

JURISDICTION OF E-CONTRACTS

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Jurisdiction means the power conferred by law upon an authority to entertain and adjudicate disputes¹. Jurisdiction of a contract determines the law applicable to it and the courts in which they can be enforced. Jurisdiction depends on the place where the contract is concluded.

Cyber transactions know no national or international boundaries and are not analogous to the three-dimensional world in which Common Law principles developed. The Common Law principles relating to jurisdiction are not readily adaptable in cyberspace.

Contract through computer Internet being instantaneous involving instant communication of offer and acceptance, the contract is said to be complete at the end of the proposer where acceptance is received. It is also possible to enter into contracts by oral communication of the proposal and acceptance between the parties through computer Internet having special facility of head phones being fixed to the computer. Further it is possible to enter into a contract by a continuous dialogue displayed through computer between the parties (*internet chatting*) as if the persons personally facing each other. As far as the jurisdiction of the courts is concerned by virtue of the ruling given by Supreme Court in *Bhagvandas Goverdhanadas Kedia v/s Girdhari Lal Purchottamdas & Co.*², in case of instantaneous contract through telephone, the courts at the place of proposer where the acceptance is received shall have the jurisdiction for the enforcement of contracts entered into by means of computer internet.

The e-commerce applications of Internet are limitless and the jurisdictional issues spawned by it are many and diverse. When two people residing at two different countries enter into a contract through a website located in a different country, then the following questions may arise:

1. Which court has the jurisdiction in case of any dispute arising out of such contract?
2. Whether the laws of the country in which customer resides or the laws of the country in which supplier resides, will apply?
3. How the judgment is to be executed or enforced?

In e-commerce, messages relevant to a given transaction may pass through intermediaries in tens or even hundreds of jurisdiction across the world even without the knowledge or express consent of the parties. Until legal standards are crystallized in this respect, parties engaged in e-commerce should agree upon jurisdictional issues in trading partner agreements or individual contracts.

Jurisdictional issues in India are determined either by the place of residence or the place of business or cause of action¹. The first test *i.e.*, place of residence and place of business are objective in nature and easy to determine. It is unlikely to pose any serious issue in e-commerce disputes. The second being the cause of action test is a subjective test and is most likely to be debated in e-commerce cases.

1. Meaning of jurisdiction:

2. AIR 1966 SC 543.

1. Section 20 of Civil Procedure Code, 1908

I. 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. The physical location of the server determines the applicable jurisdiction in case there is no express cause specifying it. In *R. Vs Waddon*¹, however, the court dismissed the argument that simply because the server is in another country, its laws should apply. The courts suggested that since the web site was interacted with in UK, English law should be applicable, demonstrating the willingness of the courts to extend a 'long arm jurisdiction'.

II. The cause of action means every fact that would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It includes all facts which are relevant and which are 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.

The question that arises here is: Whether an access to web site can give rise to a cause of action and consequent jurisdiction to the court within the local limits of whose jurisdiction web site can be accessed? This issue has been answered as follows "The information available on internet is treated as invitation to the offer as there is no consensus ad idem between the person browsing the website and the proposer, offer by itself cannot be treated as cause of action therefore invitation to offer cannot be treated as cause of action, thus mere access to website cannot give rise to the cause of action".

E-contracts should be valid in their entirety in the jurisdiction in which they are formed.

To avoid the ambiguity and the risk of being sued in other jurisdiction, the seller should incorporate a choice of law and jurisdiction clause in standard terms, choosing a jurisdiction, which he is most familiar with, in order to retain control.

These are the following tests, which a court of law would use to decide whether it would have jurisdiction to entertain a claim, or not:

1. Whether the defendant has purposefully availed himself of the privilege of acting in the forum state or causing a consequence in the forum state.
2. The cause of action must arise from the defendant's activities there. The acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum to make the exercise of jurisdiction over the defendant reasonable. If the above tests are satisfied then the court would entertain a claim.

The question of jurisdiction arose in the year 1996 in two US Circuit Court cases. The first was *CompuServe v. Patterson*¹, in which an Ohio court held that it had jurisdiction over a contract dispute involving CompuServe, an Ohio based concern, and Patterson, a Texas resident. The Court's decision was that so long as three tests were satisfied, they had the jurisdiction.

