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An Analysis on Jurisdiction in Ecommerce Disputes

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ABSTRACT

The internet has brought forth a boom in ecommerce. Accordingly, there is a requirement of effective dispute resolution methods for the disputes that arise out contractual disputes relating to ecommerce. However, since the internet is a borderless entity, the issue of jurisdiction arises. As a result contractual disputes are not easily solved and this leads to a deterrent in using ecommerce as the preferred method of business.

This paper analyses the current framework and precedents that are used to determine jurisdiction in e-contract disputes. The paper also analyses if the principles of private international law can be used to set up a regulatory framework for determining jurisdiction in e-contract disputes.

I. INTRODUCTION

The advent of Internet services around the globe have caused a dynamic change in the way trade is done. Access to the Internet has brought about a revolution the form of business using the Internet as a platform. This practice is called E-Commerce. As the name suggests, E-Commerce is the practice of buying and selling goods as well as providing consumer services while using the Internet as a platform for access to a larger audience and as a communication link.²

The pandemic and the lockdown have boosted the growth of ecommerce tremendously and caused a significant shift from retail buying to online buying. Therefore, because of business opportunities, the need for an established law enlisting regulations and a system of governance over said trade has emerged.³

E-Commerce trade is conducted electronic agreements made over the internet known as E-Contracts. E-Contracts are contracts modelled, specified, executed and deployed by a software

¹ Author is a student at Symbiosis Law School Pune, India.

² Harman Preet Singh & Anurag Preet Agarwal, ELECTRONIC COMMERCE: A REVOLUTIONARY TOOL IN ERA OF GLOBALIZATION, academia.edu (2011)

³ Avril D. Haines, Why Is It So Difficult to Construct an International Legal Framework for E-commerce? The Draft Hague Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters: A Case Study, 3 EUR. BUS. ORG. L. REV. 157, 159-60 (2002).

system. The process of creation and commercial terms of agreement are similar to that established in a traditional contract.⁴ The only distinction is the technical platform that these contracts are created on and thus the changes in determining their legality. In India, E-Contracts are legalized by Information Technology Act, 2000. However, there is still prevalent, a lack of transparency in the terms & conditions attached to the contract as well the jurisdiction in cases where in a dispute may arise during the pendency of a transaction.⁵

II. E-CONTRACTS & E-COMMERCE DISPUTES

Electronic contracts are governed by the fundamental principles elucidated under Indian Contract Act, 1872 with respect to traditional contracts.⁶ E-Contracts also specifically find recognition under Section 10A of the Information Technology Act, 2000 that. Accordingly, both Indian Contract Act, 1872 and Information Technology Act, 2000 are read in consonance to provide legal validity to electronic transactions and consequently allow for legal remedies in cases where disputes arise due to several facets such as non-performance of promise or breach of contractual duty.⁷

These disputes that arise are termed as *E-Commerce Disputes*. They are distinct from traditional breaches of contractual obligations as disputes arising from traditional contracts are usually settled within the physical territory or jurisdiction where one or both of the parties are located. However, during the performance of an E-Contract, customers as well as retailers or service providers may be situated anywhere in the world. Therefore, 2 problem arise in the occurrence of an E-Commerce Dispute.

Firstly, several countries may have the jurisdiction to take cognisance of the dispute and adjudicate on the same due to the various countries that both parties may be operating from. Secondly, it is difficult to identify where the contract was entered into considering that the base platform used was internet which is a not non-tangible space.⁸ There are a myriad of E-Commerce Disputes which lead to a distinction in identification of jurisdiction.⁹ Out of these several types, disputes arising out of non-fulfilment of contractual obligations are termed

⁴ Krishna, P.R., Karlapalem, K. & Dani, A.R. FROM CONTRACTS TO E-CONTRACTS: MODELLING AND ENACTMENT. *Inf Technol Manage* 6, 363–387 (2005). <https://doi.org/10.1007/s10799-005-3901-z>

⁵ Tushar Kanti Saha, CYBERSPACE-CONFLICTING JURISDICTIONAL SPHERES OF LITIGATING IPR CLAIMS, 15 *J. INTELL. PROP. RTS.* 364, 364 (2010).

⁶ The Indian Contract Act 1872, Section 10

⁷ *Trimex International FZE Ltd. Dubai v. Vedanta Aluminum Ltd.*, 2010 (1) SCALE 574

⁸ Ethan Katsh & Anita Ramasastry, E-COMMERCE: AN INTRODUCTION, BERKMAN CENTER FOR INTERNET & SOCIETY (2001), <https://cyber.harvard.edu/ecommerce/disputes.html#jurisdiction> (last visited Mar 23, 2020).

