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CONFLICT OF LAW AND CHOICE OF LAW IN DIGITAL ERA IN LIEU OF JURISDICTION

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ABSTRACT

Where the website is not merely passive but it is interactive permitting the browsers to not only access the contents thereof but also to subscribe to the services provide by the owners, then the position would be different. At the outset, the digital space is an extension of the physical space. The current Internet technology creates ambiguity for sovereign territory because network boundaries intersect and transcend national borders. Even then, the evolution of the cyber world's technological infrastructure is intertwined with sovereign jurisdiction because the relationship between technology and law is dynamic.

INTRODUCTION

"Traditional " rules of jurisdiction :- India follows what are today known in England as the "traditional" of jurisdiction. The rules have now become "traditional" in England because today England like most of Europe is largely governed by rules of jurisdiction laid down by the Convention on Jurisdiction and the Enforcement of judgment in Civil and Commercial matters (the Brussels Convention) which same into force in 1973, followed by various Accession Conventions by new members, U.K. having in 1978, followed by its amended version the Lugano Conventions of 1988.

(i)Jurisdiction in " personam " in "rem" :-Traditional Jurisdiction is of two kinds- jurisdiction 'in personam' and Jurisdiction ' in rem' Jurisdiction is " in personam" when the action is to compel a person to do or not do a particular thing, for determine the rights and interest to the parties among themselves and the for determining the rights and interest of the parties among themselves and the judgment is binding on the parties to the action e.g., an action to pay a debt, specification performance for

damages of breach of contract, an action for injunction in a tort case or for possession of tangible property.

(ii)Procedural character of personal Jurisdiction :- For historical reasons, the striking features of rule of Jurisdiction at common law in such matters is that it is purely procedural in character. The rule is simply that the person should be served with process. Service of process is the foundation of court's Jurisdiction. Process or writ or obtaining summons are now called " claim form" in England. In Special cases English courts exercise called even on a person outside their Jurisdiction provided he is served the process. Nationality is no bar for the exercise of the English Jurisdiction . A foreigner even in temporary stay in England can be brought under Jurisdiction through service of a writ.[1996]

(iii)Jurisdiction in rem – In Roman and later in English Common law is the power to decide a " jus in rem" a right, like ownership, available against all persons against, " the whole world " as traditionally expressed. Actions in rem are broadly of 3 kinds. Declaration of right or side to possession of property, Declaration of personal status. Action for declaration of right and recovery of property where the only type of real actions or actions in rem. This was later extended to movables and property of any kind: real or proposal. The judgment of the court itself constitutes good title against the entire world whatever deflect may have previously existed in the title to the property.[1997]

Rules of Jurisdiction in India

In *Vishwanathan* v. *Abdul Wajid*[1998] a case dealing with the distribute of a deceased person's assets situated on different pre-independence Indian States and Provinces , Vishwanathan being his eldest son and Abdul wajid (a retired Revenue Commissioner) the executor of his Will, various questions of private International

*LL.M, A.K.K. NEW LAW ACADEMY, PUNE

[1996] Available at http://www.cyberlawconsulting.com/cyber-case.html, visited (30th May, 2014)

[1997] Nandan Kamath, *Law Relating to Computers, Internet And E-Commerce,* Universal Law Pub. Co., Delhi, 2000, p. 18

[1998] AIR 1963 SC 1

Law including extra- territorial jurisdiction arose. Besides defining the examples what private International Law means and interpreting section 13 of Civil Procedure Code the rules of jurisdiction.

In India' were concisely enunciated by Justice J.C. Shah (afterwards (C.J.I) follows:-

(i) Jurisdiction in rem:- A foreign court has jurisdiction to deliver a judgment in rem which will be enforced in India provided the property movable immovable is within the foreign country,

(ii) Jurisdiction over immovable'- it is also settled that a foreign court has no jurisdiction to deliver an enforceable judgment in respect of title to immovable property situated outside its jurisdiction.

