

DETERMINATION OF JURISDICTION TO ADJUDICATE CROSS-BORDER ELECTRONIC COMMERCE DISPUTES

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Abstract: *The tremendous increase in E-commerce brings about the all-important question of which court has jurisdiction to adjudicate cross-border E-commerce dispute in perspective of the fact that parties to E-contract live in various jurisdiction with different legal frameworks. The response to this question has a mix of legislation, self-regulation and international cooperation. The study examines the existing laws and regulations as well as the rejuvenation and the provision of the harmonious agreement with regard to private law at the international level. It also analyses the current legal administrative structure of jurisdiction in E-commerce dispute adjudication and recommends means to evacuate the impediments to the determination of jurisdiction in cross-border E-commerce disputes adjudication. Using a qualitative approach that involves theoretical review and empirical study mixed with the explanatory presentation, the study explains keywords such as E-commerce, Jurisdiction and Dispute by utilizing existing information from journals, articles, case reports and other historical records. It also uses the analytical and theoretical approach in examining the stance of some international organizations such as the International Chamber of Commerce (ICC), The Organization for Economic Cooperation and Development (OECD), World Trade Organization (WTO) and World Intellectual Property Organization (WIPO) on the mechanism to adopt in the determination of jurisdiction in cross-border E-commerce dispute adjudication.*

Keywords: *Electronic Commerce; Cross-border; Jurisdiction; Disputes, Adjudicate*

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1. INTRODUCTION

In the current world of information technology, individuals and businesses, using the unbounded internet can transact business online from wherever they are. Conducting commercial transactions online was an exotic issue in law but it is now having a lot of attention from legal experts. Organization have begun exchanging goods and rendering services online, and "electronic commerce" turned to a term in which legal experts became interested in.

Numerous disputes about online transactions are advancing to the courts for adjudication. Besides, in a manner whereby topographical limits are practically trivial, questions regarding the particular court that has jurisdiction to settle these disputes are regularly asked. Legal systems traditionally have answered these questions by taking into consideration the physical location of the parties and their conducts involved; allowing that, a party could be duly sued wherever the party was physically present and would be governed by the legal doctrine of the

place where the party acted. Because of the complexity of location of internet users and their business transactions, those concepts do not easily apply to internet businesses (Mann 2008).

Moreover, these questions become more problematic because of the fact that E-commerce can take place in different jurisdictions due to the global nature of the internet. First, they create a fundamental lack of symmetry between the regulatory jurisdiction and the underlying market. Legal systems arguably work best when a single jurisdiction can articulate rules that govern all transactions in a single market. The internet, however, covers the whole world; and thus, its transactions are not necessarily located in any single territorial jurisdiction. Second, exacerbating the first, the internet reduces the threshold for transactional economic activity. Just some years ago, only a few numbers of companies frequently get involved in activities in other countries. However, with the internet, a very small company can engage in economic activities in so many countries. In this case, the tension of allocating jurisdictional authority will be both more common and more problematic in the internet age especially when there is a dispute between parties in an E-commerce transaction.

The fundamental problem about the determination of jurisdiction in a cross-border online commercial transaction is the presence of different parties around the globe who have a virtual nexus with each other. The question emerges that in an event that one party needs to sue the other, where would one be able to sue? The customary law requires two territories, where the defendant lives, and where the reason for the dispute emerges. However, with regards to E-commerce, both of these are difficult to build up with any assurance.

From the above reasons, the provision as to the court having jurisdiction to resolve disputes between the parties becomes an essential question regarding the security and confidence placed in E-commerce. Jurisdiction to resolve the possible disagreement between the parties is a matter that is not only expedient but also a determinative of the later application by that judicial body of the rules determining the law applicable to the case. Generally, each domestic court resorts to its own procedural rules to identify those cases and circumstances in which it has jurisdiction to resolve a dispute. This condition from the outset makes jurisdiction highly uncertain for the parties and requires them to deal with a large indeterminate number of domestic procedural rules. For this reason, there is a clear international trend to unify these rules, to reach an agreement of worldwide scope regarding jurisdiction, acknowledgement, and requirement of judgments.