The second case was *Playboy Enterprises, Inc. v. Chuckleberry Publishing Inc.*². In this case, the respondent firm had been sued for infringement of the appellant's trademark rights. The respondent had done so by distributing certain materials under the name "PLAYMEN" on an Italian website. The court decided that the respondent's soliciting

1. Decided in 1999, South work crown court, (unreported) cited in Janaie Wilson, 'Net Porn Baron Escapes Jail'. The Guardian London Sept.7 1999 at page 5.

1. 1996 WL 405356 (6th. Cir. (Ohio), No. 95-3452, July 22, 1996.

2. S.D.N.Y., No. 79. Civ. 3525 (SAS), June 19, 1996

of US customers over the Italian web site, receiving their faxes, and e-mailing them passwords, constituted distribution in the United States. Thus the US Court held that they had jurisdiction.

The Supreme Court of India, in the case of *SIL Import vs. Exim Aides Silk Importers*¹, has recognized the need of the judiciary to interpret a statute by making allowances for any relevant technological change that has occurred. Until there is specific legislation in regard to the jurisdiction of the Indian Courts with respect to Internet disputes, or unless India is a signatory to an International Treaty under which the jurisdiction of the national courts and the circumstances under which they can be exercised are spelt out, the Indian Courts will have to give a wide interpretation to Section 20 of the Code of Civil Procedure for exercising Internet disputes.

As the utility of the Internet expands, the issue of “when a court can exercise personal jurisdiction over a person based on a person’s Internet contacts is arising in more and more different types of factual scenarios”. Nevertheless, there are several factual scenarios in which the issue of assessing personal jurisdiction based on Internet contacts has been adjudicated more frequently. These are as follows:

Domain Name Disputes: Domain name disputes arise when one party uses another party’s trademark as its Internet domain name—the Internet equivalent of a company’s address, telephone number, and trademark, all in one. In these cases, the aggrieved trademark brings a trademark infringement suit against the alleged infringer, and in doing so, must establish personal jurisdiction over the alleged infringer.

Trademark & Copyright Disputes: Trademark and copyright infringement

disputes often arise when one party uses another party’s trademark or copyrighted work within the content of her website.

The aggrieved trademark or copyright holder, in bringing an infringement suit, must establish personal jurisdiction over the alleged infringer.

Libel/Defamation Claims: These claims occur when one party allegedly publishes defamatory materials about another party on a website, on an Internet newsgroup, etc. The defamed party then brings a libel suit against the other party, and in doing so, must establish personal jurisdiction over that party.

A Developing Framework for Internet Jurisdiction Cases

Because of the novelty of the issue and the difficulty of applying the modern, territorial-based due process analysis to the Internet, courts have struggled in assessing whether they have jurisdiction over a party whose contacts with the forum are solely or primarily Internet related. It is not surprising then, that there is some variance among the different courts to address the issue. Nevertheless, a sliding-scale framework based on the traditional minimum contacts analysis is developing as the principal analysis that courts use to assess personal jurisdiction in Internet related cases.

The Sliding Scale Framework:

This sliding-scale framework, first developed by the United States District Court for the Western District of Pennsylvania in *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) is premised on the idea that—

“The likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of

1. (1999) 4 SUPREME COURT CASES 567

commercial activity that an entity conducts over the Internet.” .

There are three different categories of Internet activity on the *Zippo* sliding scale:

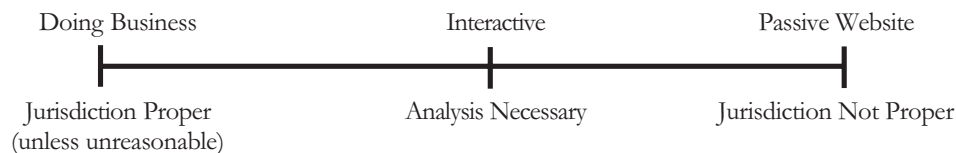
1. **Doing Business Category:** At this end of the spectrum, the defendant clearly conducts business over the Internet and has repeated contact with the forum state in question, such that an exercise of jurisdiction over that defendant is proper.
2. **Interactive Category:** This is the middle ground between the Doing Business Category and the Passive Website Category. This portion of

the spectrum is “occupied by interactive websites where a user can exchange information with the host computer.”

