

# Jurisdiction: An Issue in E-Commerce

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**Abstract:** *Enormous flexibility of the Internet has made possible what is popularly called “e-commerce” which has made inroads in the traditional methods of business management. All the facets of the business transaction with which we are accustomed in physical environment can be now executed over the Internet including, on-line advertising, on-line ordering, publishing, banking, investment, auction, and professional services. In discussing these aspects of the internet’s role a distinction can be drawn between three forms of transaction. In the first category, as epitomized by the on-line sale of books, Internet businesses allow contracts of sale to be entered into electronically, with the goods involved being delivered using traditional mechanisms. Internet facilitating e-commerce has besides, great advantages; posed many threats because of its being what is popularly called “faceless and borderless”. For instance, sending an e-mail message (offer here) does not require disclosure of the identity any more, e-mail message being like an open post card can be intercepted at any place on line, modified, altered, changed and been made to appear to have come from a person other than the actual sender and what is worst, recipient cannot detect it. Thus, securing issues like Authentication, Confidentiality, Integrity, and Non-repudiation etc have been answered. In order to elucidate the security concern, a separate chapter has been made in this work to discuss the same.*

**Keywords:** *Cyberspace, E-Commerce, Information Technology, Internet, Jurisdiction*

## I. INTRODUCTION

Since the Internet connects computers all over the world, any business that engages in electronic commerce instantly becomes an international business. The foremost factor concerning any legal dispute is regarding the jurisdiction of the case in question. Before the dispute can formally be tried in a court of law, it becomes incumbent to determine the law that will be applied and the place where it shall be adjudicated. However in the context of the Internet, it is difficult to establish with any certainty and no clear guidelines are present as to how these are to be determined. A number of commentators have voiced the notion that cyberspace should be treated as a separate jurisdiction. However in practice, this view has not been supported by the courts or addressed by lawmakers. The Internet can be seen as multi-jurisdictional because of the case which a user can access a web site anywhere in the world. It can even be viewed as a jurisdictional in the sense that from the user’s perspective state and national borders are essentially transparent. Thus, cyberspace transactions know no national or international boundaries and are not analogous to three dimensional worlds in which common law principles developed. Web access is possible from any part of the globe and parties may not be aware about the Jurisdictions which their transactions may traverse.

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The Common law principles relating to Jurisdiction are not readily adaptable to transactions in cyberspace. The e-commerce applications of internet are limitless and the Jurisdictional issues spawned by it are many diverse; However, it is not the end, once e-commerce applications of Internet are unfolded to its potential, Jurisdictional issues likely to emerge may not be forcible at present. It is quite possible that the supplier and customer may be residing in two different countries or continents and the web site is located in the third country or continent. The questions which are likely to arise are: which court has the Jurisdiction in case of dispute? Whether the laws of the country in which customer resides or the laws of the country in which supplier resides, apply? How to enforce Judgment?

## II. POSITION IN INDIA

Due to the near unanimity of the laws applicable throughout India, the only question most likely to arise at the national level is the question of Jurisdiction of the courts. Jurisdictional issues in India re determined either by the place of residence or place of business test or cause of a action test. The first test is an objective one and easy to determine. It is unlikely to pose any serious issue in e-commerce disputes. The cause of action test is a subjective test and is most likely to be debated in e-commerce cases. Can access to web site give rise to the cause of action and consequent Jurisdiction to the court within the local limits of whose Jurisdiction web sit has been accessed? The cause of action means every fact that it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the Judgment of the court. It does not include every piece of evidence, which is necessary to prove each fact, but every fact, which is necessary to be proved. Even an infinitesimal fraction of a cause of action will be part of the cause of action and will confer Jurisdiction on the court within the territorial limits of which that little occurs. It has been made abundantly clear by the Judicial gloss that the formation of the contract is a part of the cause of action and where suit is for damages for breach of the contract, it can lie at any place where the contract was made, notwithstanding that the place where the contract was to be performed and the place where the breach alleged in the plaint occurred, are both outside such Jurisdiction. The place where a contract is concluded will be either the place where acceptance is posted or where acceptance is received depending upon the medium of communication used. However, as already discussed in case of electronic communications used for executing contracts, place of business or place of residence, as the case may be, will be deemed as a place of contract formation, notwithstanding that the contract may actually be concluded at a different place. After the initial disagreement expressed by the courts regarding the offer forming part of the cause of action, the controversy has been now set at rest by the Indian Supreme Court in *A.B. C. Laminant Pvt., Ltd., v. A. P. Agencies, Salem*, Where in it was laid down that making

