

**TELECOM DISPUTES SETTLEMENT & APPELLATE TRIBUNAL
NEW DELHI**

Dated 23rd August, 2010

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Petition No.221(C) of 2010

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Kumarina Investment Ltd.

...Petitioner

Vs.

Digital Media Convergence Ltd. & Anr.

...Respondents

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BEFORE:

HON'BLE MR. JUSTICE S.B.SINHA, CHAIRPERSON

HON'BLE MR. G. D. GAIHA, MEMBER

HON'BLE MR.P.K. RASTOGI, MEMBER

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For Petitioner

: Mr. C.S. Vaidyanathan, Sr. Advocate
Mr. Manjul Bajpai, Advocate
Mr. Ashish Yadav, Advocate

For Respondents

: Mr. Maninder Singh, Sr. Advocate

Mrs. Prathiba M. Singh, Advocate
Ms. Nitya Thakur, Advocate
Mr. Arjun Natrajan, Advocate

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J U D G E M E N T

S. B. Sinha

Introduction:

An interesting question involving ‘choice of law’ and ‘choice of forum’ choosing the English law of contract and London courts as the forum, under a contract entered into by and between the parties hereto, although the petitioner carries its activities in Israel and respondents in India, arises for consideration in the petition.

Backdrop Facts:

The first petitioner is a company registered in Cyprus. The second petitioner is registered in Nicosia. The first respondent is a content aggregator. The first petitioner and the 1st respondent entered into an agreement on or about 4th April, 2007, in terms whereof non-exclusive rights to stream licensed content was granted to the latter via the internet on its website and on other terms and conditions contained therein.

The said agreement came into force w.e.f. 4th April, 2007; pursuant whereto, nine different channels of Zee TV transmitted from India were to be re-transmitted by the petitioners from their Israel headend throughout the world except India.

An 'Addenda' to the said agreement was executed; pursuant whereto and in furtherance whereof, six more channels of the said broadcasters were added for retransmission on and from 15th October, 2009. Indisputably, those signals were meant especially for the Indian audience residing/travelling abroad.

This petition has been filed *inter alia* on the premise that on or about 29.6.2010, transmission of Zee Punjabi Channel was disconnected by the respondent No. 1 without notice. On or about 8.7.2010, transmission of three more channels namely Zee TV, Zee Marathi and Zee News were also disconnected by the said respondent again without any notice.

The petitioners herein have *inter alia* prayed for a direction upon the respondents to restore/re-connect the said signals.

The petitioners herein admittedly have been paying the due amount of royalty. Disconnection of Zee Punjabi channel, however, was effected by the 1st respondent on or about 29.06.2010 whereupon the petitioner by an e-mail communication dated 30th June, 2010 asked the reasons therefor. On or about 30.6.2010 the respondent sent an e-mail stating that the problem with respect to transmission of Zee Punjabi Channel has been rectified.

However, on 1st July, when again the said channel went out of air, the petitioners were informed that the Dish TV had issued instructions to deactivate the said channel, stating :-

“Dish TV has issued instructions to deactivate the Zee Punjabi VC provided to you as they detected the channel being streamed on jadoo TV platform through it.

Dish TV needs to be convinced that there will be no leakage of feed to illegal content providers before they approve re-activation of the VC.”

The petitioners sent the following e-mail to the respondent No. 1 on the said date, contending :-

“I was very surprised to get your mail.

We don't know who is jadoo and don't have anything to do with them.

In fact, it is us who have been notifying you in the past many times about pirates sites like idesi TV and others which are constantly stealing Zee feeds and making them available online hurting our ability to make legitimate business.

Let me rest assure you that these steals are not taken from us in any way : Our system use a stream security authentication system that generates 160 bit one time keys. This one time key can only be issued to paying subscribers. The secure authentication key has a Time-To-Live of 5 seconds, meaning it cannot be transferred from one computer to another. We stream through a world know top tier CDN which guarantees security and content protection as their expertise.

We request you will restore our feed immediately and handle this matter for once and for all. Hurting us is the most unreasonable way to handle this and we ask you go back from doing that.”

The petitioners in turn were asked to look at the snap shots provided by Dish TV provided to it.

The petitioner by an e-mail dated 7.7.2010, stated:-

“Jadoo – we have learned the activity and we now realize this is a box produced by a company called Verissimo which Ceo info is available with us. They had contracted with these Jadoo guys which are marketing the service which is basically allowing pirate feeds of various channels some of them with us and some are not. In the case of Zee Punjabi, we suspect they had opened an account with us and hacked the one time key time out mechanism. We believe we are able to block them but need your co-operation to re-activate the card and check whether this is resolved. In addition we had sent DMCA notes to Jadoo, Verisimo and the relevant subscriber ISP to ensure they stop this illegal activity. We have all info of that subscriber including credit cards and other personal info which can help us bring him to justice. We ask you to submit DMCA notes to these to ensure they don't try again.”

While the communications were going on, the other three channels being Zee TV, Zee Marathi and Zee News were also disconnected. The petitioner by an Email dated 8.7.2010 informed the respondent about the said disconnection and furthermore stated that many customers had started asking for refund of money from them.

Preliminary Issues:

On 19th July, 2010 a prayer was made by the learned counsel appearing on behalf of the petitioner for grant of an interim injunction in mandatory form, whereupon liberty was granted to the respondents to file a short reply. Pursuant to the liberty so granted, a short reply has been filed wherein, inter alia, the following contentions have been raised :-

1. The petitioner is guilty of piracy in so far as it had been re-transmitting the signals of the respondents through Jadoo TV Platform and Karishma TV Platform
2. The petitioner has failed and/or neglected to protect the interests of the respondent in so far as it had not prevented the misuse and/or illegal transmissions of the signals of their channels; and
3. This Tribunal has no jurisdiction to determine the dispute between the parties.