Domestic policymakers have demonstrated strong compassion for this topic and the United Nations Commission on International Trade Law (UNCITRAL) subsequently came out with a Model Law on Electronic Commerce in 1996 (UNCITRAL, 29th session 17(A/51/17). It accommodates the clients of electronic business and traditional business to be dealt with similarly. It was propounded with the aim of offering an arrangement of universally acknowledged tenets to domestic legislators. This will evacuate the deterrents in the method for the improvement of electronic trade and furthermore make a protected lawful condition for electronic business.

As of now, there are no particular principles in the UNCITRAL Model Laws and convention that deals with the jurisdiction of online business disputes (Art 15 of UNCITRAL 1996). There are no arrangements to determine jurisdiction in the “UNCITRAL Model Law on Electronic Commerce and the UN Convention on the Use of Electronic Communications in global Contracts.” However, they decide the time and place of dispatch and receipt of information messages or electronic correspondence and the place of the parties, giving the associating components, for example, "the place of business", "the nearest relationship to the applicable contract, the fundamental exchange or the important place of business", which may analyze parties' business area to find out jurisdiction.

Countries such the United States of America (USA), the European Union (EU), China etc. and other international organizations have propounded laws and legal instruments that serve as guiding principle in the determination of jurisdiction in E-commerce disputes resolution but it is evident that these laws and legal instruments are at the national level of these countries or to only countries that are signatory to the legal instruments. Thereby making the enforcement of jurisdiction especially in cross-border E-commerce dispute so complex and having low success rate especially if the parties involved are from countries having no bilateral treaty or multilateral international convention.

This paper considers the current vulnerability tormenting inquiries of jurisdiction in cross-border E-commerce disputes resolution and it aims to understand how jurisdiction would be determined in E-contract dispute. The study also examines how countries and international organizations can adopt national or international regulations that would serve as a guiding principle for determination of jurisdiction in E-commerce disputes adjudication.

2. CONCEPTS AND DEFINITION OF ELECTRONIC COMMERCE

Electronic commerce has gotten immense fame due to the computerization strategy utilized by it. Because of simplicity in transactions, the quantity of E-customers is developing at a high rate and within a brief period, it will vanquish physical customers. Today, E-commerce is greatly influencing business. It does not just exchange information amongst purchasers and vendors of goods, but additionally offers help and services to shoppers. More customers' requests show up on the internet than some other mediums. It shows that the internet has an immense potential to snatch numerous clients in a short measure of time which can turn into an objective market for developing firms. E-commerce has changed the economy so much that a large portion of the business exercises today is done on the internet (Praveen, K. M).

The world is moving from the conventional economy that concentrated on the physical assembling of products to the new economy that focuses more on knowledge and information than anything. E-commerce is a critical feature in such a manner. E-commerce delivers a keen business rivalry, leads to prompts making of new commercial centres, quicker business transactions, and fast development in innovations. Online commercial business can be for the most part comprehended as a framework or a technique for leading a business through electronic media as opposed to through regular physical means. It is favoured over regular

strategies owing to the fact that it gives advantageous access to items that generally may not be available. In this manner, it prompts effective transactions both for customers and E-retailers. Furthermore, online commercial business has influenced conceivable low incentive to cross-border transactions on a scale that was previously unfathomable.

The definitions of E-commerce are numerous depending on the view of the writer. Few authors characterize E-commerce as being not the same as E-business; others see and characterize the two ideas as the same. When we take a gander of separating the two ideas, E-commerce is definitely perceived as a form business, whereby values are included in its payments. However, this can be portrayed as money related exchanges which are interceded in an electronic form amongst business organizations and business partners alike.

Additionally, E-commerce can also be seen from a more extensive point of view, which incorporates distinctive types of payments which may not be included in all commercial activities. The most part of E-commerce in the genuine sense is a wide range of activities which are interceded in an electronic form either by business or generally among organizations and its dealings with third parties. Some authors characterized E-business as part of E-commerce which influences them to utilize the two ideas reciprocally.

According to (Greenstein & Feinman 2000), E-commerce is “a business transaction with the utilization of electronic transmission medium that has to do with buying and selling of goods and services that require physical or digital transportation between the business locations”. It can also mean sharing of information by business, keeping connections by businesses and directing business activities by the medium of networks made possible by telecommunication.