In this category, “the *exercise of jurisdiction [over the defendant] is determined by examining the level of the interactivity and commercial nature of the exchange of information that occurs on the website.*”

3. **Passive Website Category:** At this end of the spectrum, the defendant operates a website that is passive in nature in the sense that the website does nothing more than post information on the Internet that Internet users can access. At this end of the sliding scale the *exercise of jurisdiction over the defendant is not proper.*

THE ZIPPO SLIDING SCALE



The Sliding Scale is not a proxy for the minimum contacts analysis

Courts still ultimately must consider whether there are minimum contacts with the forum state such that exercising personal jurisdiction over the defendant comports with “traditional notions of fair play and substantial justice.”

The *Zippo* sliding scale should only aid the courts in performing this analysis as it provides guidelines for what Internet activity is generally considered to be enough to subject a defendant into the jurisdiction of a particular forum.

The Personal Jurisdiction, under the “forum effects test,” originally introduced by the Supreme Court in *Calder v. Jones*,¹ it is possible for a defendant to be subject to jurisdiction

in a foreign state based on the commission of an intentional tort: “If a court finds that the defendant committed an intentional act with the knowledge that that act would adversely affect the plaintiff in a particular forum, then an exercise of personal jurisdiction over the defendant in that particular forum is enough to satisfy the purposeful availment prong of the due process analysis”.

One of the USA state court in *Hall v. LaRonde*² has held that the sending of e-mails from one forum to another can subject a person to personal jurisdiction in the forum where he sends his emails.

Measures to reduce litigation over jurisdictional issues

The issues of jurisdiction, applicable law and enforcement of the judgments are not

1. *Calder v. Jones*, 465 U.S. 783 (1984).

2. *Hall v. LaRonde*, 56 Cal. App. 4th 1342 (Cal Ct. App. 1997)

confined to 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 instruments already in vogue in Europe, with necessary changes can provide 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 businesses using website for executing contract is at present precarious.

However, the various alternatives available to safeguard the interests include:

1. Choice of forum and law:

In India parties are free to make choice of forum by making a contract to that effect where two or more courts have jurisdiction but it is not open to confer jurisdiction on a court by an agreement where the court lacks jurisdiction¹.

The parties to the contract in India don't have any choice in case of the applicability of laws since Central Acts are applicable throughout India.

In America, three tests have been laid down to determine the validity of a clause in a contract incorporating choice of law. They are (a) The chosen law must have a substantial relationship to either party or transaction (b) 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 (c) 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 make choice of the law, which will govern the contract.

The only requirement is that the choice must be expressed with reasonable certainty by the terms of the contract or the circumstances of the case. Another way to avoid the jurisdictional problems is to introduce any of the following clauses in the contracts. They are:

- **Forum Selection Clause:** A forum selection clause is a clause in a contract in which parties expressly agree to litigate all disputes arising from the contract in a specific jurisdiction and venue.
- **Choice of Law Clause** - A choice of law clause determines which state's law will govern in the event a dispute arises.
- **Arbitration Clause** - Similar to the other clauses, an arbitration clause mandates that the parties undergo arbitration before proceeding to litigation.
- **E-mail Contract** - This contract would allow users to sign the contract by using their digital signature in order to agree to the web site operator's choice of forum, venue and jurisdiction.

2. Conspicuous Notice:

Businesses using website 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. Also ensure that it is apparent to the user that they are agreeing to the forum selection clause

3. Unconscionability:

Provide standard terms and conditions for each country and avoid creating a contract that is unfair, or so one-sided that a court would refuse to enforce it. In *Capsi v. The Microsoft Network*,¹ a New Jersey Court had evaluated the following before enforcing a disputed e-contract.

1. *Angulie insulations v/s Davy Ashmore Ltd-* AIR 2002 SC 2402.

1. *Capsi v. The Microsoft Network*, 732 A.2d 528 (N.J. Super. 1999)

- Whether the enforcement violate public policy,
- Whether the clause was a result of fraud or “overweening” bargaining power and
- Whether its enforcement would result into a seriously inconvenience trial.