Submissions:

Mr. C. S. Vaidyanathan, the learned Senior Counsel appearing on behalf of the petitioners would contend:-

1. The petitioners were concerned with the illegal transmissions of signals of the respondents through the said Jadoo TV and Karishma TV Platforms. Petitioners did not even know who the Jadoo TV was, and thus, it cannot be said to have committed any breach of contract warranting disconnection of signals of their channels by the respondents;
2. From the averments made in the petition as also various documents filed by the petitioners, it would be evident that they had taken all possible steps to stop illegal transmission of signals of the respondent's channels.
3. Keeping in view the fact that such disconnection of signals of the channels was effected without any notice and without giving any opportunity of hearing to the petitioner, the impugned action on the part of the

respondents must be held to be illegal.

4. The agreement having been entered in India, payments were to be made in India, the respondent No. 1 was required to uplink its signals from India; the respondents being the residents of India and the breach of contract having taken place in India, a suit was maintainable in the Indian Courts and the jurisdiction of the Civil Court being barred under Section 15 of the Telecom Regulatory Authority of India Act 1997 (The said Act); this Tribunal has the exclusive jurisdiction to determine the dispute between the parties in terms of Section 14 thereof.
5. The parties hereto being 'service providers' within the meaning of the provisions of the said Act as also the Telecommunications (Broadcasting and Cable Services) Regulations, 2004 (The Regulations), this Tribunal alone has jurisdiction to determine the disputes between the parties.
6. The impugned act of disconnection of the signals of some of the channels of the respondent having been illegally effected, the petitioner has made out a case for grant of injunction in mandatory form.

Mr. Maninder Singh, the learned senior counsel appearing on behalf of the respondents, on the other hand, urged :-

- (a) The petitioner being not a service provider within the meaning of the provisions of the said Act; this Tribunal has no jurisdiction to entertain the petition.
- (b) The petitioner being not a licensee within the meaning of the provisions of the Indian Telegraph Act, 1885 and the said Act, this Tribunal has no jurisdiction to determine the disputes between the parties.

- (c) The parties having chosen its own forum in terms whereof the English Courts alone have jurisdiction, this Tribunal must refrain itself from exercising its jurisdiction.
- (d) Parties hereto having arrived at a consensus that English Law will govern the contract entered into by and between them and the London courts will have jurisdiction in respect thereof, the Indian courts have no jurisdiction to determine the issues between the parties.
- (e) The Regulations framed by the Telecom Regulatory Authority of India (TRAI) will have no application in the instant case as supply of signals was to be effected on a non-exclusive basis.
- (f) The respondents having been receiving signals only at Israel, this Tribunal cannot enter into the question as to how and in what manner the said signals were being re-transmitted.
- (g) In any event, the petitioners herein having not made any averment whatsoever in this petition that they are service providers or their rights and obligations are governed by the Interconnection Regulations framed by the TRAI, the questions of applicability of the “must provide” clause contained in 3.2 thereof and/or requirements of service of notice as contained in Clauses 4.1 and 4.3 would not arise.
- (h) If the said Act and the Regulations framed thereunder, having regard to the scheme thereof, have no application, this Tribunal cannot be said to have any jurisdiction in relation thereto.

Question:

The principal questions which arise for consideration in this petition are:-

1. Whether this Tribunal has any jurisdiction to entertain this petition, and;
2. Whether the petitioner has made out a case for grant of an order of injunction in mandatory form?

The Agreement:

Before, however, we advert to the rival contentions of the parties, we may notice the relevant clauses of the contract.

Clause 2.1 provides for the terms and conditions set forth therein specifying the respective obligations on the part of the licensor and the licensee.

Clause 2.8 provides for an undertaking to be furnished by the licensees in the following terms:-

“The Licensee undertakes to enter into an electronic agreement with each of the Subscribers, which shall include, among other things, a provision upon which the Subscribers shall use the Downloadable Content for non-commercial purpose only. The Downloadable Content shall also be protected under Licensee’s DRM software and policy. The Licensee further agrees and undertakes that every subscriber/user will agree for the terms and conditions of the said electronic agreement and the DRM of the Licensee’s software will allow Licensee’s subscribers to download and store the audio and video of the Licensed Downloadable content on their hard discs but will not permit any copies of the same.”

The matter relating to payment of royalty is governed by clause 3.1. Clause 3.1.5 provides for minimum guarantee.

Clause 6 provides for the 'Term and Termination' of the contract, sub clause (1) whereof provides that the license would be for a period of three years. We may notice clause 6.2 which read as under:

“Either Party may terminate this Agreement by providing the other Party with a 30 days prior written notice in case of a material breach of any of the terms or conditions of this Agreement, provided, however, that such a breach remains uncured during the aforesaid 30 days period.”

Clause 9.6, which is material for our purpose, provides for 'Dispute resolution, Governing Law and Jurisdiction' in the following terms:-

“Any controversy, dispute or claim arising out of or in connection with this Agreement or the breach thereof, shall be first brought before the Chief Executive Officers of the Parties, which shall use their best endeavors to resolve such controversy, dispute or claim by means of direct negotiations in good faith within forty five (45) days from the date such controversy, dispute or claim was referred to them.

If the Chief Executive Officers of the Parties fail to resolve such controversy, dispute or claim by means of direct negotiations in good faith within such forty five (45) day period, any such controversy, dispute or claim shall be construed in accordance with the substantive laws (and not the laws of conflicts) of England and any such controversy, dispute or claim shall be brought before and exclusively settled by the competent court of London.”

As noticed hereinbefore, an 'Addendum' to the agreement was executed and made effective from 15th July, 2009 whereby and whereunder the license period was extended from 5th July 2009 to 14th July 2012, unless terminated earlier.

The Statutory Provisions:

The Parliament enacted 'the said Act' inter alia for establishment of this Tribunal.

The Act extends to the whole of India.

Ordinarily the Parliament of India, subject of course to the provisions of the Constitution of India and/or the international law, can make a law which apply beyond the territory of India. But the Telegraph Act, 1885 as also 'the said Act' extend only to the territory of India and not beyond the same.

Prima facie, thus, the said act does not provide for its application beyond the territory of India.

Interpretation section contained in various sub-sections of Section 2 of 'the said Act', ex facie, does not indicate that the provisions thereof are applicable to any contract, a part of which arises within the territory of India and part outside it.

