

GROWTH, DEVELOPMENT AND PROBLEM RELATED TO E-COMMERCE IN THE PRESENT WORLD

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ABSTRACT

In the era of Information Technology, computers and the internet are becoming a vital part of everyone's life. It has become a mode of communication to store and process data, it has made the lifestyle of people much easier. But the increasing technology has developed various new terminologies like Cyberworld, E-Commerce, Netizens, Cyberterrorism etc. Back in the 1990s, where business class people who were aware of ICTs, as it which was much easier, quicker and cheaper to store, communicate and transact the electronic information. But at that time they hesitated to interact electronically as no legal protection was provided to them which further provoked a potential threat to law enforcement. After the development of Cyber Law, Information Technology Law or Internet Law, this started to safeguard and gave an order and structure to cyberspace. For the first time in 1996, United Nations Commission on International Trade (UNCITRAL), adopted Model Law on E-Commerce (MLEC), subsequently it was adopted by the General Assembly of United Nations. The main objective of MLEC was to provide uniformity at international level which related to e-commerce and provide equal treatment for both electronic and paper-based information and transactions. India is signatory to this Model law which enacted Information Technology Act in the year 2000. Various other countries are signatories to this Model law which has also enacted new laws or amended their existing laws. To keep the pace with the ever growing technology UNCITRAL adopted Model law on e-signature. Further, India also amended the IT Act in the year 2008.

The authors critically analyze the said law in context with the activities of E-commerce and legal issues arising out of it (such as Jurisdiction, Domain Names, IPRs, Taxation and Privacy issues), which are untouched by the Model Law in cyberspace and are attracting the attention

of international community. This paper attempts to make a study of International and Indian law relating to E-commerce and discusses the various legal issues regarding E-commerce.

INTRODUCTION

In the 21st century, Computers, Internet, and Information Communication Technologies (ICTs) have completely changed the lifestyle of people. Today, with the development of internet we have introduced new terminologies like the Cyber World, E-Commerce, Netizens, E-Transactions, E-Return, E-Banking, Online Contracts etc. Apart from having a positive impact of E-Revolution, there is a negative side of it as well. The ever-growing computers, internet, and ICTs are in the hands of criminals and the cyber world has become a weapon of offence for them.

In the 1990s, the use of ICTs was increasing, as it was much easier, quicker and cheaper to store, transact and communicate electronic information. It became popular in conducting business transactions and entering into contracts. In 1996, United Nations Commission on International Trade (UNCITRAL), adopted Model Law on E-Commerce (MLEC), subsequently, it was adopted by the General Assembly of the United Nations. The main objective of MLEC was to provide uniformity at international level which related to e-commerce and provide equal treatment for both electronic and paper-based information and transactions. India is a signatory to this Model law which enacted the Information Technology Act in the year 2000. Various other countries are signatories to this Model law which has also enacted new laws or have amended their existing laws. To keep up with the pace of the ever-growing technology UNCITRAL adopted Model law on E-Signature. Further, India also amended the IT Act in the year 2008.

With the different provisions and activities introduced in E-commerce, it again gave rise to various legal aspects. The legal disputes and cases are attracting the attention of government and industrialist around the world. Various legal aspects of E-commerce are Security, integrity, jurisdiction, contracts, warranties, liabilities, copyrights, trademarks, patent, taxation, domain name, e-signatures etc.

INTERNATIONAL SCENARIO

Two Model laws relating to E-Commerce were formed, first in 1996 UNCITRAL Model Law on Electronic Commerce (MLEC) and second UNCITRAL Model Law on Electronic Signature (MLES), in the year 2001. Subsequently, another convention was also adopted, The United Nations Convention on the Use of Electronic Communication in International Contracts, 2005.

UNCITRAL Model Law on Electronic Commerce (MLEC), 1996

It was adopted in 1996 to facilitate e-communication and storage of information like electronic mail, telecopy; electronic data interchange (EDI) etc. Its main objective was to bring uniformity among law related to e-commerce. It has recognition for the data message and digital signature and equal treatment have been provided to both paper-based and electronic information. Such equal treatment is essential for the development of paperless communication and achieving efficiency in international trade.