E-Commerce incorporates the management and facilitation of business transactions, either selling and buying of products and services rendered via online (Jelassi 2005). The utilization of E-communication or computerized data enhancing innovation in commercial activities to make, change and define connections for wealth formulation among business organizations and people (Lallana et al 2005).

According to the World Trade Organization (WTO), E-commerce means the manufacturing, appropriation, marketing, conveyance of merchandise and electronic means services. A transaction by the business organization can be separated into three fundamental stages, namely the marketing stage, the transaction stage and the stage where the goods are delivered.

The information trading across electronic network systems at any phase of the inventory network, regardless of whether inside an organization, amongst organizations and consumers, the general population and the sector controlled by private individuals.

The above definitions are evident that many authors and scholars view E-commerce from a different perspective and I believe they all have a point regarding their different perspectives.

This study considers E-commerce from the point of view that includes a transaction that is possibly either business or non-business and furthermore if it has its payments to its corresponding transactions or else E-commerce will just be seen as E-Business.

3. DISPUTES IN ELECTRONIC COMMERCE

With much said in regard to E-commerce and the potential merit of the computerized era, little has been said in regard to disputes emerging out of E-commerce and the determination of jurisdiction to resolve these disputes. Possibly disputes could happen at each phase of E-commerce, from the underlying phase of setting up to the last phase of consumption (Hill 19970). Disputes in E-commerce show no distinction fundamentally from those in customary business. The definition of disputes in online commercial business can mean the disagreements between or among parties involved in E-commerce.

E-commerce furnishes us with new commercial centre of business and also with another commercial centre for disputes. Context might influence the individual associated with the disputes, as well as the sorts of disputes liable to surface. While containing and reflecting the numerous parts of this present reality. E-commerce is making a situation that will confront us with a large variety of dispute practices and attitudes. Some of which might be recognizable and some might not (Katsh 1996). Disputes in E-commerce depend on various principles, these include, interconnection disputes, sales disputes, payment disputes, delivery disputes, infringement disputes, and disputes relating to a trademark belonging to a third party. The nature and capability of the disputing parties constitute another standard of comparison, for instance, there is question including consumers, organizations and public authorities.

Dispute typically resolved within the territory of any of the party to the contract. However, with an online business, clients could be found anywhere on the planet. Presently the greatest question that strikes a chord is that how a business organization adapts to such expansive exposure. To confirm the customer's location is for all intents and purposes incomprehensible. A consumer may even have the capacity to pay services secretly utilizing what might as well be called money. Taking note of whether the product will be delivered by a physical means should be considered by the parties. In this case, a business organization that has dealings through online can confine customers to jurisdictions that the products have been delivered. However, with computerized products that are online delivery services, it is relatively unimaginable, which makes the business organization to depend on the honesty of the information available from the customers in regard to his or her location of domicile.

The users of electronic trade are witnessing both advantages and inconveniences. These advantages incorporate instant commercial transaction, costs benefits, comfort, reduction of time in transaction businesses, and so on. The inconveniences accrued to users of E-commerce include fraud and cybercrimes. Now and again there are legal disputes among parties to E-commerce that cannot be settled utilizing customary litigation methods. Subsequently, one might say that disputes are inescapable in the business cycle, regardless of being internet or customary business.

4. OVERVIEW OF JURISDICTION IN ELECTRONIC COMMERCE

Generally, jurisdiction alludes to “the general power by a government to assert authority on people and things that are in the boundaries, a power of the court to adjudicate a legal suit or issue a legal order, or a topographic territory under which the exercising of judicial authority may be upheld” (Bryan 1999).

Cyber jurisdiction as an expression alludes to the internal governance set up by the internet users and administrators, however in this paper “cyber-jurisdiction” alludes to power by the government and the authority of the court over internet users and their actions online especially in the event of disputes resolution.

The customary way to deal with jurisdiction is to find out if a court has a competent jurisdiction to adjudicate a legal suit summon before it. The issue of jurisdiction in E-commerce gets problematic to a great extent by virtue of how borderless the internet is.