of an offer on a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily, acceptance of an offer and its intimation to the offer or results in a contract and hence a suit can be filed at the place where the contract should have been performed or its performance completed. If the contract is to be performed a place where it is made, the suit on the contract is to be filed there and nowhere else. Answering to the issue whether an access to web site can give rise to a cause of action can be found on the basis of above discussion. There is near consensus to regard information available on the Internet as an invitation to treat unless contrary intention may be inferred. The courts, as stated above, have declined to consider offers as a part of the cause of action. Invitation to treat is much less in degree than the offer. If offer does not give rise to the cause of action, the question of invitation to treat forming part of the cause of action does not arise. Thus whether information on web site is construed as offer or invitation to treat, mere access to web site cannot give rise to the cause of action. However, it should be differentiated from a situation where information itself gives rise to the cause of action. For instance, in case of false or misleading advertisement under the Consumer Protection Act, 1986 or defamation under law of torts. As mentioned already, the transaction of business over Internet is possible beyond the national borders. Can a person domiciled in India file a suit against a non-resident foreigner on the basis of a cause of action which arises within India and can a person domiciled in India file a suit against a cause of action that arises outside India? As regards the first questions, the Allahabad High Court has in *Gaekwar Baroda State Rly v. Habibullah*, made it clear that the language of section 20 of the Civil Procedure Code is wide and flexible enough to cover the cases of nonresident foreigners whose cause of action arose within India and there is nothing which makes an exception as regards them. However, the court cautioned that the sanctity of the decision in a foreign country should not be confused with the actual legal position. The apprehension of the court regarding the enforcement of the decision in another country proved true in *Bachchan v. India Abroad Publications* incorporated where an Indian National got a favorable Judgment in the United Kingdom but could not get Judgment enforced in New York. The Court held that the United Kingdom law applicable to the case is not in harmony with United States law and therefore the decision cannot be recognized as enforceable in the United States. This issue of enforcement of the court decision in jurisdiction other than that where the decision was pronounced is likely to be faced by the courts frequently in e-commerce disputes. The second issue was raised before the Privy Council in *Annamelli v. Murugesu*, but was left undecided. This issue has become much important now than it was before the birth of Multinational Corporations and the present economic liberalization undertaken by the Government of India. The solution to this problem can be found by giving wide interpretation to the expression "carries on business" used in section 20 of the Civil Procedure Code 1908 so as to "carries include "any business carried on by himself or through an agent". This interpretation is supported by the fact that the expression "carries on business" has been used in addition to the expression "personally works for gain". The two

expressions are quite distinct to from each other and one of the distinctions is the physical involvement of the person concerned. Thus the person who is not carrying on business in India personally but through an agent or any other instrumentality may be considered as carrying on business for the purposes of section 20. The issues of jurisdiction are more intriguing at the international level where not only the Jurisdiction of the court but also the applicable law will have to be determined. The problem becomes complicated because of the diversity of the laws. For instance comparative advertising is prohibited in Germany but not in America or India. Similarly advertising aimed at children is forbidden in Scandinavian countries but not in India. Thus it is quite possible that any business activity executed over web site may be perfectly legal in one country but may not be so in another. This is no more hypothetical issue. In America, where states have their own laws, New York, *State Supreme Court in New York v. World Interactive Gaming Corp* ruled that the internet gambling web site based in Antigua violated state and federal anti-gaming laws when they accepted bets from gamblers in New York. It was immaterial that gambling via Internet is legal in Antigua. Businesses may also face legal action, not in their own country but in another country where its web site has been accessed. In *R. v. Weddon* the defendant was found to have violated UK's Obscene Publication Act by supplying pornographic material for sale in UK through various web sites, although the web sites, on which obscene material was loaded, were based in California. The court ruled: since the absence material could be accessed or down loaded in the UK, its publication was deemed to have taken place in the UK notwithstanding that it was hosted on a web site outside the UK.

