum having competent jurisdiction where the case may be tried more suitably for the interest of all the parties and the ends of justice.<sup>49</sup>

The Supreme Court in **Kusum Ingots & Alloys Limited v. Union of India and Anr**<sup>50</sup> to advance the proposition that even if a small part of the cause of action arises within the territorial jurisdiction of the High Court, the same by itself may not be considered to be a determinative factor compelling the High Court to decide the matter on merits. In appropriate cases, the Court may refuse to exercise its discretionary jurisdiction by invoking the doctrine of forum convenience.

### "Minimum Contacts" Theory in USA

The US courts have developed the "minimum contacts" theory whereby the courts may exercise personal jurisdiction over persons who have sufficient minimum contacts with the forum state. These "minimum contacts" may consist of physical presence, financial gain, stream of commerce, and election of the appropriate court via contract.<sup>51</sup>

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<sup>47</sup> (India TV) Independent News ... vs. India Broadcast Live And Ors. , MIPR 2007 (2) 396, 2007 (35) PTC 177 Del.

<sup>48</sup> <http://www.courts.gov.B.C..ca/jdb-txt/ca/99/01/c99-0169.txt>

<sup>49</sup> Spiliada Maritime Corporation v. Cansulex Ltd. [1986] 3 All E.R. 84

<sup>50</sup> (2004) 6 SCC 254

<sup>51</sup> International Shoe Co v Washington (1945) cited from "A Separate Jurisdiction for Cyberspace?" by Juliet M. Oberding and Terje Norderhaug available at <http://jcmc.indiana.edu/vol2/issue1/juris.html>

The tests usually applied by American Courts for the exercise of personal jurisdiction over non-resident defendants are (a) existence of sufficient minimum contacts with the forum state (b) claim asserted must arise out of the contact (c) exercise of jurisdiction must be reasonable and (d) effect test.

### **Indian Case Laws vis-à-vis E-commerce**

Unlike US Courts, courts in India are not frequently confronted with the issue of jurisdiction in matter relating to cyber space. In **Casio India Co. Ltd V. Ashita Tele Systems Pvt Ltd**<sup>52</sup>, Delhi High Court held that once a web site can be accessed from Delhi, it is enough to invoke the territorial jurisdiction of the Court. It is further held in **India TV Independent News Service Pvt Ltd V. India Broadcast Live LLC**<sup>53</sup>, that the mere fact that a website is accessible in a particular place may not itself be sufficient for the courts of that place to exercise personal jurisdiction over the owners of the website. However, where the website is not merely passive but it is interactive permitting the browsers to not only access the contents thereof but also to subscribe to the services provided by the owners, then the position would be different.

In **National Association of Software and Service Companies vs. Ajay Sood & Others**<sup>54</sup>, decided by Delhi High Court in 2005, the defendants were operating a placement agency involved in 'head-hunting' and recruitment. In order to obtain personal data which they could use for head-hunting, the defendants composed and sent emails to third parties in NASSCOM's name. Court granted Injunction and Rs. 16 lakhs as damages.

Delhi High Court in **SMC Pneumatics (India) Private Limited v. Jogesh Kwatra**<sup>55</sup> granted an injunction and restrained the employee from sending, publishing and transmitting emails which are defamatory or derogatory to the plaintiffs.

In **Syed Asifuddin & Ors V State of Andhra Pradesh & another**<sup>56</sup> -Employees of a competing mobile services company lured the customers of the above company to alter / tamper with the special (locking) computer program / technology so that the hand-set can be used with the competing mobile services. Held: such tampering is an offence u/s 65 of IT Act as well as Copyright infringement u/s 63 of Copyrights Act.

In **Casio India Co. Limited v. Ashita Tele Systems Pvt. Limited**<sup>57</sup> was a passing off action where the defendant was carrying on business from Bombay. The defendant had managed to get a registration of domain name www.casiointia.com and defendant no. 2 was the Registrar with whom the domain name had been registered. The plaintiff, on the other hand, claimed to be a 100% subsidiary of Casio Computer Ltd., Japan (Casio Japan), which was the registered owner of the trade mark 'Casio' in India used for a large number of electronic and other products. He had registered a large number of domain names in India like 'CasiolndiaCompany.com', 'Casiolndia.org', 'Casiolndia.net', etc. Defendant No. 1 had obtained the above domain names during the time when it held a distributorship agreement with the plaintiff. It was held by the learned single Judge after referring to the decisions in **Rediff Communication Ltd. v. Cyber**