It is true that for the purpose of transmission of signals of the channels of the broadcasters, the provisions of the Indian Telegraph Act so far as the same relate to grant of license is concerned will have application, and in terms thereof any broadcaster will be a service provider, of course for a limited purpose, in so far as permission granted to it by the Central Government, which would include the Ministry of Information & Broadcasting.

The question as to whether the petitioner comes within the purview of the definition of 'Broadcasters' is in controversy. It is also in controversy as to whether the respondents are bound by the terms of the 'Regulations' as also the provisions of 'the said Act'. So far as 'Broadcasting and Cable Services Regulations' are concerned, a person carrying on business of re-

transmission of signals would be a service provider for the said purpose. It is not necessary to obtain any license under the Indian Telegraph Act 1885. It has been so held by this Tribunal in Star (India) Pvt. Ltd. Vs. BSNL (Petition No.172 of 2009) disposed of on 22.01.2010.

Section 11 of the Act confers powers and functions on the TRAI. Its powers and functions including the ones relating to issue of directions and/or to make regulations indicate that the same would have no application outside the territory of India.

Section 14 and 14A providing for Constitution of this Tribunal and its jurisdiction, read as under :-

“14. Establishment of Appellate Tribunal.—The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to—

- (a) adjudicate any dispute—
 - (i) between a licensor and a licensee;
 - (ii) between two or more service providers;
 - (iii) between a service provider and a group of consumers;

14A. Application for settlement of disputes and appeals to Appellate Tribunal.—(1) The Central Government or a State Government or a local authority or any person may make an application to the Appellate Tribunal for adjudication of any dispute referred to in clause (a) of section 14.

(2) The Central Government or a State Government or a local authority or any person aggrieved by any direction, decision or order made by the Authority may prefer an appeal to the Appellate Tribunal.”

Submission of Mr.Vaidyanathan, however, is that sub-section (1) of Section 14(A) expands the jurisdiction of this Tribunal. This may be so, but we do not feel it necessary to delve deep into the said contention in this case as such a question has not been raised before us. In any event, having regard to the provisions contained in ‘the said Act’ in so far as the same relates to the ‘Broadcasting and Telecommunications Services’ rendered by the ‘Broadcasters’ and/or ‘Service Providers’ are concerned, nothing has been shown before us that the restrictions contained therein would apply to the contracts which are governed by the English law and/or wherefor London Courts alone would have exclusive jurisdiction.

Section 15 of the Act bars the jurisdiction of the Civil Court.

Keeping in view the aforementioned provisions of the said Act in mind, we may notice the Regulations made by the TRAI.

Section 11 (1) (b) of the Act empowers the TRAI to make ‘Regulations’ providing *inter alia* for the mode and manner in which interconnection between two service providers are to be governed. In exercise of the said power as also Section 36 of the Act, the TRAI made regulations known as the Telecommunication (Broadcasting and Cable Services) Interconnection Regulations, 2004, clause 1(ii) whereof reads thus:

“1. Short title, extent and commencement:-

(i)

(ii) This regulation shall cover arrangements among service providers for interconnection and revenue share, for all Telecommunication (Broadcasting and Cable) Services throughout the territory of India.”

A bare perusal of the aforementioned provision clearly shows that it provides for:

- (i) an 'Arrangement' between the parties and ;
- (ii) Such arrangements are to be amongst the service providers for interconnection and revenue share throughout the territory of India. If that is so, by necessary implication any arrangement providing for interconnection and revenue share outside the territory of India stands excluded.

The definitions of the terminologies used therein, inter alia, the “addressable system”, “broadcasting services”, “distributor”, “multi-service operator”, “service provider” do not even indirectly suggest that any of the aforementioned entities who may reside outside the jurisdiction of the Indian courts can take benefit thereof and/or against whom the contractual obligations can be enforced only in Indian courts.

We, in that view of the matter, may also notice the “must provide” clause contained in Clause 3.2 as also the ones providing for giving of notices being clauses 4.1 and 4.3 of the Regulations:-

“3.2 Every broadcaster shall provide on request signals of its TV channels on non-discriminatory terms to all distributors of TV channels, which may include, but be not limited to a cable operator, direct to home operator, multi system operator, head ends in the sky operator; multi system operators shall also on request re-transmit signals received from a broadcaster, on a non-discriminatory basis to cable operators.

Provided that this provision shall not apply in the case of a distributor of TV channels having defaulted in payment.

Provided further that any imposition of terms which are unreasonable shall be deemed to constitute a denial of request.

4.2 No distributor of TV channels shall disconnect the re-transmission of any TV channel without giving three weeks notice to the broadcaster or multi system operator clearly giving the reasons for the proposed action.

4.3 A broadcaster/ multi system operator/ distributor of TV channels shall inform the consumers about such dispute to enable them to protect their interests. Accordingly, the notice to disconnect signals shall also be given in two local newspapers out of which at least one notice shall be given in local language in a newspaper which is published in the local language, in case the distributor of TV channels is operating in one district and in two national newspapers in case the distributor of TV channels is providing services in more than one district. The period of three weeks mentioned in sub-clauses 4.1 and 4.2 of this regulation shall start from the date of publication of the notice in the newspapers or the date of service of the notice on the service provider, whichever is later.”

Interpretation of Statutory Provisions:

From a perusal of the Act as also the Regulations made thereunder, it is evident that the provisions thereof relate to those transactions and/or arrangement, which are connected with interconnections of different service providers where area of operation must be within the territory of India. The scheme of the Act as also the Regulations in our opinion, having regard to the interest of consumers and the public interest contemplated thereby must be taken into consideration in the context of Indian scenario and not in an international scenario.

It is one thing to say that notice is required to be served in terms of the provisions of a statute before a contract can be terminated but it is another thing to say that the parties themselves have provided for the same by way of a contractual obligation.

In the latter category of cases, as we have held recently in *Viacom 18 Media Private Ltd. Vs. MSM Discovery Pvt. Ltd.* and *Viacom 18 Media Private Ltd. Vs. Star India* [Petition No.220(C) of 2010] disposed of on 27th July, 2010 that no injunction can be granted.

Had the petitioners been entitled to approach this Tribunal in terms of clause 3.2 of the Regulations on the relevant date (which we think it could not have) they would have been entitled to any notice in terms of clauses 4.1 or 4.3 is the question. We are, thus, of the opinion that they were not entitled to such a notice.