⁹ Rania Nemat, Taking a Look at Different Types of E-Commerce, 1 *WORLD APPLIED PROGRAMMING J.* 100, 101-04 (2011).

Contractual Disputes.

There are several examples of contractual disputes existing in the corporate arena, some of which include disputes between the company and the Internet Service Provider (ISP), Business-to-business (B2B) disputes and Business-to-consumer (B2C) disputes. There exists another type of E-Commerce Dispute which are Non-contractual disputes. They are disputes that arise due to non-observance of a statutory obligation on the part of the parties to the transaction. Some of the common types of Non-contractual disputes that may arise in an online enterprise are disputes over copyrights, action due to failure to protect customer data, violation of failure to Right of Free Expression and lastly disputes arising out of Competition law infractions.

It can be said, that due to the diverse types of E-Commerce Disputes, the jurisdiction to adjudicate upon these disputes must be sourced from a myriad of domestic statutes, international covenants as universally agreed principles of law.¹⁰ Furthermore, it is observed that although many of the considerations such as jurisdictional issues, choice of law issue, high cost of cross-jurisdictional litigation issue, which arise with respect to the different categories of disputes, are similar, the adversities are perhaps more pronounced in relation to 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.¹¹

III. JURISDICTION IN E-COMMERCE DISPUTES

Traditionally, the question of jurisdiction is settled by the court in which the case is filed based on criteria such as territorial, pecuniary, or subject matter jurisdiction. However, in terms of the internet, the question of 'territorial' jurisdiction gets largely convoluted on account of the fact that the internet is borderless entity where there is no *per se* distinction between regions or countries of the world.¹²

In terms of Indian law, jurisdiction is derived out of several domestic statutes and overlying international principles. The source changes according to the dispute as well as nature of the parties to the dispute.¹³

¹⁰ J. Ndambe Anyu & Chigbo Ofong, Teething Problems in Litigation and Regulation of E-Commerce, 7 INT'L J. ORG. INNOVATION 47, 48 (2015)

¹¹ James J. Healy, Consumer Protection Choice of Law: European Lessons for the United States, 19 DUKE J. COMP. & INT'L L. 535,547 (2009)

¹² S. Muralidhar, Jurisdictional Issues in Cyberspace, 6 Indian J. L. & Tech. 1 (2010).

¹³ Katie Sutton, E-Commerce and Jurisdictional Issues: An Overview, 49 COMPUTERS & L. 1, 21 (2002)

IV. BASIS OF JURISDICTION UNDER INDIAN LAW

E-commerce websites operating in India are required to adhere to several laws of India including the Information Technology Act, 2000. According to the IT Act, 2000 E-Commerce websites operating within India are Internet intermediaries and thus are required to comply with cyber law due diligence requirements as well.¹⁴ Furthermore, the legal requirements for undertaking e-commerce in India also involve compliance with other laws like contract law, Indian penal code, etc. Additionally, online retail in India also requires strict compliance with the banking and financial norms applicable in India.¹⁵ Therefore, it can be said that there does not exist a single set of laws and regulations that govern all e-commerce segments. Every e-commerce segment is governed by different laws.

(A) Information Technology Act, 2000

The goal of the Information Technology Act, is to create and provide for legal recognition of E-commerce transactions in India. The Act also establishes a regulatory framework for cyber laws and lays down punishment regimes for different cybercrimes and offences. Therefore, ecommerce disputes that involve criminal charges such as hacking as the objective of E-Contract or criminal malpractice via electronic transactions derive their jurisdiction to be tried in India, through this legislation.

Section 75 of this Act enables the act to be 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. Therefore, the inference of this provision can be that the Act largely tries to answer the question of territorial jurisdiction by assuming that computers operating within the territory of India warrant territorial jurisdiction to the courts on India.

(B) The Indian Penal Code, 1908

The IPC lists out 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.¹⁶ There is lack of jurisprudence in India on the issue of jurisdiction in cases of e-

¹⁴ The Information Technology (Intermediaries guidelines) Rules 2011, Rule 3

¹⁵ Regulation of E-Commerce Companies, Press Information Bureau, Government of India, Ministry of Commerce & Industry, <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1594910>, (last visited Mar 23, 2020)

¹⁶ The Indian Penal Code, 1860, Section 3

commerce. However, there exist some instances where in the courts had in the preliminary stages assumed jurisdiction over a matter. For example, in the case of *SMC Pneumatics (India) Pvt. Ltd. v. Jogesh Kwatra*¹⁷, the Delhi High Court assumed jurisdiction where a corporate reputation was being defamed through e-mails.