Online transactions, obviously are not restricted to parties that live in a specific country. It is imperative to consider the conditions in which a court of another country can exercise jurisdiction over the operator of E-commerce. On that point, the international law forces generous restrictions that come with the power of a country to assert jurisdiction in a dispute between its own residents and parties that do not live in that country. For the most part, a country has the authority to exercise jurisdiction if the dispute includes activity that took place within its territory or that has or is planned to include significant impact within its borders. Additionally, a country, by and large, has the authority to manage the conduct of non-resident foreigners either outside or inside its territory if the conduct influences the exercises and interests of its residents.

5. SOME INTERNATIONAL ORGANIZATION STANCE ON JURISDICTION TO ADJUDICATE DISPUTES IN CROSS-BORDER ELECTRONIC-COMMERCE

The structure of E-commerce has required global exertion in settling disputes emerging out of it patronizing. In the mission for proper jurisdiction determination for disputes resolution, the international organization is evidently the correct bodies to represent the global group in general. It is against this background that international bodies such as the ICC, OECD, WIPO, and WTO propounded mechanisms for the determination of jurisdiction to adjudicate cross-border E-commerce disputes.

5.1. The International Chamber of Commerce (ICC)

The ICC is a body mandated to regulate internationally conducted businesses. It offers dispute resolutions through the ICC international court of Arbitration. It is situated in Paris, France. This ICC court is recognized internationally, and made up of members from nearly 60 nations and each continent, in actuality the ICC is the most broadly represented disputes resolution foundation in the world. The ICC drove the path in drawing up a Global Business Action Plan for Electronic Commerce that has been submitted to OECD. This plan advocates the advancement of a carefully fit, rapid, and master situated instrument for settling the

dispute in E-commerce. Meanwhile, it proposes governments to empower the utilization of self-administrative disputes resolution mechanism as a viable method for resolving dispute, court, specifically ought to develop electronic expertise (Alboukrek (2003). With regard to jurisdiction, the plan perceives the legitimacy of alternative disputes resolution mechanism which is being produced by existing disputes resolution establishments and requires helpful endeavours by the legal profession at the global level.

5.2. The Organization for Economic Cooperation and Development (OECD)

The OECD has become somewhat dynamic in the field of electronic trade. It gives a forum to open or private dialogue and break down the deal to manage the technological realities of the world economy. In 1998, customer international (CI) required the use of rules drafted for buyer insurance with regards to E-commerce which incorporate consumer redress measures. Despite the fact that not official, they enable direct governments to furnish customers with essential security, to educate buyers and organizations about their rights and duties and encourage ADR systems (Swindells & Henderson 1998). They recognize a requirement for a mechanism to determine cross-border disputes and propose that the current international business bodies ought to be urged to take up this role.

5.3. World Trade Organization (WTO)

WTO became involved in the issue of E-commerce as late as 1998. On September 25th, 1998, members adopted the WTO assertion on international E-commerce with encouraging the general guidance to set up a far-reaching work program to analyze all business-related issues in international E-commerce. While the electronic world has certain difficulties with the current policy system, customary WTO principle of non-discrimination, straightforwardness and market transparency remain substantial for online business. The present structure just generally accommodates those types of internet business changing the international economy (Hauser & Wunsch 2001). Many endeavours have been committed to including them in the following round of trade transaction. As far as dispute resolution is concerned, the WTO has a new approach for settling disputes (Komuro1995).

For the most part, thought to be a noteworthy change on the previous WTO system, this mechanism came into being after the Uruguay round of negotiation and has been accepted by most member states. Imperatively, all E-commerce disputes emerging out of the WTO system might be submitted to this mechanism for resolution. The WTO disputes settlement understanding builds up a coordinated dispute settlement framework for all multilateral agreement under the umbrella of the WTO. The issue with this mechanism for E-commerce is its elite accessibility to member states. This mechanism is not the one to determine a private dispute unless, obviously, that dispute was upheld by a member state.

5.4. World Intellectual Property Organization (WIPO)

WIPO regulates the issue of intellectual property. Its association with E-commerce came about because of the way numerous disputes are emerging out of E-commerce which is firmly identified with the protection of intellectual property. Moreover, the WIPO

intervention and mediation focus have just been effective in carrying out a dispute resolution mechanism. Situated in Geneva Switzerland, the WIPO focus was set up in 1994 for the purpose of offering arbitration and mediation assistance for the determination of global E-commerce disputes between foreign parties.