We say so as we are firmly of the opinion that the provisions creating rights and obligations between the parties must be interpreted and applied keeping in view the scheme and purport thereof. Whereas clause 4.1 has been inserted for the benefit of a party to the contract, clause 4.3 has been made for the benefit of the public.

Clause 4.3 provides for publication of notice in two local newspapers; one of them in a regional language. It is wholly inconceivable that in respect of disconnection of supply of signal of a service provider (even if the same terminology is held to be applicable to the petitioners being residents of foreign countries) the petitioners would be entitled to the benefits thereof as it is preposterous to think that a 'Broadcaster' and/or another 'MSO' can publish such notices against a foreigner in a local newspaper and that too in a language understood by the public of the said place. Even the other provisions contained in the said Regulations providing for renewal of the contract, supply of SLRs, increase and decrease in the subscriber base and other matters provided for therein would not be attracted in a situation of this nature.

The said Regulations, in our considered opinion, only govern those who operate their networks within this country.

We may in this connection furthermore notice that the TRAI had made a Regulation known as “The Telecommunication (Broadcasting and Cable Services) Interconnection (Second Amendment) Regulation, 2006” in the year 2006. By reason of the said Regulations a prohibition had been introduced with regard to ‘minimum guarantee’ in a contract. The parties herein have in the contract provided for such minimum guarantee, which, if the Regulations apply, render the said clause illegal.

It is true that by a notification dated 9th January, 2004, it was directed that the ‘Broadcasting Services’ to be the ‘Telecommunication Services’ in terms of the proviso appended to Section 2(k) of the Act, by creating a legal fiction.

We are, however, not oblivious of the fact that in Star Vs. BSNL (Petition No.172 of 2009) disposed of on 22.01.2010, referring to Bhavnagar University Vs. Palitana Sugar Mill (P) Ltd.& Ors. – 2003(2) SCC 111 and various other decisions, it was held that where a legal fiction has been created the same must be given its full effect, but it has also to be borne in mind that such a legal fiction is created only for specific purposes and, thus, the scope thereof cannot be extended beyond the same.

It is true that in the context of a dispute between a ‘Broadcaster’ and a ‘Service Provider’ which would also include a licensee under the Indian Telegraph Act, it has been held in Star(supra), any reference to ‘Regulations’ for the purpose of resolution of disputes between two such service providers, one a telecom service provider and another a broadcasting service provider would be wholly irrelevant but there cannot be any doubt or dispute that the said decision has been rendered keeping in view the Indian scenario as also the consumers in India as the TRAI did not frame any ‘Regulations’ governing two different types of service providers and in the context of convergence of services.

Code of Civil Procedure:

It is beyond any controversy that a suit, subject to the provisions of Section 15 of the said Act would have been maintainable in terms of Section 9 of the Code of Civil Procedure, 1908(The Code).

Part II of the Code inter alia provides for the jurisdiction of the Civil Courts.

Section 16 of the Code provides for the suits to be instituted where subject matter thereof is situated. Section 17 deals with suits in respect of immovable property situated within the jurisdiction of different courts.

Section 18 provides for the place of institution of suit in a case where the local limits of jurisdiction of courts are uncertain.

A place of suing for a decree for compensation for wrongs to person or movables would be as specified in Section 19 of the Act.

Section 20 provides for the institution of other suits, where the defendants reside or cause of action arises.

The relevant part of it reads as under:-

“20. Other suits to be instituted where defendants reside or cause of action arises.

Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction-

- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b)

(c) the cause of action, wholly or in part, arises.

It is beyond any controversy that 'cause of action' for attracting the jurisdiction of this Tribunal will have to be determined having regard to a bundle of facts necessary to be proved by the petitioners.

Jurisdiction Issue:

The question as to whether this Tribunal has the requisite jurisdiction to entertain this petition, ordinarily should be determined as a preliminary issue; in as much as, once it is held that it has no jurisdiction in the matter; no order of injunction can be issued. In fact even the merit of the matter need not be gone into as has been held by the Supreme Court of India in some decisions. We may notice a few of them.

In T.K. Lathika Vs. Seth Karsandas Jamnadas - (1999) 6 SCC 632, the Supreme Court of India held as under:-

“9. If the ban contained in the third proviso to Section 11(3) of the Act applies, its corollary is that the petition filed by the landlord has to be expelled on the sole ground that the landlord was then not entitled to file it. In such a situation the court should not enter into the merits because whatever is said or found on the merits would then be without jurisdiction. The High Court should have first decided the question of maintainability of the petition and only if that point was found in the affirmative the merits need have been gone into.”

Yet again in Arun Agarwal Vs. Nagreeka Exports (P) Ltd. - (2002) 10 SCC 101, it was opined:

“3. We are of the view that the question regarding the jurisdiction of the Court was required to be decided as a preliminary issue. We, therefore, set aside the order under challenge and send the case back to the High Court to decide the question of jurisdiction of the Court as a preliminary issue.”

In that view of the matter only we intend to take up the question of jurisdiction of this Tribunal as a preliminary issue.

For determining the question of jurisdiction in this case it has to be kept in mind that this question arises in wake of a contract between the parties, where petitioner is a foreigner and where the parties to contract have made a specific choice of applicable law in favour of English law to govern their contract and disputes arising out of this contract.

In such cases the internationally accepted practice according to settled principles of private international law is to uphold the principle of party autonomy, to respect the choice of the parties. However, there are certain exceptions to this general principle and the Tribunal or the court, as the case may be, other than the one which has been chosen by the parties, can assume jurisdiction in some specific situations. These situations are: where the contract between the parties are subordinate to the Municipal Law of the country with which the case has the connection or where the cause of action may have arisen; where the governing law clause in the contract violates the public policy of the country and governing law clause does confer exclusive jurisdiction on the forum chosen; or where the choice of applicable law makes it possible to override the forum chosen by the contracting parties.

In this particular case in front of us, where the contract has a governing law clause containing a clear and express choice of forum as London Courts and applicable law as English law, this Tribunal can assume jurisdiction if any of the above three

situations can be satisfied. We will look into each situation individually to come to the conclusion about jurisdiction of this Tribunal in this case.