(iii)Jurisdiction in Personam:- there is no general rule of private international that a Court can in no event exercise jurisdiction in relation to personam, matters or properties outside jurisdiction. An action in personam lies normally where the Defendant is personally within jurisdiction or submits to the jurisdiction or through outside. Jurisdiction may be reached by an order of the court in an action for movable, the court has Jurisdiction where parties has submit to the Jurisdiction. A person who institutes a suit in a foreign court and claims a decree in personam cannot after the judgment is pronounced against him say that the court has no jurisdiction which is invoked. It was held that an order for transfer of shares of company registered outside Jurisdiction can be rendered effective by personal compliance since share certificates must be deemed to be with the Defendants within Jurisdiction.

iv) Personal Jurisdiction:- The implication of this important institute of private international Law again came up for consideration of the supreme court of *British India Steam Navigation Co. Ltd.* v. *Shanmughavilas Cashew Industries*[1999] where in the respondent purchased from east Africa raw Cashew nuts which were shipped in a vessel chartered by the Appellant company incorporated in England. Clause 3 of the bill of lading stipulated English law and English Jurisdiction or the option of the

[1999] (1990) 3 SSC 481

carrier at the port of destination according to English law to the exclusion of Jurisdiction of courts of any other country. The supply delivered at cochin was found short and the Respondent sued the appellant of the court of subordinate judge, cochin. The suit and appeal to High court were both dismissed for want of jurisdiction of the court at cochin allowing the appeal the appeal and remanding the case of the trial court of disposal, the supreme court held that for the purpose of Jurisdiction the action of respondent 1 is an action in personam in private International Law. An action is personam is an action brought against a person to compel him to do a particular thing. The old classic Indian case on international Jurisdiction was *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*[2000] Where in the privy council had decided that no territorial legislation can give Jurisdiction in a personal action which any foreign court should recognize against absent foreigners owing no allegiance or obedience to the power which so legislates. The Raja had obtained from the court of Faridkote Court's Jurisdiction. Privy Council dismissed the Raja Suit holding that a personal action a decree passed "in absentem" by a foreign court to the Jurisdiction of which the Defendant had never submitted is by international law an absolute nullity.

(v) Choice of Jurisdiction by agreement :--- In *In ABC Laminaret Pvt. Ltd. Agencies* v. *Salem*[2001] for the purpose of interpreting an agreement excluding the jurisdiction of a court, in the light of sections 28 & 23 of the contract Act, 1872, thought the matter did not involve any foreign element relied on the settled principles of the Conflict of Laws/Private International Law regarding factors for the determination of suits of contract and held that, an agreement which purpose to oust the Jurisdiction of the court absolutely is contrary to public policy and hence void.

Transnational Disclosures

The features of modem commerce present huge opportunities for legitimate and illegitimate business. Fraud and corruption know frontiers. International fraud is a

[2000] 1894 AC 670
[2001] (1989) 2 SSC 163

growth business, claims sir peter Millet and the law reports would bear it out[2002]. Some notorious are:--

In *Grupo Torras* v. *Fahad Et Al*[2003] the Kuwait Investment Authority 1 claimed that it's Spanish Investment Company was defrauded of millions of pounds though a conspiracy of senior officers and that the proceeds were siphoned through a web panamian and other off shore companies with accounts in Switzerland and the channel islands.

In *Arab Monetary Fund* v. *Hashim*[2004] , the AMF pursued a claim off similar dimensions against its former Managing Director Dr. Hashim for alleged corruption on a grand scale.[2005]

In *Republic of Haiti* v. *Duvalier*[2006] even more sensational attempts were made by the new government of the Republic of Haiti to recover assets allegedly looted by "Baby Doc" Duvalier. In *Sumitomo Bank Ltd.* v. *Kaiika Ratna Tahir*[2007] the fraud was by corrupt government officials. *ISC Technologies Ltd.* v. *Guerin*[2008] by the Directors of public companies the annals of fraud was committed.

In any case having foreign complexion or nonfactual implications, the Court seized of it, after deciding whether it will entertain the case at all (i.e. Choice of Jurisdiction) has to thereafter decide under "which law" the dispute ought to be decided. This decision is called "Choice of law". Any number of issue may arise in one case and each may be governed by a rule taken from a different law. Conflict of laws arises when at least one issues shows features or involves factors connecting it with more than one system of law, in other words, when it has several points of contract. Hence choice of law means choice of that "connecting factors" or "point of contract" which matters the most or is the most relevant.

[2002] Campbell McLachian, *The Jurisdiction Limits of Disclosure orders in Transnational Fraud, Litigation*, (1989) 47 ICLQ 3
[2003] (1996) 1 Lioyd's Rep 7 (CA).
[2004] (1991) 2 AC 114
[2005] Campbell McLachian, *Transnational Disclosure Orders*, (1998) 47ICLQ 6
[2006] (1990) 1 QB 202
[2007] (1993) 1 SLR 735
[2008] (1992) 2 Lloyd's Rep 430

Extra Territorial Operation of Indian Law

In 1689, the Dutch Jurist Ulrich Huber (1636-1694) wrote the shortest treatise ever written on the conflict of laws known as "De Conflictu Legum" Which However influenced English and American law more than any other foreign jurist. Here he laid down 3 rules to solve the difficulty of this particularly intricate subject.