The institution has since concentrated noteworthy resources on building up an operational and legitimate system for the organization of disputes identifying with E-commerce. Its part in helping the application service provider industry build up some rules and proper exercises for cross-border dispute evasion and settlement has additionally fortified the WIPO spearheading position in the quest for the best practice for dispute resolution in E-commerce.

WIPO additionally suggest that a dispute resolution provision is incorporated into their underlying contractual agreement of the parties, which could give the two parties a level of sureness with respect to dispute resolution. Dispute resolution can be directed ad hoc bases depending on the specific course of action of the parties or as per an arrangement of principles made accessible by an institutional dispute resolution provider.

6. RECOMMENDATIONS

The following are some recommendations to government officials, international organizations, legal experts and parties to cross-border E-commerce on how jurisdiction should be determined in the event of dispute adjudication. These recommendations if implemented will go a long way to reduce if not to eradicate the uncertainty that is associated with the determination of appropriate jurisdiction in an event of adjudicating cross-border E-commerce disputes.

6.1. Adoption of the Targeting Approach at the International Level

For organizations that take part in E-commerce, a unified adoption of the targeting approach which was propounded by the US would appropriately eliminate absurd legal suits since entrepreneurs would have the capacity to confine businesses to their targeted geographic zones. It is also worth noting that for typical internet clients, such a targeting on necessity would not permit claims within the forum state of the plaintiff when all that was accessed to him in the country was a website not intended to transact commercial activities within that country. Such outcomes will fulfil the strategies of parties' protection and business consolation, guarantee and promote advancements and development of E-commerce.

Arguably the targeting approach is a superior mechanism that can be utilized by the court while deciding jurisdiction in E-commerce dispute litigations. It places more noteworthy accentuation on distinguishing the goals of asserting or avoiding jurisdiction.

In adopting the targeting approach, the defendant must be proven to have conducted online business dealings in the state in which the suit is filed. This investigation tries to distinguish the party's mindset and to survey the means adopted to either assert or avoid jurisdiction. This, however, implies that a defendant particularly conducts its online dealings

in order to be subject to the jurisdiction of that country. This enables the courts to have a strong reasonable premise, thus, "intended or planned activity" which is deemed to handle advanced litigations and deliver reliable outcomes. Secondly, the defendant is expected to participate in commercial activities or different interaction in the state in which the suit is filed or the defendant must take part in dealings that made a reason for activity as to an individual in the state in which the suit is filed.

The targeting approach renders an exclusive legitimate sureness over asserting jurisdiction in E-commerce disputes and if adopted by all and sundry would give a unified system which could improve the global jurisdictional administration in cross-border E-commerce disputes.

6.2. Ratification and Modernization of international Conventions and National law respectively to suit international standard.

To blend the legal principles and increment of the likelihood of the requirement for the understanding of jurisdiction, nations signatory and sanctioning of The Hague Convention on the decision of court assertion would be helpful as it receives the neutral strategy approach. In this situation, nations can choose to exclude matters by means of an affirmation indicating the issue that it needed to be rejected or reclassified when ratifying or endorsing the convention.

The EU sets a decent case for looking into its existing jurisdictional standards in the light of a new international convention. The Brussels I Regulation by the EU viewed into details regarding its review expressly highlighted that decisions from choice of court conventions would apply in all situations where no less than one of the parties lives in the territory of the contracting state rather than an EU Member State, though Brussels I Regulation applies where no less than one party's lives in a Member State. The Green Paper on the survey of the Brussels I Regulation likewise incorporates debate on keeping up or removing the rule of *lis pendens* or presenting a recognized choice of court statement, as the choice of court convention excludes an immediate rule on *lis pendens*.

In my opinion, I recommend that the *lis pendens* rule ought to be excluded from the Brussels I Regulation, so it could be in accordance with international standard in the choice of court convention as it will fortify the legitimate assurance and proficiency of jurisdictional assertions. The standard decision of court clause will in the meantime speed up the choice on the jurisdictional inquiry by the court.

