
NAVIGATING JURISDICTION IN E-CONTRACTS: LEGAL CHALLENGES IN CYBERSPACE

Droana Kanaujia, Legal Administration Services – EisnerAmper India | (Lawyer)

ABSTRACT

With the development in technology and inventions in tech world there has been increasing need of laws to govern that whole different world. Technology has made our lives easier in every aspect, it has given us the ease of doing all our tasks, i.e., from daily tasks to professional tasks. Technology is not just a part of entertainment, but it is now a huge part of business world. Cyber law was not a common word as it is today. The impact of this drastic technological change has brought a new wave of e-commerce, and this has led to the introduction of e-contracts. Today the need of pen and paper has reduced and the need of electronic systems is increased. Online contracts or e-contracts are replacing the traditional contracts and this change urged to bring in the laws governing the issues revolving around e-contracts. The major issue about the e-contracts and its enforceability is the jurisdiction in case of any conflict. Therefore, it is important to understand the significance of jurisdiction and its current position in cyber laws.

Keywords: e-contracts, cyber laws, jurisdiction, cyber space.

Introduction:

Jurisdiction is the power of the court/tribunal to hear and decide a case.¹ The world of cyber space is borderless. Cyber world has no definite region and space where it belongs to, it is everywhere and anywhere, no borders, no defined space or region. Due to this nature, during the time of any conflict in the cyber law jurisdiction becomes a major and complex part. With the globalization there has been an increase in cross-border transactions and as a result there is a rise in e-contracts for business transactions and deals. There is a lacuna in law in relation to the jurisdiction of e-contract issues and even today courts are interpreting it in different ways. Even today there are several challenges faced by the courts/tribunals in determining their power to deal with a particular matter, especially e-contracts. There are international transactions and an activity legal in India might not be legal in the other country where the opposite party belongs to. There are various types of cyber-crimes taking place all over the world and it is getting crucial to ascertain the fact where the crime took place, who the criminal is etc. Cyber space has transcended the physical presence for any sort of corporate exchanges through e-commerce. E-commerce like Amazon has set up its business in various places and it also contracts with local business for its distribution. It is connected locally and globally.

The existing civil laws along with the Information Technology Act, 2000 ("IT Act") and rules are insufficient and lack up to a great extent in clarifying the position of the courts in e-contracts. There are laws governing the jurisdiction of the courts, like in Code of Civil Procedure, 1908 ("CPC") and IT Act. However, there is still ambiguity and uncertainty in determining which law to apply and the powers of a particular court in a particular case. For the time being there are certain tests applied by the courts around the world to ascertain the jurisdiction of courts. These tests are minimum contacts test, purposeful availment test, close connection test, sliding test etc.

E-contract is basically an agreement which is entered into by the parties, digitally. These are made enforceable by following the relevant laws.

Requirements of contracts and e-contracts:

For e-contract to be binding, it has to fulfil all the essentials of a valid contract as provided

¹ Nandan Kamath, *Law Relating to Computers, Internet and E-Commerce: A Guide to Cyber Laws* (4th edn, Universal Law Publishing 2009) 20

under section 10 of the Indian Contract Act, 1872. The essentials of a valid contract are:

- Offer and acceptance
- Lawful consideration in exchange of any activity
- Consensus ad idem, i.e., meeting of the minds of the parties to form a mutual agreement.
- Competency of the parties, i.e., they must be a major, not a defaulter or a person with any mental disability
- The lawful object and
- The contract must be legal to be enforceable.

There is no specific law to govern e-contracts however, there are certain provisions in the IT Act dealing with e-contracts. Section 4 of the IT Act, i.e., Legal recognition of electronic documents ascertains the position that the electronic contract would be treated as the traditional contracts where any matter or information is in writing or printed form. It does not specifically talk about e-contracts but indirectly addresses its reference. For an example, a contract communicated through email or any electronic means shall be deemed as electronic contract which shall have the legal binding force.

Section 10A of the IT Act specifically states about the Validity of contract formed through electronic means wherein the offer, its acceptance/revocation is made in electronic form would be deemed as a valid contract.

There are various provisions for e-signature in the IT Act. For an electronic contract, the parties need digital signature/e-signature, the reference to which is provided in the IT Act. It deals with various aspects of e-signature which makes the contract valid and enforceable. It is not a mandatory part yet an important sign of a valid contract. It makes the document legally binding and authentic which can be admissible in court without any suspicion.

Considering the current global scenario and the increased commercialization, Government through the amendment, has imbibed the provision exclusive for validating the e-contract. This amendment has not cleared the position, though the attempt brought in some clarification, there

is still more to it. In the case of Trimex², the Hon'ble Supreme Court of India held that the communication through e-mails was unconditionally accepted by the parties which can be considered as a valid contract which satisfied the requirements of the Indian Contract Act, 1872.

The defined and concrete laws to govern the overall cyber space is not available in India, and not significantly worldwide. The cyber law is an umbrella term which includes everything in electronic/digital form. Courts, through different issues in the cases, from time to time have set some precedents pertaining to e-contracts. Various international methods, tests and rules are being applied here, in order to get into the conclusion of the jurisdictional aspects in the electronic contracts.