Rule of territorial law. --- Laws shall operate within the territorial limits of the respective State and bind those who are subject to it.

Subject of the State all persons living permanently or temporarily within its limits. Comity between Sovereigns shall be observed in the rights acquired within the limits of the state retain there force everywhere. The Doctrine of Territorial operation is balanced by the Doctrine of comity which explains why laws still have extra-territorial operation.[2009]

Huber's approach can be seen to have been adopted by A.V. Dicey in (English) Conflict of laws and in the American law institute's restatement. In India the constitution, Article 245(2), Extent of laws made by parliament and by the state legislatures lays down,

(i) That Parliament may make laws for the whole or any parts of the territory of India and the legislature of a state may make laws of the whole or any part of state.

(ii) No law made by Parliament shall to be deemed to be invalid on the ground that it would have extra-territorial operation.

Article 245 lays down the principal of territoriality and Parliaments to transcend it. Article 245(1) actually enacts the Doctrine of Territoriality of laws, from private international Laws. Article 245(2) notwithstanding the rule, providers an exception thereto in case of Parliament signifying that a municipal court cannot refuse to give effect to a law made by parliament because it has extra operation.[2010] It was held by

[2009] David Me Clean, Morris, *The Conflict of laws*, London, Sweets & Maxwell Ltd., 5th Ed., 2000, p.533

[2010] H.M. seervai, *Constitution Law of India*, Bombay, New Delhi, Universal Law Publishing Co. Pvt. Ltd, 3rd End., 1986, Vol. I, p. 1893

the erstwhile Federal court of India that legislation may offend the rule of International law, may not be recognized by foreign courts or there may be practical difficulties in enforcing them, but these are question of policy with which domestic tribunals are not concerned.[2011]

Primarily all laws are territorial in their operation. The question has arisen whether tax laws can operate of income derived from India by corporation or bodies residing outside India. The theory of territorial nexus was applied by the Federal Court.[2012]

The privy Council too held that the principal of sufficient territorial connection not rule of residence giving effect to that principal is implicit in the power conferred by Government of India Act, 1935.[2013]

The privy council held that derivation from British India of the major part of its income for a year, gave to a company sufficient territorial connection to justify its being treated as at home in British India for all: purposed of tax on its income for that year from whatever source that income may be derived. A company which a in substance lives on a country may: rationally be treated as living in it.

Although in the inter-State (Not international) context, the principle of territorial nexus was treated as well established and it was held that there was sufficient territorial nexus between the respondents who conducted the prize competition from Mysore and the state from which competitors sent entries accompanied by entry fees which fees were taxed by the State.

The principal of territorial nexus was held to be applicable not only to income-tax but also to sales tax legislation.[2014] It was held applicable to religious endowments.[2015]

The Doctrine of territoriality of operations of law and the exception thereto in Articles 245(1) and (2) respectively of the constitution came up the consideration before the Supreme Court in *Electronic Corporation of India Limited* v. *Commissioner of*

[2011] *A.H. Wadia* v. *C.I.T., Bombay*, AIR 1949 FC 18
[2012] *Governor-General* v. *Raleigh Investment co.*, (1944) FCR 229
[2013] *Wallace Brothers* v. *C.I.T, Bombay*, (1948) FCR 1
[2014] *Tata Iron Steel Co. Ltd.* v. *Bihar* , AIR 1958 SC 452
[2015] *Bihar* v. *Chaxusila Dasi*, AIR 1959 SC 1002

Income Tax[2016] regarding Income-tax act, 1961, section 9(1)(vii)(b) dealing with income deemed to accrue of arise of India . The Extra-territorial operation of the provision and its and its Constitutionality were in issue. The facts were that services rendered by foreign company in the nature of training abroad to personal of India company and payment to the foreign company also affected abroad under agreement. It was held that parliament was competent to enact a law having extra territorial operation provided the object it seeks to sub-serve has nexus with anything done in India. The further question was whether the provision indicates such a nexus. On the facts of the case question was referred to a constitution Bench of the court having regard to its substantial importance as dealing with international Trade and International Law.