Additionally, the Act also provides for extension of the Code to extra-territorial offences. The provisions of IPC thus also apply offences committed by any person in any place beyond India committing offence which targets a computer resource located in India.¹⁸

These provisions essentially widen the scope of Indian jurisdiction over E-Commerce Disputes that invoke criminal liability.

V. PRINCIPLES FOR EVALUATION OF JURISDICTION IN INDIA

The Supreme Court has through a set of precedents as well as recognition of foreign judgements given a set of principles that may be utilized in evaluating jurisdiction in E-Commerce Disputes while supplementing the domestic legislations.

These Principles are as follows:

(A) Purposeful Availment Test

The 'Purposeful Availment Test' is an age old test that is used to determine if a company may be sued in a specific jurisdiction in the case of Internet companies.¹⁹ While adjudicating, the courts must look at three essential criteria:

1. Availment of a company to another jurisdiction
2. Whether the act was done in another jurisdiction and
3. Whether the defendant can reasonably defend themselves in the jurisdiction.

(B) Forum Convenience Test

The basic tenet is that a stay may be granted on the grounds of forum inconvenience 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.²⁰

It may be noted that the Supreme Court in *Kusum Ingots & Alloys Limited v. Union of India*

¹⁷ Suit No. 1279/2001. This case is still pending. Cited from "Ascertaining Cyber Jurisdiction in Cyber Space: Jurisprudential Understanding and A Comparative Analysis" published by AIR Journal and available at <http://www.allindiaareporter.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

¹⁸ The Indian Penal Code, 1860, Section 4

¹⁹ (India TV) Independent News v. India Broadcast Live And Ors., MIPR 2007 (2) 396, 2007 (35) PTC 177 Del.

²⁰ Spiliada Maritime Corporation v. Cansulex Ltd. [1986] 3 All E.R. 84

*and Anr*²¹ advanced 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.

(C) Minimum Contacts Theory

The US courts have developed the “minimum contacts” theory, which is recognised by the Indian Courts as well, 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.²²

These tests are effectively applied by the Courts in India to determine jurisdiction when all the conditions entailed in the tests are satisfied. However, there may arise a situation wherein there is a cross border E-Contract and the jurisdiction lies in the forums of two countries. In such situations, the application of Private international as well as alternate methods of dispute resolution are an elegant solution.

VI. THE ROLE OF PRIVATE INTERNATIONAL LAW IN EVALUATING JURISDICTION

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.²³ Instances of such relationships include contractual disputes between parties located in different jurisdictions, 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.

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 are Instantaneous Global Presence, Consumer Protection Issues and relevance of Intellectual Property. Therefore there arises a need to adjudicate upon

²¹ *Kusum Ingots & Alloys Limited v. Union of India and Anr*, (2004) 6 SCC 254

²² *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>

²³ http://www.wipo.int/copyright/en/e-commerce/ip_survey/chap4.html

these issues by primarily recognising the apt jurisdiction. One of the most effective solutions is application of Private International Law in the dispute and identifying jurisdictions based on the established rules under Private International Law.

Since India is a signatory to most trade conventions, all principles of Private International Laws are accepted and applied in India Further, in the case of *Ramanathan Chettiar v. Soma Sunderam Chettiar*²⁴, it was held that India accepts the well-established principles of private international law that the law of the forum in which the legal proceedings are instituted governs all matters of procedure. Therefore, parties are open to agree to choose any competent courts to decide their disputes if more than one court has jurisdiction to try the case. In situations wherein parties based on their own agreement have expressly agreed that their dispute shall be tried by a particular court, then the parties are bound by the forum selection clause.²⁵

VII. CONCLUSION

It can be concluded that E-commerce websites should ensure that the terms and conditions are not general in nature but specific depending upon the nature of the goods & services offered. Such clarity as well as mutual agreement is essential in evaluating jurisdiction in later stages. This will help in ensuring that if and when E-Commerce Disputes arise, they can be dealt with swiftly.

²⁴ *Ramanathan Chettiar v. Soma Sunderam Chettiar*, AIR 1964 Madras 527

²⁵ *Shriram City Finance Corp Ltd V. Rama Mishra* (2002 9 SCC 613)