Further understanding the e-contracts, there are different types of e-contracts:

1. Browse wrap contract: These are the agreements where the terms & conditions and privacy policy written on the website highlighted with a link. It is a highlighted part in blue color and by clicking on it, you're redirected to a page containing the actual terms and conditions of the contract. The consumer is deemed to have accepted all the prescribed terms and conditions by clicking on the link. These type to agreements are seen on many websites.
2. Shrink-wrap contracts: In these types of contracts wherein the offer has been accepted by unwrapping the packaging or seal. It can also be considered in a way that when we download a software it is deemed that the installer accepts all the provided terms and conditions in the inbound contract.
3. Click wrap Contract: Where there are options on the screen of, "accept", "delete", or "back". Here by clicking on the "I accept" option the user agrees and accepts all the terms and conditions. It maybe while installing any software or maybe while signing up for an e-mail.

What is India's stand on jurisdiction?

With respect to the jurisdiction in the e-contracts, Indian courts have been putting efforts to create a uniform and standardized stand for the power of the courts and the law binding on it.

² Trimex International FZE Ltd, Dubai v Vedanta Aluminium Ltd (2010) 3 SCC 1

The civil courts are given the power to decide the case, by the Civil Procedure Code, 1908. It has imbibed the provision with respect to jurisdiction in different types of cases. There are provisions and rules for the enforcement of the foreign judgement. The discrepancy in 'territorial' jurisdiction gets more complex when it comes to the internet, due to the fact that it is borderless³. The code of civil procedure, 1908 outlines the mechanism in determining the jurisdiction which is based on the place of residence and/or where the cause of action arises. Jurisdiction can also be determined based on the target audience or clients of a particular internet-based activity or any website. Generally, in traditional contracts and e-contracts parties include a clause of jurisdiction in case any dispute arises between them. The territorial jurisdiction is being included in it. However, in absence of such clause or some issue with the decided jurisdiction then courts will have to decide on the jurisdictional aspect as well.

The Supreme Court in *Bhagwandas Goverdhandas Kedia v. Girdhari Lal Parshottamdas & Co*⁴ held that "at the place of proposer where the acceptance is received shall have jurisdiction for the execution of contracts entered into via computer internet."

The question of "place of business" has been clarified judicially in the case of *PR Transport Agency v. Union of India*.⁵ In this case, "PR transport Agency was awarded a tender by BCCL Jharkhand. The acceptance of PRTA's bid was conveyed via email and was received in Chamauli, UP. The respondents argued that no cause of action arose in UP." The respondent contended that since the tender took place in Jharkhand, the courts over there shall have jurisdiction, and the cause of action did not take place in Uttar Pradesh. The court relied on section 13(3) of the IT Act⁶ and held that the e-mail was sent with the intention to be received by company at its place of business. "The office of the company being located in Chamauli, the UP court had jurisdiction. Therefore, a partial cause of action was sufficient to grant the court jurisdiction."

The doctrine of purposive availment has been introduced in India by the judicial interpretations by the Indian courts. They introduced it in the case of the *Banyan Tree* case, in this case the defendants provided their service in India through an active website. The plaintiff claimed that the defendants in Hyderabad has deceptively similar name and initiated the proceedings in

³ Justice S Muralidhar, '*Jurisdictional Issues in Cyberspace*' (2010) 6 Indian Journal of Law and Technology 45

⁴ *Bhagwandas Goverdhandas Kedia v Girdhari Lal Parshottamdas & Co* AIR 1966 SC 543

⁵ *PR Transport Agency v Union of India* AIR 2006 All 23

⁶ Information Technology Act 2000, s 13(3)

Delhi stating that the defendants have their business in Delhi. The court in this matter stated that the jurisdiction can be in the case where the defendant purposely availed it and here the defendant's business must have commercial transaction and that the plaintiff suffered loss or injury due to defendant's specific targeting or forum. For the court to hear any suit, the plaintiff must demonstrate that some part of the course of action arose in the forum state and the defendants' website directly aimed at facilitating commercial transactions in that state. After this case, the purposeful availment test is being applied by courts with respect to electronic contracts and commerce in several cases.

Jurisdiction tests:

Courts from all over the world have been trying to deal with the cyber jurisdiction issues. Whenever there's any cyber-crime or any civil wrong in the cyber world, more than the consequence the competency of the court is in question. Finding the right authority to adjudicate a case is of utmost importance, as it will impact the users or consumers in various ways.

The close connection test: In this test the laws governing a dispute and the jurisdiction is being determined by the closest place where the transaction took place. The transacting taking place in a particular place, and the place closest to it is to be considered for jurisdiction for the dispute. The major flaw in this test is that there might be multiple closest connected places to be considered in determining the governing law, and it is difficult to choose the most efficient one among them. This test was applied in *Braintech v. Koustik*⁷. In this case, the actions taken by the defendant company demonstrated a genuine and significant link to the state of Texas. This connection was substantial enough for the British Columbia Court of Appeal to uphold the ruling made by a court operating under an alternate jurisdiction.