After considering the constitution of India, Article 245, extra –territorial operation of Law, Constitutionality, scope of its enforceability and private International Law, It was held by the court that:-

Now it is perfectly clearly that it is envisaged under our constitutional scheme that parliament in India may make laws which operate extra-territorially. Article 245 (1) of the constitution prescribes the extent of laws made by parliament. They may be made for the whole or any part of the territory of India Article 245 (2) Declares that no law made by the parliament shall be deemed to be invalid on the ground that it would have extraterritorial operation. Therefore, a parliamentary statute having extraterritorial operation cannot be ruled out from contemplation. The operation of law can extent to person , things and acts outside the territory of India. The general principle flowing from the sovereignty states, is that jaws made by one state can have no operation in another state. The apparent opposition between the two position is reconciled by the statement found in *British Columbia Eclectic Railway Company Limited* v. *king*[2017] "A legislature which passes a law having extra territorial operation may find that what it has enacted cannot be directly enforce, but the Act is Not invalid on that account, and the courts of its country must enforce the law with the Machinery available to them.

[2016] 1989 Sup. (2) SSC 642
[2017] (1946) 2 AC 527

In other words , while the enforcement of the law cannot be contemplated in a foreign state , it can , nonetheless, be enforced by the court of the enacting state to the degree that is permissible with the machinery available to them. They will not be regarded by such courts an invalid on the ground of such extra-territoriality. But the Question is whether a nexus with something in India is necessary. It seems to us that unless such nexus exists Parliament will have no Competence to make the law. It will be noted that Article 245(1) empowers parliament to enact law For the whole or any part of the territory of India. The provocation for the law must be found within India itself. Such a law may have extra territorial operation in order to sub-serve the object, and that object must be related to something in India. It is inconceivable that a law should be made by the parliament in India which has no relationship with anything in India. The only question is then whether the ingredients in terms of the impugned provision indicate a nexus. The question is one of the substantial importance, especially as the concerns collaboration agreement with foreign companies and other such agreements for the better development of industry and commerce in India. In view of the great public importance of the question, we think it desirable to refer this case to a constitution Bench, and we do so order.[2018]

Limitation in Conflict Cases

The question as to Whether foreign law of limitation is to be applied in India in case having foreign elements i.e. ,a private international law or a conflict case came up for decision in connection with section 11 of the (old) Indian limitation act, 1908.[2019] It was settled that so much of the law as affects the remedy and the procedure only is governed by the law of country in which the action is brought and not by foreign law. The court will not apply a foreign law of limitation which affects the remedy only and is therefore a matter of mere procedure. The foreign law of limitation will be applied where it extinguished the right or creates the title so that it causes to be a matter of mere procedure. Section11, limitation Act is plain recognition of this principle.

[2018] 1988 sup.(2) SCC 642

[2019] Dr. Ashok soni, *Digest of Cases on Law of Limitation* , universal aw Publishing Co. Pvt. Ltd. 2002 Ed.,p. 28

Though the proper law of contract determines most latter relating to the formation, validity and substance of the contract by virtue of section 11 of the limitation act, no foreign law of limitation is a defense to suit in India unless that laws has extinguished the contract and the parties were domiciled in such country during the prescribe period. Section 11 of the limitation act is however, not exhaustive; *R.A. Dickie and Co. (Agencies) Ltd.*v. *Municipal Board.*[2020]

The question whether a suit in this country on a foreign case of action would be within time or not has got to be decide by computing time from the date when the case of action arose under the contract and not from the date of last acknowledgement of liability; *Ramanathan Chettiar* v. *K.M.O.L.M. Ram Chettiar.*[2021]

Choice of Law- its Development

The US Restatement of conflict of laws, first in 1934, created a series of simple, mechanical rules for choosing what law to apply in inter-jurisdictional litigation. The substance of the claim – whether the case was based in tort, contract, or property – determined the applicable rule. In tort cases, the first Restatement applied a simple choice-of-law rule – lex loci delicti, or "the law of the place of the wrong". Under this rule, a reviewing court would apply the place "where the last event necessary to make any actor liable for an alleged tort takes place". For contracts, the first restatement applied a similarly formal rule. The law of the place where the contractor was made would govern the validity of a contract. The place of making was defined as the place where the "principle event necessary to make contract" had occurred.[2022] Under the first restatement, real properly was governed by the lex situs- the law of its physical location. These rules were modified by the second restatement, in 1971 whereby a rule was laid down, namely that "when faced with a choice between jurisdictions, courts should apply the law of the jurisdictions with the most significant relationship to the