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<sup>52</sup> 2003 27 PTC 265 Delhi

<sup>53</sup> 2007 35 PTC 177 Delhi

<sup>54</sup> 119 (2005) DLT 596, 2005 (30) PTC 437 Del

<sup>55</sup> Being Suit No. 1279/2001 available at <http://cyberlaws.net/cyberindia/defamation.htm>

<sup>56</sup> 2005 CrLJ4314 (AP)

<sup>57</sup> 2003 (27) P.T.C. 265 (Del.) (India), overruled by Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy, CS(OS) 894/2008 (High Court of Delhi, 23rd November 2009) (India).

**Booth**<sup>58</sup> and **Dow Jones & Co. Inc. v. Gutnick**<sup>59</sup> that “once access to the impugned domain name website could be had from anywhere else, the jurisdiction in such matters cannot be confined to the territorial limits of the residence of the defendant.”<sup>60</sup> According to the learned single Judge, since a mere likelihood of deception, whereby an average person is likely to be deceived or confused was sufficient to entertain an action for passing off, it was not at all required to be proved that “any actual deception took place at Delhi. Accordingly, the fact that the website of Defendant No. 1 can be accessed from Delhi is sufficient to invoke the territorial jurisdiction of this Court.”<sup>61</sup>

In **Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy**<sup>62</sup> Delhi HC overruling its prior *Caiso judgment* held that for the purposes of a passing off action, or an infringement action where the plaintiff is not carrying on business within the jurisdiction of a court, and in the absence of a long-arm statute, in order to satisfy the forum court that it has jurisdiction to entertain the suit, the plaintiff would have to show that the defendant ‘purposefully availed’ itself of the jurisdiction of the forum court. For this it would have to be prima facie shown that the nature of the activity indulged in by the defendant by the use of the website was with an intention to conclude a commercial transaction with the website user and that the specific targeting of the forum state by the defendant resulted in an injury or harm to the plaintiff within the forum state.

### **The Role of Private International Law and Alternative Dispute Resolution**

Private international law, also known as conflict of laws in more common law-oriented jurisdictions, is a body of law that seeks to resolve certain questions that result from the presence of a foreign element in legal relationships.<sup>63</sup>

**Examples:** Instances of such relationships include contractual disputes between parties located in different jurisdictions, the marital status of partners of different nationalities, the legal status of real estate located in a foreign jurisdiction, and, in the intellectual property context, disputes between a copyright owner residing in one country and Internet users residing in other countries who are accused of making available, on servers located in multiple jurisdictions, copyrighted material for download by any person anywhere in the world, without the necessary permissions.<sup>64</sup>

With the advent of the Internet, cross-border relationships have intensified, raising more complex questions of jurisdiction and applicable law. A number of special characteristics of Internet-based transactions have added novel dimensions to the debate. Among the most noteworthy of such characteristics the following can be mentioned.<sup>65</sup>

- (i) Instantaneous Global Presence
- (ii) Consumer Protection Issues

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<sup>58</sup> A.I.R. 2000 Bom 27 (India)

<sup>59</sup> (2002) H.C.A. 56 (Austl.)

<sup>60</sup> Supra note 67, at ¶ 6.

<sup>61</sup> *ibid*

<sup>62</sup> CS (OS) 894/2008 (High Court of Delhi, 23rd November 2009) (India)

<sup>63</sup> [http://www.wipo.int/copyright/en/ecommerce/ip\\_survey/chap4.html](http://www.wipo.int/copyright/en/ecommerce/ip_survey/chap4.html)

<sup>64</sup> *ibid*

<sup>65</sup> *ibid*

(iii) Relevance of Intellectual Property

PIL, Harmonization and Intellectual Property

The fundamental difficulty in coping with legal relationships involving foreign elements flows from the fact that the legal systems of more than one country may reasonably be found to have a connection with them. The application of the laws of one system, rather than the other, in most cases will lead to different results. One solution to this problem consists of selecting, based on certain criteria, from among the various potentially applicable legal systems, the laws of one particular legal system, to govern the legal relationship. This, in essence, is the exercise of determining the applicable law under a private international law approach. It is also the solution which encroaches the least on existing national law, because it requires no changes to such law in order to resolve the problem posed by the presence of the foreign element.<sup>66</sup>