MLEC was the first legislative which adopted the fundamental principles of non-discrimination, technologies neutrality and functional equivalence. To ensure that the document would get proper recognition of its legal effect, validity, and enforceability, it has laid down the principle of non-discrimination. The principle makes electronic communication equivalent to paper-based communication.

The law was divided into two parts i.e. part I dealing with E-commerce, in general, providing equal weight to paper-based concepts and lays down the validity of contracts through electronic means, data messages, acknowledgment of receipt etc. Part two of MLEC deals with e-commerce in connection with the carriage of goods.

UNCITRAL Model Law on Electronic Signature (MLES), 2001

It came into force in the year 2001, with the main objective was to grant legal recognition to e-signature and to bring about uniformity in national laws related to e-signature. The model law applies wherever e-signatures are used. However, it does not override any law enacted for the protection of consumers.

United Nations Convention on the Use of Electronic Communications in International Contracts, 2005

Adopted in November 2005, and came into force on 1st March 2013. With the aim to facilitate the use of electronic communication in international trade by providing assuring that e-contract concluded and exchanged electronic are valid and enforceable in the court of law similar to paper-based contracts. The convention has been enacted in order to harmonize rules regarding electronic commerce and foster uniformity in the enactment of UNCITRAL model laws. Finally, the convention provides those countries with modern drafted legislation who have not yet adopted the provision on electronic commerce.

LAW RELATED TO E-COMMERCE: INDIAN SCENARIO

The government of India enacted Information Technology Act, 2000 for the implementation of UNCITRAL Model Law on E-commerce, 1996 and further adopted the amendment act (Information Technology Act, 2008) for implementing the UNCITRAL Model Law on Electronic Signature, 2001 in India.

Being signatory to the UNCITRAL Model Law, it was mandatory for India to enact the Information Technology Act in tune with the model law. The IT Act 2000 main aim is to provide recognition to all the transactions carried out by means of electronic commerce, which doesn't involve paper-based methods of communication and storage of information.

It contains the provision which recognizes electronic records and digital signatures, rules for attribution of the e-record, mode, and manner of acknowledgment, for determining place and time of dispatch and receipt of electronic records. Further, the law provides for civil liability i.e. Cyber contraventions and criminal violations, penalties, the establishment of the Adjudicating Authority, and the Cyber Regulatory Appellate Tribunals.

The act also amended the Indian Penal Code, 1860, the Indian Evidence Act, 1872, Banker's Book Evidence Act, 1891 and Reserve Bank of India Act, 1934 for the matters related to therewith or incidental thereto. The main purpose of the amendment was to address issues related to e-commerce, electronic crimes, and evidence and regulating electronic fund transfer. Further, the implementation of IT (amended) Act, 2008 had brought about many changes related

to the legal structure for e-commerce i.e. introducing the concept of e-signature, amended the definition of intermediary etc.

The notable feature of the amended act was the legal validity and enforceability of the digital signature and electronic records. It also emphasizes on securing digital signature and electronic records; hence encouraging the growth of e-commerce in India.

PRIVACY ISSUES

The major security issue in e-commerce is online credit card fraud, i.e. obtaining money from another's account without authorization. The credit card details obtained without authorization are used for withdrawal of funds from unauthorized accounts, fraudulent purchases, and obtaining false credit.