Minimum Contacts test: In this test the parties are to adhere to the jurisdiction of the state in which it has minimum contacts or come connection with the state. Irrespective of the physical presence of the plaintiff in a particular state, it can knock the doors of the court of the state where it has meaningful ties or relations. This test established in *Compuserve Inc. v. Patterson*⁸ involved Compuserve, which was based in Ohio, Patterson, based in Texas. The court ruled that Patterson was subject to Ohio jurisdiction due to its business activities in the state.

⁷ *Braintech Inc v Kostiuk* (1999) 171 DLR (4th) 46 (CA)

⁸ *CompuServe Inc v Patterson* 89 F 3d 1257 (6th Cir, 1996)

However, this approach has a significant drawback: there is no objective standard for determining what constitutes "minimum contacts." It remains unclear whether minimum contacts should be measured by the number of users engaging with the service, the frequency of website access, the number of hits received, or any other criteria.

The stream of commerce test: This test applies in situations where the defendant is not physically present in the jurisdiction, yet may still be subject to its laws. It focuses on the jurisdiction related to the sale of a product or service. In the case of *Gray v. American Radiator & Standard Sanitary Corp.*,⁹ the court established jurisdiction over a manufacturer of component parts after a customer was injured due to a defective part. The reasoning was that the manufacturer would not have a market for its component unless it was part of a sold final product. Consequently, the laws of the jurisdiction where the final sale occurred were deemed applicable.¹⁰

Another important test to ascertain the jurisdiction for adjudicating the online issues is provided in the Zippo test. This method evolves from the sliding scale theory. This theory determines the jurisdiction of non-resident websites on the degree of inactivity between the forum and the website. This test was formulated from the case of *Zippo*¹¹ In this case the jurisdiction was ascertained by classifying the websites into active and passive websites. In this test a passive website is insufficient to determine the jurisdiction. The degree of the activity/inactivity of the website in a particular place/forum helps in determining the jurisdiction. In this case the three-prong test was also given.

Effects test/ Calder test: Zippo test was developed in the beginning of the internet era and hence it was better applicable. But with the advancement of technology the complexities increased and there was need to come up with better tests. The effect test was evolved in the case of *Calder v Jones*,¹² which was a defamation case. The key consideration in this situation revolves around the consequences or harm caused by the defendant's website within the state. Essentially, the influence of the defendant's online actions and their overall impact on the state will take precedence over other factors. Consequently, the state that experiences this impact will have the jurisdiction to address the matter.

⁹ *Gray v American Radiator & Standard Sanitary Corp* 22 Ill 2d 432 (Ill Sup Ct 1961)

¹⁰ Rodney D Ryder, *Guide to Cyber Laws* (3rd edn, Wadhwa Publishers 2007) 215

¹¹ *Zippo Manufacturing Co v Zippo Dot Com Inc* No 96-1968 (WD Pa, 16 January 1997)

¹² *Calder v Jones* 465 US 783 (1984)

On the international level, these tests are being applied by various courts. These tests are applied individually or even missed with the other tests to conclude the jurisdiction in the specific issue.

Conclusion:

The world is changing and is shifting to a digital age. For the ease of doing business e-contracts prove to be an advantage to the parties to increase the trade and commerce worldwide. Parties are transacting and doing business at an international level and this is immensely aided by the option of e-contracts. Parties sitting in any corner of the world can get into a business deal without their physical presence. The premiere law governing the cyber space and e-contracts is IT Act, 2000 which is not sufficient to clarify the stand of jurisdiction in the disputes of electronic contracts. The cyber law is at its primary stage and requires many additions and upgrades to it. There are several kinds of jurisdictional tests provided by the courts through various cases however, their applicability depends on case to case and none of them are definite. There are not many countries where there are rules and laws framed to govern the cyber world. The current position of the jurisdiction in cyber space, specifically with reference to the electronic contracts is uncertain and ambiguous. With the passage of time and through various challenges courts are trying to get to a clear point to determine the jurisdiction of courts in e-contracts.

Suggestions:

As it is understood that the jurisdiction is one such important aspect in any legal case to be determined, the stand of it is quite unclear in e-contracts. E-contracts are one of the best advances made by us as a part of doing business worldwide, however it comes double edged with both positive and negative aspects. For getting the clarity over the jurisdictional aspects in the e-contracts.

There should be a legislation with necessary rules to address the jurisdictional issue in cyber sector. There should be a clause pertaining to territorial jurisdiction in the contract itself so as to avoid the uncertainty.

At the international level there should be a binding document agreed by majority of the countries, wherein clear rules and principles for determining the jurisdiction of cyber aspects,

especially the e-contracts shall be framed by the lawmakers worldwide.

Interpreting the current scenario of the cyber world, there is urgent need for all the countries to come together and frame appropriate law for governing the jurisdiction issue.