1) Applicability of the Act and the Regulations:

In this case the exclusive jurisdiction of this Tribunal can be invoked only if the provisions of the Act and Regulations apply to the facts of the present case. The question which would arise for consideration in this regard is as to whether the contract between the parties is subordinate to the Municipal Law of the country.

In this respect we may notice that in a recent petition being in Petition No.220(C) of 2010 (Viacom 18 Media Vs. MSM Discovery) disposed of on 27.07.2010, it was held as under:

“The contract in question is not governed by any statute. The respondent does not say that it, in terms of any Parliamentary Act and/or any other Subordinate legislation including any Regulations framed by the TRAI, it was entitled to a notice.

The legal rights claimed by the parties, thus, arise under contract qua contract. The provisions contained in a contract so far their specific performance is concerned, are governed by the provisions of Specific Reliefs Act, 1963.”

We have noticed heretofore the statutory scheme as contained in the said Act as also the Regulations made thereunder. If they have application only in relation to the contracts and the services provided by the service providers within the territory

and jurisdiction of this country, it is difficult to agree with the submissions of Mr.Vaidyanathan that this Tribunal will have jurisdiction to determine the lis between the parties. We also say so because the petitioners in this petition have not laid down any foundational fact to invoke the jurisdiction of the Tribunal. It has not been mentioned that it was a service provider. Such an averment has been made for the first time in the rejoinder to the reply. The petitioners furthermore have not raised any contention far less taking any stand that the contract is against public policy.

We may, for the purpose of determining the issues between the parties notice, para 14 of the reply filed by the respondent:

“14. It is respectfully submitted that the channels of the answering respondents are being uplinked in C-band for the Teleport of the Dish TV situated in Noida and are downlinked by the petitioners in Israel through the Integrated Receiver Decoders (IRDs) along with the relevant Smart Cards (Viewing Cards) provided by the respondent to the petitioner. Each channel can be downlinked only through a specific Smart Card having a unique serial number. Thereafter these signals are required to be re-encrypted with the encryption key(s) by the petitioners for distribution through internet to its subscribers who have subscribed to the same. The subscribers decrypt the signals of the channels through decryption key(s)/Set Top Box provided by the petitioners. It is submitted that only the viewers which have been provided with the relevant decryption key(s)/Set Top Box are authorized to decrypt the signals and watch these channels through internet/web.”

It is true that therein the mechanism for transmission of signals of the channels of the broadcasters have been stated and furthermore it has been accepted that the source of transmission of signals is in India. There is furthermore no doubt or dispute

that uplinking has been done in India and the transmission has also been disturbed in India. But the same, in our considered view would not attract the provisions of the Act and the Regulations.

2) Validity of Choice of Forum and Public Policy of the Country:

As mentioned above, the second important point that needs to be decided to determining jurisdiction is about the validity of the choice of forum in the contract. Parties to International Commercial Contract, it is trite, subject to the public policy and the law made by the Parliament, may choose any or any forum. The same by itself would not be illegal.

It is settled law in India too that once the law of one country governing the contract is chosen, law of any other country, subject to above can be invoked. Once the forum is chosen, the same would be the proper forum. It is, once again trite to mention that the jurisdiction of a court to entertain a suit will have to be considered, in a case where the parties have agreed that the disputes and differences between them shall be determined by a particular court having regard to the party autonomy in mind, although there are exceptions to the said rule.

With reference to above, a question that has often arisen before the Supreme Court is whether the parties by contract can choose to override jurisdiction of the courts where the entire or part of cause of action has arisen. The principles of law governing the forum chosen by the parties vis-à-vis the court within whose jurisdiction the entire cause of action or a part thereof arose, have been considered in a large number of decisions rendered by the Supreme Court of India. We may notice in this connection, Section 28 of the Indian Contract Act :-

“28. Agreements in restraint of legal proceedings void.- Every agreement,-

(a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or

(b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.”

There cannot be any doubt or dispute that in a case where the contract is within the purview of the above provision of the Indian Contract Act, the same will apply. But it is difficult to apply the above provision in a situation of this nature as the matter relating to conferment of jurisdiction exclusively in one of the forums must be determined having regard to the provisions of the contract and not otherwise.

A contract wholly governed by the Indian Contract Act and an International Contract where it is not, stand on different footings. Before, however, rendering a detailed discussion on the said subject, we may notice some decisions whereupon reliance has been by Mr. Vaidyanathan.

In A.B.C. Laminart (P) Ltd. Vs. A.P. Agencies, (1989) 2 SCC 163, on which both the counsels have placed reliance upon, the Supreme Court of India opined :-

“12. A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff.”

The principles laid down in ABC Laminart (supra) are :-

- 1) If a court has nothing to do with the subject matter of dispute, a clause conferring jurisdiction upon it would be void.
- 2) The jurisdiction of the court in a matter of contract will depend on the situs of the contract and the cause of action for a suit for damages for breach of contract inter alia would depend upon the place where it was entered into, have been performed and the breach occurred. A suit on a contract can be filed at a place where it was made. The determination of the place where the contract was made is part of the law of contract.
- 3) The performance of a contract is a part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance completed.

- 4) In the case of repudiation of a contract, the place where the repudiation is received is the place where the suit will lie.
- 5) So long the parties to a contract did not oust the jurisdiction of all the courts which would otherwise have jurisdiction to decide the cause of action under the law, it cannot be said that the parties have by their contract ousted the jurisdiction of the court.

We may, however, notice that therein the Supreme Court in no uncertain terms referring to the decision in *Hukam Singh Vs. Gammon India Ltd.* - 1971(1) SCC 286, whereon again Mr.Vaidyanathan placed strong reliance, stated the law thus:-

“Thus it is now a settled principle that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therewithin, if the parties to the contract agreed to vest jurisdiction in one such court to try the dispute which might arise as between themselves the agreement would be valid. If such a contract is clear, unambiguous and explicit and not vague it is not hit by Sections 23 and 28 of the Contract Act. This cannot be understood as parties contracting against the statute. Mercantile law and practice permit such agreements.”