Credit card fraud is executed through hacking, skimming, identity theft, phishing, card being stolen, Cardholder Not Present (CNP) transactions and pharming. Credit cards are vulnerable to fraud because, once the online purchase transaction is over, the credit card details are still stored on the network database or other storage devices which are not secured and are prone to hacking. Hacker usually infiltrates the network using a virus which attacks the server on which the information is maintained. Credit card details could also be obtained from the network server if they are not protected from the use of malicious software also credit card details are obtained through various malware like keyloggers, trojans, worms where hackers trace the keystrokes of users and hack the credit card information. In India, maximum credit card fraud cases take place in cardholder not being present (CNP) circumstances and of course, all e-commerce websites support online transactions in CNP. Physical absence of cardholder and card at the time of carrying out e-commerce transaction makes it difficult to find whether the person is the actual cardholder or fraudster who is carrying out the transaction.

The credit card fraud in a CNP is perpetrated by skimming or through the other methods such as pharming, phishing or identity theft. Through one of these methods, the credit card details, access code/PINs are stolen from the network or server or from the magnetic strip of the card etc. When an unauthorized user carries out the transactions, the merchant is unaware of who is carrying out the transaction.

To overcome the security issues various measures have been taken as merchant should request the credit card number, the name of the cardholder, OTP and secure PINs provided by issuing bank, Virtual Player Authentications, and AVS where the address on the credit card is verified with the address provided in the file of the issuing bank. Credit Value Verification (CVV) should also be checked by the merchant when the order is placed¹.

Under various circumstances fraud can be exposed i.e. when multiple account numbers result in shipping goods to the same address, transactions with similar account numbers, multiple transactions on one card in a short period, multiple account number from the same IP address². Frequent attempts to find the number alerts the issuing bank and thus transaction can be stopped. The companies carrying e-commerce should ensure the use of AVS, CVVs, Virtual Player Authentication and other security measures.

To curb credit card fraud, the Reserve Bank of India (RBI) has set up a Credit Information Bureau of India in collaboration with Dun and Bradstreet (D&B)³. However, credit card statements should be checked on a monthly basis. The RBI has issued a circular entitled 'Credit Card Operations of Banks' requiring bank to have internal control systems to prevent credit card fraud. The RBI has advised the credit card issuing bank to check 'know your customer' (KYC) requirements in detail.

JURISDICTION

The growing of the internet can be interpreted as 'distance is dead'. With the use of internet, people can enter into an online agreement without cost and communication. Since geographical borders have disappeared online and the world has famously become flat this creates important consequences determining jurisdiction over disputes arising from e-commerce.

Since e-commerce agreements are executed through an electronic medium and the parties are often physically located in different countries or different places in the world, an important legal issue is which country or state within the country has a jurisdiction over disputes arising under e-commerce agreements. Moreover, since the contracts are concluded online, the

¹ Available at <http://nextnext.us/emerging-technology-involving-creditdebit-cards/>

² Available at <http://www.riskpayments.com/card-not-present-fraud-indicators/>

³ Available at <http://chillibreeze.com/articles/creditcardfraud.asp>

physical residence is not immaterial and US courts have often attempted to examine the physical location of the website server.

Jurisdiction not only means deciding power of the court with regard to the subject matter of the suit but also the pecuniary limits of the jurisdiction known as pecuniary jurisdiction. Under Indian law, each court is limited by the scope of jurisdiction conferred on it principally by the Code of Civil Procedure, 1908. There is no legislation which specifically determines jurisdiction over disputes arising under e-commerce contracts.

There are several principal types of jurisdiction under the law. 'in personam jurisdiction' and 'in rem jurisdiction'. In personam jurisdiction refers to the principles of exercising jurisdiction over rights attached to a specific person and 'in rem jurisdiction' refers to the principles of exercising jurisdiction over a thing such as real property.

A private international law is the body of law applied to determine which country's law will apply to a dispute where the parties belong to different countries or the transaction is international. The private international law is therefore particularly important in the context of e-commerce contracts and disputes which inherently have an international basis.

Delhi HC in *World Wrestling Entertainment, Inc. v M/S Reshma Collection*, decided that jurisdiction in e-commerce cases involving trademark, copyright disputes would be determined by the buyer's place of residence.

The issue raised in this case was, "When the transaction takes place over the internet, where is the contract concluded?"