### III. POSITION IN USA

In America, the out of state defendant can be brought within the Jurisdictions of the forum state only when he has certain "minimum contacts" within that state such that the maintenance of the suit does not offend traditional notions of fair play and substantial Justice. Jurisdiction has been classified as general Jurisdiction and specific Jurisdiction depending upon the defendant's contact with the forum. The general Jurisdiction can be invoked even when the cause of action arises outside the forum state but the defendant has continuous and systematic contacts with the forum state. The specific Jurisdiction requires that the dispute must arise out of defendant's contacts with the forum and can be invoked even where defendant minimum contacts. These rule were further refined by holding that the forum state can exercise Jurisdiction over a corporation that delivers products in to the stream of commerce with the expectation that they will be purchased in the forum state or where it is shown that the defendant purposefully availed themselves of the benefits of the forum state. The above rules based on the case law have been invoked by the American Courts to decided jurisdictional issues relating to e-commerce cases. The California District Court in *MC Donough v. Fallon MC Elligot Inc* refused to exercise Jurisdiction simply on the basis of existence of a web site. However, the Texas court in *Niezkowshi v. Masco Corp* exercised Jurisdiction where, in addition to the web site, it was shown that the defendant had other contacts with the state. The America courts have for

the purposes of the Jurisdiction classified web sites into three categories: (1) active web sites, (2) interactive web sites; and (3) passive web sites.

**1. Active web** sites facilitate establishing of contractual relationships and acts as a “Window Shop” for the defendant to do actual business on the Internet. Courts have exercised personal Jurisdiction where a defendant was found to be operating an active web site on the ground that he purposefully availed the Jurisdiction of the forum state as he intentionally reached beyond his own state to engage in business with residents of the forum state.

**2. Interactive web** sites enable users to exchange information with the host computer. The exercise of personal Jurisdiction depends upon the level of interactivity and the commercial nature of the exchange of information. The courts have failed to lay down any objective criteria with the result there has been no unanimity on the standard to determine the required level of interactivity and commercial nature of the information on the interactive web site.

**3. Passive web** sites which make only information available and do nothing more, cannot form a ground for the exercise of the Jurisdiction in a forum state where it has been accessed, unless additional business contacts of the defendant within the forum state related to the issue in question have been shown. In the opinion of the courts, it does not give rise to “minimum contacts” or “purposeful availment”. Unless the information available on the web sites gives itself a cause of action, courts have generally refused to exercise personal Jurisdiction where web site is passive.

#### IV. POSITION IN EUROPEAN COMMUNITY

Much before the advent of e-commerce, European Community has, to facilitate transborder commerce within the Members states, adopted the Brussels Convention, for Jurisdictional matters and Rome Convention, 1980 for applicable law to contractual obligations. European Directive on Distance selling was enacted in June 1997 for providing homogenous consumer protection rules which were due to come into force in the year, 2000. The Brussels Convention provides that a defendant domiciled in a contracting state must, as a general rule, be sued in that state. This rule does not apply to the consumer as defined in the convention. Where a seller in addition to any other conditions, “directly solicits a consumer of the contracting state, the latter is free to sue the seller in the court of the contracting state in which either he himself resides or the seller resides. The expression “directly solicits” has not been interpreted as including access to web site. Recently, the European Commission published a proposal with the object to amend the Brussels convention so as to extend it to those states also which may join the union in future. The important change made in the proposed regulation is that any activity “directed at one or more Member states would include a consumer who can access a web site in his domiciled contracting state. The position of the consumer is further strengthened by the Rome Convention, 1980 which provides that the contracting parties are free to choose legal system of the contracting state that will govern their contracts. The supplier may choose legal system of his

liking but where opposite party is a consumer, then in addition to the law of a chosen state, the consumer protection rules of the consumer’s country of habitual residence will apply.