4. Exclusivity:

The forum selection clause must expressly indicate that the forum is the exclusive place for the dispute resolution, else courts may construe that the clause to mean that it permits but does not require litigation in that forum. In *Decker v. Circus Circus Hotel*¹ the Hon’ble New Jersey court held that the following forum selection clause, which specified a mandatory forum, was enforceable: “By placing an order or making a reservation for goods or services offered or promoted herein, you will be deemed to have agreed to the exclusive jurisdiction of the State and Federal courts of the State of Nevada for resolution of any dispute you have relating to such goods or services.”

5. Consent to Personal Jurisdiction:

Additionally, although it is not required, it is prudent to explicitly state that by agreeing to the forum selection clause, the signer consents to personal jurisdiction.

6. E-Mail Contracts

Additionally, a website operator could rely on an e-mail contract to confirm that the user agrees to jurisdiction in the website author’s chosen jurisdiction and venue. E-mail contracts incorporate new digital technology in order to authenticate the source of the transmission. The Hon’ble Massachusetts Court in *Doherty v. Registry of Motor Vehicles*, No. 97CV0050 (Mass. 1997)

held that an e-mail containing a statement as to the source’s identity qualified as a signed writing.

7. To use sophisticated filtering techniques to make web access possible only to the limited countries.

International Enforceability

Given the global nature of the Internet, one must also consider whether the forum selection clause is enforceable internationally. While, there are a number of jurisdiction issues on the international level, a discussion of which can be found at International Jurisdiction, there is some hope that “E-contracts” may be find international acceptance.

Singapore has taken a groundbreaking step in enacting the Electronic Transactions Act (ETA), which validates e-contracts. The ETA makes it clear that e-contracts are recognized documents subject to noted exceptions. Nevertheless, until a uniform body of law exists for regulating the Internet, site operators should consider and possible provide for international forums as well.

Case laws:

Federal Circuit Court Decisions:

Personal Jurisdiction Found

10th Circuit: *Intercon, Inc. v. Bell Atlantic Internet Solutions, Inc.*, 205 F.3d 1244 (10th. Cir. 2000)

Facts: Intercon, Inc., an Oklahoma company, brought a suit to recover damages caused by Bell Atlantic, a Delaware company, when Bell Atlantic used Intercon’s e-mail server without authorization. Intercon argued that jurisdiction in Oklahoma was proper because Bell Atlantic continually routed e-mails through Intercon’s e-mail server in Oklahoma.

1. *Decker v. Circus Circus Hotel*, 49 F. Supp.2d 743 (D.N.J. 1999).

Held: Personal Jurisdiction over Bell Atlantic is proper. Without stating where on the Sliding Scale, the defendant's contact fell, the Tenth Circuit Court of Appeals reasoned that because Bell Atlantic knew that it was routing e-mails through Intercon's e-mail server in Oklahoma after Intercon notified Bell Atlantic to stop doing so, yet still continued to do so for 4 months, Bell Atlantic purposefully availed itself to suit in Oklahoma.

Other related case laws:

9th Circuit: *Panavision International, L.P. v. Toeppen*, 141 F.3d 1316 (9th Cir. 1998)

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

Personal Jurisdiction Denied

D.C. Circuit: *GTE New Media Services, Inc. v. Bellsouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000)

Facts: In *GTE*, GTE New Media Services, Inc. filed suit in the District of Columbia against several competitors alleging Sherman Antitrust Act violations. GTE argued that jurisdiction was proper over the defendants based on the defendants' interactive websites in which users could search through the defendants' yellow-page like databases for information.

Held: The D.C. Circuit held that jurisdiction over the defendants was lacking. The court found the websites in question to fall into the middle, interactive level of the sliding scale framework. The court, however, said that because there was no evidence that any of the defendants actually interacted with residents of D.C., other than by having D.C. residents access their sites, the defendants did not purposefully avail themselves to suit in D.C.