The court interpreted the meaning of the phrase "carries on business" as mentioned in section 134(2) of the Trademarks Act, 1999 and section 62(2) of the Copyright Act, 1957. The section states that as the suit for infringement under the said Acts is to be instituted in a District Court having jurisdiction to try the suit. Further, the Courts specify that "District Court having jurisdiction" would "include a District Court within the local limits of whose jurisdiction...the person instituting the suit or proceeding...carries on business or personally works for gain."

In *Dhodha House Vs. S.K. Maingi*⁴, the SC laid down a 3-pronged test to determine whether the plaintiff could be said to “carry on business” in a particular place; the SC was also of the view that a person may carry on business not necessarily by himself but through a servant or an agent.

The 3 conditions are:

- (i) the agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal and not as a general agent who does business for anyone that pays him;
- (ii) the person acting as agent, must be an agent in the strict sense of the term and a manager of a Joint Hindu Family cannot be regarded as an —agent within the meaning of this condition; and
- (iii) to constitute —carrying on business at a certain place, the essential part of the business must be performed at that place.

Referring to the case of *Bhagwan Goverdhandas Kedia v Girdharilal Parshottamdas & Co*⁵. where it was held that, "The general rule is that the contract is complete when the offeror receives intimation that the offeree has accepted his offer. An exception to this has been carved out in respect of contracts negotiated by postal communications or telegrams. The exception being that the bargain in such cases (post or telegram) would be struck and the contract would be complete when the acceptance of the offeree is put into a course of transmission by him by posting a letter or dispatching a telegram." The SC had held that in such a case, the negotiations are concluded by instantaneous communication of speech and therefore, the exception to the general rule of the contract would not be applicable in this case.

Further, Delhi HC observed that just as in the case of telephonic conversations, there is instantaneous communication where transaction takes place online and further, applying the rule laid down in the case of *Bhagwan Goverdhandas Kedia v Girdharilal Parshottamdas & Co.*, the court held that in the case of e-commerce, "contract would be completed at the place where the acceptance is communicated".

⁴ (2006) 9 SCC 41

⁵ AIR 1966 SC 543

The court notes in Para 23, "The website of the appellant/ plaintiff refers to various goods and services. It is not an offer but an invitation to an offer, just as a menu in a restaurant. The invitation, if accepted by a customer in Delhi, becomes an offer made by the customer in Delhi for purchasing the goods —advertised on the website of the appellant/ plaintiff. When, through the mode of the software and the browser, the transaction is confirmed and payment is made to the appellant/ plaintiff through its website, the appellant/plaintiff accepts the offer of the customer at Delhi. Since the transaction between the two takes place instantaneously, the acceptance by the appellant/ plaintiff is instantaneously communicated to its customer through the internet at Delhi."

The Court in Para 24 reasons, "if the contracts and/ or transactions entered into between the appellant/ plaintiff on the one hand and its customers are being concluded in Delhi, can it not be said that the essential part of the business of the appellant/ plaintiff, insofar as its transactions with customers in Delhi are concerned, takes place in Delhi? The offers are made by customers at Delhi. The offers are subject to confirmation/ acceptance of the appellant/ plaintiff through its website. The money would emanate or be paid from Delhi. Can it not then be considered that the appellant/ plaintiff is, to a certain extent, carrying on business at Delhi?"⁶

TAXATION OF E-COMMERCE

E-commerce has changed the requirement of physical presence to do business. The fact that the locations of business, the initiation of transaction place, the delivery location, servers from which payment is done are all virtual challenges in theories of taxation. The absence of physical availability made it difficult to apply the traditional principles of taxation related to the residence of the parties or source of the income or say residence based taxation or source-based taxation. Residence based taxation means all the individual or legal entities residing in the particular place are subject to tax payment in accordance to the particular location. Source-based taxation means all the income are subject to tax by the country.