6.3. Choice of Jurisdictional Clause in an Electronic form should be included in the E-commerce Contracts

A decent global long-term business relationship is critical for the upkeep and further advancement of the matter of business enterprise. Shaping and keeping a progressing solid international business relationship requires relational correspondence and arrangement abilities more critically, requests polished methodology and the development in managing business disputes. A very much drafted business contract, as a rule, should incorporate an

exclusive choice of court provision and choice of law contract or an exclusive assertion condition. It expands consistency and avoids superfluous clashes in court prosecutions. With the development of information technology, such clash of court clause or agreement can be established on the internet. It challenges the legitimacy of the electronic exclusive clash of court assertion as it is difficult to demonstrate or ensure consensus between the contracting parties. Moreover, the legitimacy of the error in the electronic exclusive jurisdiction assertion's or decision of court agreement should be in accordance with the principles of errors in the electronic communication under "UN Convention on the use of Electronic Communications in International Contracts". Furthermore, the regulation of exclusive jurisdiction in electronic provision might be substantial, yet it should also be subject to a convention or formal practices of global trade parties.

6.4. Adoption of Online Disputes Resolution and Implementation of International Model Convention on Online Disputes Resolution.

For some little cases or internet-related disputes, it might be valuable for the parties to pick online arbitration, mediation or negotiation as it can give a more benevolent and proficient but less expensive than going to court. The process of Online Dispute Resolution (ODR) can be partially or fully done over the internet. For instance, the filing of the suit might be done through an online method and even submit evidence in an electronic form by the parties involved but decide to meet in person for negotiation, mediation or arbitration or the suit might be written but negotiated or mediated over the internet chosen ODR methods. The entire procedure of dispute settlement can be done online.

In practice, ODR mechanisms can be used to adjudicate litigations involving online commercial transactions and domain names. There should be confidence in the quality of disputes resolution in terms of expertise in adjudicating online related litigation by the parties choosing ODR in order to promote how the ODR is going to be used on the global level.

Cases involving domain names should adopt ODR procedures in disputes resolution since domain names are not on territorial bases, they are unique and global in nature which means only one organization has the right to the usage of a specific name and can be accessed globally.

As ODR is not just another legitimate idea yet, in addition, an imaginative innovation benefit, changing the conventional arbitration or mediation law itself will not be adequate to fit the direction of online dispute resolution in the international market. A careful global ODR legal structure on the technique-related requirement, the standard of reasonable methodology and service obligation issues would improve the legitimate sureness of the legitimacy and requirement of ODR agreement coming about because of procedures and encourage the advancement of ODR as far as its system and service.

A universal Model Convention on ODR could learn from the practical encounters of eBay and SquareTrade and Cybersettle, and additionally utilizing some particular law of some nations for references, for example, the China International Economic and Trade Arbitration Commission (CIETAC) Online Arbitration Rules and the "CIDIP VII Draft

Model Rules for Electronic Arbitration of cross-border consumer claims". Such global instruments will expand the legal sureness of settling the dispute on the internet and subsequently help the client's trust in forming cross-border electronic business contract.

7. CONCLUSION

It has been a marvellous event worldwide witnessing the predominance of E-commerce and seeing first hand its expansion and development across the globe. Taking note of the fact that it would be problematic to totally wipe out offline business, the reality is that online commercial business is the fate of business in this modern world. It is hence necessary for parties to commercial activities who are the clients of E-commerce goods and services to be urged to take an attitudinal change. This change would be with the prime goal that they can turn out to be more aligned with utilizing electronic goods and E-platforms.

Meanwhile, as there is a tremendous increment of internet users worldwide, buyers and sellers have gotten more familiarized and have found solace in working together online. Internet markets would, therefore, play a much more noted role in the economies of countries worldwide. Along these lines, the issue of jurisdiction in E-commerce contracts is of paramount significance in the activities of online sellers, customers, policy analysts, and government officials.

In any case, there is still no reasonable sign of the formation of a unique administration of jurisdictional rules for cross-border E-commerce dispute suits. I believe it is a procedure, which is time and money involving. Regardless of whether attempts were made to come out with a particular regulation or mechanism, it will still require a lot of time and effort to come into full enforcement. Possible in future, the new fast-growing electronic phenomenon would generate high methods that will indicate that current regulations are no more reasonable or applicable. A unique administration of jurisdictional guidelines for E-commerce will ultimately be presented on the grounds that conventional territorially based ideas of jurisdiction adequately were not sufficient to direct the determination of jurisdiction in the adjudication of cross-border E-commerce disputes.

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