#### V. ALTERNATIVES AVAILABLE IN JURISDICTIONAL ISSUES

The issues of Jurisdiction, applicable law and enforcement of the Judgments are not confined to only national boundaries. The problems raised are global in nature and need global resolution. An international treaty providing homogeneous rules for governing e-commerce, between the parties of different countries, on the lines of the instruments already in vogue in Europe, with necessary changes, can provides solution to the present uncertainty. E-commerce is likely to be stifled if the legal environment in which it is to operate is uncertain. The legal position of the business using web site for executing contract is at present precarious. However, they have various alternatives available to safeguard their interests, which include.

**1. Choice of forum and law:** In India parties are free to make choice of forum by making a contract to the effect where two or more courts have Jurisdiction and that contract will not be hit by section 28 of the Contract Act. But it is not open to the parties to confer Jurisdiction on a court, by agreement, which it does not possess under the Civil Procedure Code. The parties however, do not have choice in case of applicable law because the Central Acts are almost applicable throughout India. This choice of law is available to the parties of different states in America because of the diversity of the state laws and is also available to the parties of different countries of European Union by virtue of Rome Convention 1980.

In America, three tests have been laid down to determine the validity of a clause in a contract incorporating choice of law. These are

1. The chosen law must have a substantial relationship to either party transaction.
2. The chosen law should not be contrary to the fundamental policy of the legal system which would apply in absence of a choice of law clause,
3. The particular state has a greater interest than the chosen state to determine the relevant issue.

The Rome Convention gives parties of the contracting state, a free hand to a make choice of law, which will govern their contract. The only requirement is that the choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice, the parties can select the law applicable to the whole or only to a part of the contract. It is only in the absence of such choice that the contract will be governed by the law of the country with which it is most closely connected.

**2. Conspicuous Notice:** Business using web site can give notice conspicuously at the beginning of the web page restricting the countries to which web site is directed or indicating the passive or local nature of the web site. This worked well in *Bensusan Restaurant Corp. v. King*. New York court held that the state’s long arm statutes could not be invoked for the exercise of Jurisdiction against a non-



resident defendant when his business was unquestionably a local operation.

**3. Standard terms and Conditions:** To provide standard terms and conditions for each country, a task which is nearly impossible?

**4. Sophisticated filtering techniques:** To use sophisticated filtering techniques to make web access possible only to the limited countries. This technique will be acceptable to courts only when it successfully achieves the desired purpose. This is evidence by the Judgment in *New York v. World Interactive Gaming Corp.* Where a non-resident gaming site was held to have violated the New York state and federal gaming laws when they accepted bet from gamblers in New York, In spite of the address filtering technique used which was intended to prevent access by to New York residents. Since this technique could be easily by –passed by using the address of other state, the court said that the defendant failed to take technological precautions similar to those taken by other on line gaming sites. Thus onus lies on the defendant, not only to take technological precautions but those precautions should be sufficient to prevent access to the persons of a country with whom he does not intend to establish contractual relationship.

## VI. CONCLUSION

Internet transcends national boundaries. The user in cyberspace traverses a sovereign less region that is not subject to any one state exclusive jurisdiction. The users have only a virtual nexus with each other, so if any dispute arises then the parties find it very difficult to get the issue resolved as in internet jurisdiction it is very tough to establish both the traditional requirement for detention of jurisdiction which are the place where the defendant resides, and the place where the cause of action arose. As of now there is no comprehensive law on cyberspace jurisdiction anywhere in the world due to which investigation agencies are finding cyberspace to be on extremely difficult terrain. The IT Act has extraterritorial application similar to statutes of some U.S. States, but this jurisdiction is only self-claimed. It is doubtful if foreign courts will enforce judgments passed by Indian courts on the basis of the principles laid down in this Act. Furthermore contents of any websites which are legal in its home country may be considered illegal or offensive in India, so if any person accesses this site from his computer situated in India, then according to this Act, that site is liable to be prosecuted in an Indian Court, but such a law would not be acceptable to other countries. So India should try to embody the principles laid down in “*minimum contracts*” and “*purposeful availment*” doctrines in its information technology laws. All in all, the Information Technology Laws in India need to be given a facelift.

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