The basic principles which are applied for cross-border taxation should necessarily also be applied to e-commerce transactions which are inherently cross-border. The fundamental

⁶ Available at <https://spicyip.com/2014/10/jurisdiction-in-e-commerce-ip-disputes.html>

principle is that when a resident of a country earns income from the economic transaction in another country, both countries have a right to tax the same income. The home country will levy the tax on basis of residence rule and the host country will levy the tax on basis of source rule. This gives rise to a new issue termed as Double Taxation which is addressed in the various Bilateral Avoidance of Double Taxation Treaties.

PRINCIPLES OF TAXATION UNDER INCOME TAX ACT, 1961

Under Indian tax law, residents of India are taxed on their worldwide income whether or not it accrues, arises or is received inside or outside India. Non-residents are taxed on basis of source rule in India.

Section 9 of the Income Tax Act, 1961, states, all income accrues, arises or is received which is deemed to accrue or arise in India is taxable in India. Section 9(1)(i) deals with business income that may be taxable in India, business connection in India, any asset or source of income in India, transfer of a capital asset situated in India. Income from such sources will be deemed to arise or accrue in India is thus taxable in India.

The term 'Business connections' is a broader term than the concept of 'permanent establishment' in the avoidance of double taxation. Prior to passage of Finance Act, 2003 the term 'business connection' was not defined under IT Act and was interpreted only in case law.

In the case of *CIT v R.D. Aggarwal*⁷, the SC held that 'business connection' involves a relation between a business carried on by a non-resident which yields profits and gains and some activity in the taxable territories which contributes directly or indirectly to the earning of those profits or gains. It predicts an element of continuity between the business of the non-resident and the activity in the taxable territories. The expression 'business connection' postulates a real and intimate activity within the territories, the relation between the two contributing to the earning of income by the non-resident in his trading activity.

The Finance Act, 2003 added new explanation 2 to section 9 of Income Tax Act, 1961 which in relevant part, provides that the expression 'business connection' shall include any business

⁷ [1965] 56 ITR 20 (SC)

activity carried out by a dependent agent on behalf of a foreign company where such department agent habitually exercise in India an authority to conclude contracts on behalf of the non-resident unless his activities are limited to the purchase of goods or merchandise for the non-resident. It also added explanation 3 to section 9(1)(i) of the Income Tax Act which provides that where a business is carried on in India through a dependent agent within the meaning of explanation 2, only so much of income as is attributable to the operations carried out in India shall be deemed to accrue or arise in India.

It should be noted that both the Income Tax Act, 1961 and the jurisprudence on 'business connection' leave open the question of when the commercial activity carried out by a website available internationally would be deemed to have a business connection in India.

In the year 1999, the income tax department in India constituted a working group to examine the tax implication of e-commerce transactions. The report of the working group submitted in 1999 stated that a computer terminal should be regarded as a permanent establishment (PE) under the Avoidance of Double Taxation Treaties. Further, the report also suggested the imposition of the presumptive tax in form of a fixed portion or a 'bit tax'. If a website page is downloaded often enough, this may be sufficient to constitute a fixed place of business. Further suggestion included examining whether the supply of software was on a continuous basis and if so, this could give rise to the business connection.

CONCLUSION

Undeniably E-commerce has become an important part of our society. The virtual world now plays a vital role in our daily lives. E-commerce can conduct express business with very few clicks through the Internet, therefore, it becomes critical for small businesses to stay in competition with large websites. With increasing cryptocurrency, and lower service charges from web developers the online business has become quite affordable for small business holders to use the Internet to sell their products.

Many techniques have been developed and with increasing technology, many more would be developed to facilitate business online making an exchange of information related to online payment, payment receipts, purchase and sales, transport details much easier.

Advantages in e-commerce are cost efficiency, access to a lot of products, easy customization, and worldwide access to products. With advantages, e-commerce has its own loopholes which need to be resolved at earliest which includes reliability, security issues, jurisdiction, cost of access, cyber frauds, privacy issues etc. The developing e-commerce scenario now requires strong laws to minimize the negative impact of it.