A radically different solution, which is much more intrusive on existing national law, consists of trying to remove, through a process of harmonization, the source of the problem by eliminating the differences that exist between the laws of countries on a given issue. Harmonization is achieved through the negotiation between States of treaties establishing uniform rules and, after the international instruments in question have been ratified or acceded to by the States concerned, the subsequent modification of municipal laws in order to bring them in line with the treaty provisions.<sup>67</sup>

The principles of Private International Laws are accepted in India. It is open to the parties to agree to choose one or more competent courts to decide their disputes if more than one court has jurisdiction to try their case. In case parties under their own agreement expressly agree that their dispute shall be tried by a particular court, then the parties are bound by the forum selection clause.<sup>68</sup>

It was held in **Ramanathan Chettiar v Soma Sunderam Chettiar**<sup>69</sup> that India accepts the well-established principle of private international law that the law of the forum in which the legal proceedings are instituted governs all matters of procedure.

The Principle of National Treatment

Apart from private international law and substantive harmonization of national laws, there exist also other means of dealing with problems resulting from cross-border legal relationships which may be considered to fall in between those categories in terms of their effect on existing national laws. Examples of the latter category in the intellectual property field include, for instance, the principle of national treatment. In the industrial property area, this principle is enshrined in the Paris Convention, which states as follows:

*"Nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention. Consequently, they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided that the conditions and formalities imposed upon nationals are complied with."*<sup>70</sup>

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<sup>66</sup> *Ibid*

<sup>67</sup> *ibid*

<sup>68</sup> Shriram City Finance Corp Ltd V. Rama Mishra (2002 9 SCC 613)

<sup>69</sup> AIR 1964 Madras 527

<sup>70</sup> The Paris Convention, 1883, article 2

A similar requirement of national treatment exists in copyright and is contained in the Berne Convention providing that "*authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.*"<sup>71</sup>

The three great international intellectual property treaties, the Paris Convention, the Berne Convention and the TRIPS Agreement, all place the emphasis on harmonization, both in terms of substance and procedure, and contain few provisions that could be characterized as rules of private international law. Nonetheless, they do not exclude a private international law approach altogether. A classic example in the latter regard is Article 5(2) of the Berne Convention, which states that "the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed."<sup>72</sup> More recently, negotiations during the WIPO Diplomatic Conference on the Protection of Audiovisual Performances (December 7 to 20, 2002) on the question of the international recognition of the transfer of rights of audiovisual performers centered at least in part on a possible private international law approach in order to bridge differing positions among delegations.<sup>73</sup>

The relatively modest attention which has been brought to private international law as a means of resolving problems arising from the presence of foreign elements by the intellectual property system results from three essential features:

- a. The territorial nature of the intellectual property system, "It is conceivable that nations would agree to treat inventors and authors as having personal rights to patents or copyright which are determined by their country of origin. In principle, then, they would be able to carry their rights thus defined to other countries and demand recognition and enforcement there. In the early period of industrialization, the political unacceptability of this approach was soon enough appreciated and instead the territorial character of intellectual property became widely accepted during the nineteenth century."<sup>74</sup> **Example:** An author from country, A which gives copyright for the author's life and 50 years would be able to demand that period of protection in country B, even though its local law is limited to a copyright of (say) 56 years. The same would be true of the range of material protected and the scope of the rights granted.
- b. The need for introducing minimum intellectual property standards across jurisdictions<sup>75</sup> and
- c. The reliance of the intellectual property system, notably in industrial property, on registration as a means of enabling, or at least, facilitating the protection of the rights concerned.

### ***International Instrumentalities governing E-commerce***

- *United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)*

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<sup>71</sup> The Berne Convention, 1896, article 5

<sup>72</sup> A. Lucas, Private International Law Aspects of the Protection of Works and of the Subject Matter of Related Rights Transmitted over Digital Networks, WIPO Forum on Private International Law and Intellectual Property, Geneva, (January 30 and 31, 2001) (document WIPO/PIL/01/1 Prov.). See also paras.298-299.

<sup>73</sup> "Understanding of Provisions of the Instrument, Diplomatic Conference on the Protection of Audiovisual Performances," Geneva, (December 7 to 20, 2000) (document IAVP/DC/33).

<sup>74</sup> W.R. Cornish, "Intellectual Property" (4th edition) (Sweet & Maxwell, 1999), at pp.26-27

<sup>75</sup> The Paris and Berne Unions, from the date of their constitution in 1883 and 1886 until 1960, included less than 50 members each. Presently, however, 164 States are party to the Paris Convention, 149 to the Berne Convention and 144 to the TRIPS Agreement.