ABC Laminart (supra) has inter alia been relied on in *P. Manohar Reddy & Bros. v. Maharashtra Krishna Valley Development Corpn.* 2009 (2) SCC page 494 at 506.

However, in *Balaji Coke Industry (P) Ltd. v. Maa Bhagwati Coke Gujarat (P) Ltd.*,(2009) 9 SCC 403, the Supreme Court noticed as follows :

“27. The said question once again arose in *A.B.C. Laminart (P) Ltd.*, wherein following the decision in *Hakam Singh*, but relying on the maxim *ex dolo malo non oritur actio*, this Court held that by an agreement which absolutely ousted the jurisdiction of a court having the jurisdiction to decide the matter, would be unlawful and void, being contrary to public policy under Section 28 of the Contract Act. But so long as the parties to a contract do not oust the jurisdiction of all the courts, which would otherwise have the jurisdiction to decide the cause of action under the law, it could not be said that the parties had by their contract ousted the jurisdiction of the court.

28. This Court in *A.B.C. Laminart case* went on to observe that where there may be two or more competent courts which can entertain a suit consequent upon a part of the cause of action having arisen therewithin, if the parties to the contract agree to vest jurisdiction in one such court to try the dispute which might arise between them, the agreement would be valid.”

[See also *Shree Baidyanath Ayurved Bhawan (P) Ltd. v. Praveen Bhatia*, (2009) 8 SCC 779 and *Rajasthan SEB v. Universal Petrol Chemicals Ltd.* – 2009(3) SCC 107]

In this case it has not been denied or disputed that the contract was entered into in India. The payments are also to be made in India. The respondents are also residents of India. But what would be the legal position with regard to Party Autonomy is the question.

There cannot moreover be any doubt or dispute that jurisdiction of a court cannot be taken away by consent of the parties to the contract as was urged by Mr. Vaidyanathan. However, as the above discussion shows that the law in this respect has been

made somewhat clear by the Supreme Court. We may, also, notice that in *Man Roland Druckimachinen Ag Vs. Multicolour Offset Ltd.* - 2004(7) SCC 447, it was held as under:

“9. Undoubtedly, when the parties have agreed on a particular forum, the courts will enforce such agreement. This is not because of a lack or ouster of its own jurisdiction by reason of consensual conferment of jurisdiction on another court, but because the court will not be party to a breach of an agreement. Such an agreement is not contrary to public policy nor does it contravene Section 28 or Section 23 of the Contract Act.”

The International Commercial Contracts are being entered into these days very frequently. The jurisdiction of a court situated in a particular country is required to be determined having regard to various factors.

One of the questions which arises is as to whether in the event, this Tribunal refuses to exercise its jurisdiction would the petitioner be entitled to invoke the jurisdiction of another court? The answer to that question must be rendered in the affirmative.

In view of the contract in question, Section 20(C) of the Code on which reliance has been placed will have no application.

In our considered view, the common law of this country do not prohibit nor does any Parliamentary Act prohibit invocation of law of any other country and/or choice of any forum by the parties. When the parties were *ad idem* in choosing a forum keeping in view the effect so far as the performance of contract is concerned in various countries, including United Kingdom, it is difficult to hold that such a provision *per se* is bad in law or against the public policy.

What should be the law governing a contract or whether a forum chosen by the parties would have jurisdiction to determine their dispute is entirely a matter of choice of the parties unless, it will bear repetition to state, is contrary to a Municipal Law or against public policy.

By reason of the provisions of the said contract, an exclusive jurisdiction has been conferred on the London Courts. If an exclusive jurisdiction has been conferred on a forum chosen by the parties agreeing to submit to the law of that country, there cannot be any doubt that by reason thereof only the courts of that country will have jurisdiction having regard to principle of 'party autonomy'.

It is relevant to notice that in *British India Steam Navigation Co. Ltd. v. Shanmughavilas Cashew Industries - (1990) 3 SCC 481*, the Supreme Court clearly laid down that when a contract is entered into in relation to international trade or commerce, the question as to whether the jurisdiction clause is exclusive or non-exclusive one, or whether the claim which is the subject matter of the option falls within its terms is a matter of interpretation, usually but not invariably, it should be held that if there is no express choice of the proper law of the contract, the law of the country of the chosen court will be the proper.

Before us, no submission has been made as to law of which country other than English Law, in the facts and circumstances of the case would be the proper law. In the event it is found that the parties to the contract having regard to the provisions contained in the agreement had chosen English law to be the proper law, unless the said contract is found to be void and/or otherwise not enforceable the territorial law as also the substantive law chosen by the parties would be the governing factors. It has not been pointed out that in a situation of this nature, the Parliament has legislated any law which can be said to

be contrary to or inconsistent with the law of the country as also the forum chosen by the parties. If the provisions of the Indian Contract Act have no application in a case of this nature even Section 28 would not apply.

3. Applicable Law and Choice of Forum:

While contending for jurisdiction of this Tribunal, Mr.Vaidyanathan has also invoked the argument of applicable law in this contract. Mr.Vaidyanthan, furthermore, has placed reliance on Delhi Cloth and General Mills Co. Ltd. Vs. Harnam Singh - AIR 1955 SC 590. In that case the creditor was following the debtor. It was in the aforementioned context the Supreme Court of India opined that the doctrine of lex fori would not be applicable.

We may notice that the court proceeded on the basis that a debt is a property and the determination of the proper law involved two different considerations as would appear from the following:

“37. This involves two considerations. The first is whether the proper law is to be ascertained objectively or whether parties are free to fix it subjectively by ranging over the world and picking out whatever laws they like from any part of the globe and agreeing that those laws shall govern their contract. Cheshire points out at page 202 that the "the subjective theory may produce strangely unrealistic results". It is also obvious that difficulties will arise if the contract is illegal or against public policy according to the laws of the country in which it is sought to be enforced though lawful according to the laws of the country which the parties choose: see Lord Wright in Mount Albert Borough Council v. Australasian Temperance, etc. Society 1938 A.C. 224 at page 240. Cheshire prefers the view of an American Judge which he quotes at page 203 -

"Some law must impose the obligation, and the parties have nothing whatsoever to do with that, no more than with whether their acts are torts or crimes".