Other related cases:

5th Circuit: *Mink v. AAAA Development, L.L.C.*, 190 F.3d 333 (5th Cir. 1999)

9th Circuit: *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414 (9th Cir. 1997)

2nd Circuit: *Bensusan Restaurant Corp. v. King*, 126 F.3d 25 (2d Cir. 1997)

Federal District Court Decisions:

Personal Jurisdiction Found

Alitalia-Linee Aeree Italiane, S.P.A., v. Casionalitalia.com, 2001 U.S. Dist. LEXIS 534 (E.D. Va. 2001)

Facts: In *Alitalia*, Alitalia, an Italian Airline, brought a trademark infringement suit in Federal District Court in Virginia against *Casionalitalia.com*, a Dominican Republic on-line gambling business. Alitalia argued that the court had in rem jurisdiction over *Casionalitalia.com*'s domain name, under the Anticybersquatting Consumer Protection Act, and that it had personal jurisdiction over the defendant because of the defendant's interactive website.

Held: Although the court did not find *in rem* jurisdiction over the domain name, it did find that it had personal jurisdiction over the defendant. The court found the defendant's website to fall into the middle - interactive web site category of the sliding scale framework. Then, the court held that because *Casionalitalia.com*'s website was extremely interactive, *Casionalitalia.com* entered into gaming contracts with its users, and at least 5 of the users of *Casionalitalia.com*'s services were Virginia residents, *Casionalitalia.com* had purposefully availed itself to suit in Virginia.

Other related cases:

Multi-Tech Systems, Inc. v. VocalTec Communications, Inc., 122 F. Supp. 2d 1246 (D. Minn. 2000)

Tech Heads, Inc. v. Desktop Service Center, Inc., 105 F. Supp. 2d 1142 (D. Or. 2000)

International Star Registry of Illinois v. Bowman-Haight Ventures, Inc., 1999 U.S. Dist. LEXIS 7009 (N.D. Ill. 1999)

Personal Jurisdiction Denied

Origins Natural Resources v. Kotler, 2001 U.S. Dist. LEXIS 2639 (D.N.M. 2001)

Facts: In *Origins*, the plaintiff, a New Mexico Corporation, sued the defendants, a California resident and a California Company, for trademark infringement in Federal District Court in New Mexico. The plaintiff argued that jurisdiction over the defendants was proper in New Mexico because the defendants had sold the alleged trademark infringing products to a national department store, Nordstroms, who then sold the products through its interactive website over the Internet.

Held: After thoroughly reviewing the issues presented by Internet jurisdiction cases, the District Court held that jurisdiction over the defendants was not proper. The court stated that although the defendants sold the products through Nordstroms' interactive website, there was no evidence that they had sold any of the products to New Mexico residents (other than the plaintiff for litigation purposes). Thus, the court found that the defendants had not purposefully availed

themselves to suit in New Mexico.

Other related cases:

Rodriguez v. Circus Circus Casinos, Inc., 2001 U.S. Dist. LEXIS 61 (S.D.N.Y. 2001)

First Financial Resources v. First Financial Resources, Corp., 2000 U.S. Dist. LEXIS 16866 (N.D. Ill. 2000)

Millennium Enterprises, Inc. v. Millennium Music, L.P., 33 F. Supp. 2d 907 (D. Or. 1999)

Neogen Corp. v. Neo Gen Screening, Inc., 109 F. Supp. 2d 724 (W.D. Mich. 2000)

Roche v. Worldwide Media, Inc., 90 F. Supp. 2d 714 (E.D. Va. 2000)

Conclusion

Although it is unclear how the court will enforce "e-contracts," it is clear that they would be a very easy solution to what could become an overwhelming problem. Until the law is modified, companies must continue to educate themselves on legal developments pertaining to e-contracts and try to protect themselves from law suits in every corner of the world.

MISUSE AND ABUSE OF PUBLIC INTEREST LITIGATION

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Recently in a case the Hon'ble Delhi High Court has dismissed public interest litigation and imposed costs of Rs.50,000/- on the petitioner for filing a vexatious petition with ulterior motive and wasting the precious time of the court. The WP was filed seeking further investigation on the Ayodhya issue (demolition of Babri Masjid on Dec'06 1992). The bench comprising of Chief Justice B.C.

Patel and Justice S.K. Kaur has warned that if the costs are not paid within 2 week Non-Bailable arrest warrants will be issued against the petitioners¹.

In another case the Hon'ble Supreme Court has come down very heavily on a

1. Article published in Enadu Newspaper dated 07.07.2005.