The Electronic Communications Convention aims at facilitating the use of electronic communications in international trade by assuring that contracts concluded and other communications exchanged electronically are as valid and enforceable as their traditional paper-based equivalents.<sup>76</sup> Whether the Convention applies to a given international commercial transaction is a matter to be determined by the choice of law rules of the State whose court is asked to decide a dispute (*lex fori*). The Convention is also applicable if the parties to the contract have validly chosen its provisions as the law applicable to the contract.<sup>77</sup> **Example:** If the rules of private international law of that State require application of the substantive law of a Contracting State to the resolution of the dispute, the Convention will apply as law of that Contracting State, irrespective of the court's location

- Europe has specific rules relating to jurisdictional issues arising of e-commerce activity.
- *The Brussels Convention on Jurisdiction and Recognition of Enforcement of Judgments in Civil and Commercial Matters, 1968* (known as “the Brussels Convention”) govern the issue of jurisdiction.<sup>78</sup> The purpose of this Convention is “to determine the international jurisdiction of their courts, to facilitate recognition and to introduce an expeditious procedure for securing the enforcement of judgments, authentic instruments and court settlements”; and
- *The EC Convention on the Law Applicable to Contractual Obligations, 1961*<sup>79</sup> (known as “the Rome Convention”) governs the issue of applicable law for consumer contracts concluded over the Internet.<sup>80</sup>
  - a. Under these conventions, jurisdiction and applicable law for consumer contracts are based on whether consumer is “active” or “passive”.
  - b. The consumer is considered “passive” when he executes a contract where he is domiciled, and such contract was preceded by a specific invitation or by advertising.
  - c. A passive consumer can bring a lawsuit arising out of that contract in his or her country and the laws of the consumer’s country would apply.
  - d. A choice of forum clause in a contract would not change this result and a choice of law clause in a contract could not override the mandatory protections afforded in a consumer’s country.

**Example:** A is a tradesman who maintains his website from USA targets Consumers all over the world; B is a resident of India. B buys goods of A, online and requests A to deliver them to his address in India. This is a case of passive jurisdiction.

Furthermore, *the Hague Conference on Private International Law (HCPIIL)* has issued a Convention on Exclusive Choice of Court Agreements concluded in Civil and Commercial Matters. It aims to create an

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<sup>76</sup> [http://www.uncitral.org/uncitral/en/uncitral\\_texts/electronic\\_commerce/2005Convention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html)

<sup>77</sup> *ibid*

<sup>78</sup> From the Preamble of the Convention, Protocol of September 27, 1968 is annexed to the Convention. The Convention is also amended by the Accession Conventions under the successive enlargements of the European Communities. It has been replaced by Council Regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) which entered into force on March 1, 2002.

<sup>79</sup> <http://www.wipo.int/treaties/en/ip/rome/>

<sup>80</sup> *Jurisdictional Issues in Internet Disputes* by Talwant Singh Addl. District & Sessions Judge; Delhi



international legal regime that ensures the effectiveness of exclusive choice of court agreements concluded by private parties in civil and commercial transactions.<sup>81</sup>

## Conclusion

Hereby it is pertinent to note that E-commerce websites should lay down purchasing and payment process in sequence with absolute clarity, regular updating and monitoring of information provided. The terms and conditions should not be general in nature but specific depending upon the nature of the goods & services offered and they should be brought to the sufficient attention of the consumers and provide ample opportunity to read and then accept. E-commerce players should ensure reasonable efforts to prevent unauthorized transaction. E-commerce business is in nascent stage but the growth has been exemplary. It is crucial for e-commerce players to work towards capacity building by training employees and alarming them against the risks discussed above. Working and more crucially implementing the risk management policy and strategy for overall risk mitigation of the company is critical. Constant monitoring and evaluating the consumer behavior (like by keeping track of their footprints on their websites, which can also serve as an evidence at a later stage) for risk assessment and taking further initiatives for a strategic & dynamic approach to the digital economy is crucial. At the end of the day, e-commerce is more about strategy and business management than it is about technology. The online platform should not only provide innovative infrastructure but also innovative and proprietary information structures with sufficient protections and safeguards for its users. This will ensure the problems will remain at bay or at least the companies would be prepared with a strategy to tackle them.

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<sup>81</sup> *ibid*