[2020] AIR 1956 CAL 216
[2021] AIR 1964 MAD 527
[2022] Available at;http://informingscience.org/proceedings/IS2003Proceedings/docs/029Glads.pdf

litigation".[2023] This approach provide much less guidance to a court than the formal first Restatement model.[2024] To assist court in weighing the importance of contacts between various jurisdictions and the dispute , the restatement provided seven criteria.[2025] (i) the needs of the interstate and the international system,(ii) the relevant policies of the forum ,(iii) the relevant policies of the interested states,(iv) the protection of justified expectations,(v) the basis policies underlying the particular field of law,(vi) certainty and uniformity of result, and (vii) ease in determining and applying the law. A number of other approaches have also been suggested. One of these is "interest Analysis", certain of conflicts-scholar Brainerd Currie. Carriage argued that courts should choose what law to apply by looking at the legislative purposes behind each state's law. First, the reviewing court should identify false conflicts. If the choice of one state's law would advance the policy interests of that state without impairing the policy interests of the state whose law is not chosen, a false conflict exist, and the court should apply the law of interested state.[2026]

If the law courts do not permit technology development in the court proceeding, it would be lagging behind compared to other sectors. Technology is identify a tool.[2027]

The UNCITRIAM Model law was is only taken into account in drafting of the Arbitration and Conciliations Act, 1996 is patent from the statement of objects and reason of the act. The act and the model law are not identically drafted. The model and the judgment and the literature thereon, not a guide to the interpretation of the act.[2028]

CONCLUSION

A second Procedural issue with significant implication of substantive law to cyber-acts is the questions of conflicts of law. Different geographic sovereigns commonly have different policy preference, which are implemented through law. Typically, each

[2023] Available at http://www.virtualpune.com/citizen-centre/html/cyber_crime_glossary.shtml
[2024] Ian Walden, *Crime and Security in Cyberspace*, Cambridge Review of International Affairs, Volume 18, Issue 1 April 2005, p. 68
[2025] Grace v. *MacArthur*, 170F Supp. 442 447 (E.D. Ark 1959).
[2026] Available at;http://informingscience.org/proceedings/IS2003Proceedings/docs/029 Glads.pdf
[2027] *Amitabh Bagchi* v. *Ena Bagchi*, AIR 2005 cal11
[2028] *konkan Railway Corporation Ltd.* v. *Ram Construction (p.) ltd* (2002) 2 SSC 368

sovereign wants its law to govern disputes involving its citizens or territory. However, internet activity commonly involves persons and computer networks located in many territories , whose laws may be contradictory. Although the internet is recent phenomenon, transnational interaction is not, and courts over several decades have developed the doctrine of conflicts of law to resolve the question of which jurisdiction's law shall apply. Traditionally, US. Courts decided conflicts of law through deference to the principle of lex loci delicti, Modern courts and scholars have developed several other principles for the resolution of conflicts of law, including the "most significant relationship" test the "center of approach, and the "interest" approach. None of these tests has been universally accepted. In an attempt to minimize the inevitable conflict of law arising from 'direct penetration', efforts have been made at an intergovernmental level to address extra territorial searches under public international law.[2029] In a council of legalizing such activities in certain circumstances and under certain conditions, giving the following examples:

(i) that it would be used only for the taking of measures destined to preserve the status quo, that is, so the data cannot be tampered with;

(ii) That the data would not be used unless the involved state gives its consents;

(iii)That the nature or seriousness of the offence justifies the penetration;

(iv) That there is a strong presumption that the time needed to the resorting to a traditional procedure of letters regulatory would compare would compromise the search of truth;

(v) That the investigating authorities inform the authorities of the other state.[2030]

The first significant movement in the area was within the G8 forum. At a meeting of justice and interior ministers in Moscow in Oct. 1999, a document entitled 'principles on Trans- border access to stored computer data was adopted.[2031] As well as calling upon states to enable the repaid preservation of data expedited mutual legal assistance

[2029] Available at http://www.virtualpune.com/citizen-centre/html/cyber_crime_glossary.shtml
[2030] Available at;http://informingscience.org/proceedings/IS2003Proceedings/docs/029 Glads.pdf
[2031] Graham J H Smith, *Internet Law And Regulation*, (3rd ed. 2002), Sweet and Maxwell, London p.84

procedures, there was also agreement that access could be archived without authorization from another state for the purpose of:

(i) Accessing publicly available (open source) data, regardless of where the data is located geographically;

(ii) Accessing, searching, copying, or seizing data stored in a computer system located in another state, if acting in accordance with the lawful and voluntary consent of a person who has the lawful authority to describe to it that data.[2032]

[2032] Ibid.