The contract does not say that the parties would be governed by the Indian Law or the Law of Contract prevailing in Israel.

Delhi Cloth & General Mills (supra), therefore, in our opinion, has no application.

Reliance has also been placed on Citation Infowares Ltd. Vs. Equinox Corpn. - (2009) 7 SCC 220.

In that case the NTPC Vs. Singer Company & Ors. – 1992(3) SCC 551 was sought to be distinguished.

In that case the Supreme Court followed its decision in Bhatia International Vs. Bulk Trading S.A. & Anr. 2002(4) SCC 104, to hold:

“25. Even otherwise it is difficult to accept the contention that *NTPC case* can clinch the issue. In para 23 of *NTPC case* the Court undoubtedly expressed that the proper law of arbitration is normally the same as the proper law of contract and it is only in exceptional cases that it is not so, even where the proper law of contract is expressly chosen by the parties. The Court further expressed about the presumption arising that the law of the country where arbitration is agreed to be held is the proper law of arbitration. This presumption was heavily relied on by Shri K.K. Venugopal.

26. In my opinion the scope of the expressions in para 23 of *NTPC case* must be held to be limited. There may be presumption where the parties have agreed to hold arbitration in a particular country. In that circumstance, the

presumption would arise that the law of the country where the arbitration is agreed to be held would apply as a law of contract. Where there has been no specific expression about the law of contract, the situation is otherwise. In this case the law of contract is agreed upon as the Californian law.”

(Emphasis supplied)

The observations by the Supreme Court in the Citation Infowares (supra) were, thus, made keeping in view the agreement between the parties. Clause 13.1 of the contract was found to be similar to clause 10.1 involved in Indtel Technical Services (P) Ltd. Vs.W.S. Atkins Rail Ltd. - 2008(10) SCC 308. Therein reliance had been placed on Sumitomo Heavy Industries Ltd. v. ONGC Ltd. - (1998) 1 SCC 305. Bharucha J, (as the learned Chief Justice then was) referred extensively from the Law and Practice of Commercial Arbitration in England (2nd Edition) by Mustill and Boyd where the applicable law and the jurisdiction of the court under the sub-title “Laws Governing the Arbitration” had been quoted.

We may also notice the same:

“An agreed reference to arbitration involves two groups of obligations. The first concerns the mutual obligations of the parties to submit future disputes, or an existing dispute to arbitration, and to abide by the award of a tribunal constituted in accordance with the agreement. It is now firmly established that the arbitration agreement which creates these obligations is a separate contract, distinct from the substantive agreement in which it is usually embedded, capable of surviving the termination of the substantive agreement and susceptible of premature termination by express or implied consent, or by repudiation or frustration, in much the same manner as in more

ordinary forms of contract. Since this agreement has a distinct life of its own, it may in principle be governed by a proper law of its own, which need not be the same as the law governing the substantive contract.

The second group of obligations, consisting of what is generally referred to as the 'curial law' of the arbitration, concerns the manner in which the parties and the arbitrator are required to conduct the reference of a particular dispute. According to the English theory of arbitration, these rules are to be ascertained by reference to the express or implied terms of the agreement to arbitrate. This being so, it will be found in the great majority of cases that the curial law, i.e., the law governing the conduct of the reference, is the same as the law governing the obligation to arbitrate. It is, however, open to the parties to submit, expressly or by implication, the conduct of the reference to a different law from the one governing the underlying arbitration agreement. In such a case, the court looks first at the arbitration agreement to see whether the dispute is one which should be arbitrated, and which has validly been made the subject of the reference, it then looks to the curial law to see how that reference should be conducted and then returns to the first law in order to give effect to the resulting award."

In this case, admittedly the parties are clear in their mind that the English Law of Contract shall apply. It is also not a case where the law governing the contract can be said to be the curial law or the procedural law. The parties by reason of clause 9.6 of the contract have clearly stated that the law governing the contract would be the English Law of Contract and the London courts alone will have jurisdiction.

Reliance placed upon a decision of the Supreme Court of India in *Bharat Barrel and Drum Mfg. Co. Ltd. v. ESI Corpn.* - (1971) 2 SCC 860; is misplaced as the same related to the law of limitation with which we are not concerned in the present case.

The said decision was rendered keeping in view the avowed legislative purpose of the Employees State Insurance Act. We are not concerned herewith construction of a beneficent statute.

What is the substantive law, has been considered by a Constitution Bench of the Supreme Court of India in Executive Engineer, Dhenkanal Minor Irrigation Division Vs. N.C. Budharaj - (2001) 2 SCC 721, wherein the majority opined in the following terms:-

““Substantive law”, is that part of the law which creates, defines and regulates rights in contrast to what is called adjective or remedial law which provides the method of enforcing rights. Decisions, including the one in *Jena case* while adverting to the question of substantive law has chosen to indicate by way of illustration laws such as Sale of Goods Act, 1930 [Section 61(2)], Negotiable Instruments Act, 1881 (Section 80), etc. The provisions of the Interest Act, 1839, which prescribe the general law of interest and become applicable in the absence of any contractual or other statutory provisions specially dealing with the subject, would also answer the description of substantive law. This Act was excluded from consideration for the simple reason that unlike the inclusive definition of “court” in the 1978 Act so as to include an arbitrator also the 1839 Act did not provide any “definition” clause much less an expansive one.”

Reliance has also been placed by Mr.Vaidyanathan in *Centrotrade Minerals & Metals Inc. Vs. Hindustan Copper Ltd.* - (2006) 11 SCC 245. Therein two of the Judges of the Supreme Court differed in their opinion and in that view of the matter, it cannot be said to be a judgment which will be a binding precedent as the matter is pending consideration before a larger bench.

It has clearly been laid down by the Apex Court in *British India Steam Navigation Co. Ltd. vs. Shanmughavilas Cashew Industries and Ors.*, - (1990) 3 SCC 481 that the Indian Parliament will have no jurisdiction in respect of foreign property and the foreigners. It was furthermore held:-

“30. Dicey and Morris in the *Conflict of Laws* formulate the following rule on proper law of contract as Rule 180:

“Rule 180: The term “proper law of a contract” means the system of law by which the parties intended the contract to be governed, or, where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest and most real connection.

Sub-rule 1: When the intention of the parties to a contract, as to the law governing the contract, is expressed in words, this expressed intention, in general, determines the proper law of the contract.

Sub-rule 2: When the intention of the parties to a contract with regard to the law governing the contract is not expressed in words, their intention is to be inferred from the terms and nature of the contract and from the general circumstances of the case, and such inferred intention determines the proper law of the contract.”

There can, therefore, be no doubt that the instant contract of affreightment evidenced by the bills of lading will be governed by English law. As the law has been chosen, the proper law will be the domestic law of England and the proper law must be the law at the time when the contract is made throughout the life of the contract and there cannot be a “floating” proper law. It has been recognised since *Gienar v. Meyer* that at the time of making the contract the parties may expressly select the law by which it is to be governed and they may declare their common intention by a simple statement that the contract shall be governed by the law of a particular country.

Yet again in *National Thermal Power Corpn. v. Singer Company*, (1992) 3 SCC 551, the Supreme Court of India while noticing Dicey & Morris, *The Conflict of Laws* (11th Edition) Voll. II, stated the law, thus:

“The expression ‘proper law of a contract’ refers to the legal system by which the parties to the contract intended their contract to be governed. If their intention is expressly stated or if it can be clearly inferred from the contract itself or its surrounding circumstances, such intention determines the proper law of the contract.”

It was observed:

“Where, however, the intention of the parties is not expressly stated and no inference about it can be drawn, their intention as such has no relevance. In that event, the courts endeavour to impute an intention by identifying the legal system with which the transaction has its closest and most real connection.

14. The expressed intention of the parties is generally decisive in determining the proper law of the contract. The only limitation on this rule is that the intention of the parties must be expressed bona fide and it should not be opposed to public policy. In the words of Lord Wright:

“... where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is bona fide and legal, and provided there is no reason for avoiding the choice on the ground of public policy”

Even in a case where there is no express statement about the governing law, the intention of the parties, according to the Supreme Court of India can be gathered.

In Halsbury's Laws of England [Vol 8(3), para 131], it is stated:

“131. Forum non conveniens. The court has power at any stage of the proceedings to order a stay on the ground of forum non conveniens where to do so is not inconsistent with the ‘Brussels I’ Regulation or with the Brussels or Lugano Conventions. As a general rule the party seeking the stay (usually the defendant) must establish that there exists another forum to whose jurisdiction he is amenable, and which is clearly or distinctly more appropriate than England for the trial of the action. If the defendant fails to establish this, a stay on this ground will not be granted; if the defendant succeeds in establishing it, the claimant will nevertheless be permitted to proceed in England, and the action will not be stayed, if in the interests of justice the action should be permitted to proceed.

In determining whether there is another forum clearly or distinctly more appropriate than England for the trial of the action, the court is entitled to take into account all factors connected to the parties, the claim or the action, including:

- (1) the residence of the parties.
- (2) the factual connections between the dispute and the courts, such as the place where the relevant events occurred and the residence of the witnesses;
- (3) the law which will be applied to resolve the dispute;

- (4) the possibility of a lis alibi pendens or other related proceedings; and
- (5) the question whether other persons may become parties to the litigation.

The question of which factors are relevant and weight to be accorded to each of them (which will vary from case to case), is essentially one for the discretion of the trial judge, with whose assessment an appellate court will be reluctant to interfere.”

However, it is trite that it is for the proper law of the contract to determine whether a foreign jurisdiction clause provide for the exclusive jurisdiction of the court of a country or merely that the parties will not object to the exercise of jurisdiction by those courts.

(Also see, Halsbury’s Law of India, Para 75.231, Page 321)

In Conflict of Laws by Setelvad, Para 8.13 at page 203, after considering the laws of different countries, it is stated:

“Position in India

Choice of Court Clauses

“When, broadly, an Indian court will grant an anti-suit injunction have already been noted.

Agreements to refer any dispute that may arise to the courts of a country to which one of the parties belongs, or the courts of a third or ‘neutral’ country, are valid as they do not violate either ss 23 or 28 of the Indian Contract

Act, 1872; the rules of the Code of Civil Procedure 1908, and the principle that parties cannot by consent confer jurisdiction on a court which does not have jurisdiction, do not apply to courts outside India.

If the dispute relates to a contract, and the contract contains a clause providing that disputes that may arise will be decided by a specified court, the approach of the court will depend on whether such a specified court is specified as the court with exclusive jurisdiction or not.”

It was furthermore stated:

“Where jurisdiction of a court is invoked on the basis of jurisdiction clause in a contract, the recitals therein, in regard to the exclusive or non-exclusive jurisdiction of the court of the choice of the parties, are not determinative but relevant factors, and when a question as to the nature of jurisdiction agreed to between the parties arises, the court has to decide the same on a true interpretation of the contract on the facts and in the circumstances of each case.”

In Halsbury’s Law of India at Para 75.234, Page 323 it is further stated:

“A court has power to stay proceedings brought in India in breach of a provision in a contract; such disputes may be referred to the exclusive jurisdiction of the foreign court. This power will be exercised on the defendant’s application unless the plaintiff establishes that it is just and proper to allow the action to proceed; the burden of proof is on the plaintiff, who must establish a strong case before being allowed to break his contract.

A stay will not be granted if the foreign jurisdiction clause contravenes a statutory provision forbidding ouster of the jurisdiction of the court in certain type of case, or where the term, or the entire contract, is void or otherwise unenforceable. Neither will a stay be granted where the court on which the contract purports to confer jurisdiction is no longer the same as that contemplated by the parties at the time of the making of the contract.”

Dicey, Morris and Collins in their classic treatise ‘The Conflict of Laws’, at page 518 state:-

“**12-092** It is a question of interpretation, governed by the law applicable to the contract, or more accurately, the law governing the jurisdiction agreement, whether a jurisdiction clause is exclusive or non-exclusive, i.e. whether it requires proceedings to be brought in a particular forum, or simply confers jurisdiction on the courts of a particular country without requiring proceedings to be brought there. Some authorities suggest that the clause must provide in terms that the jurisdiction of the chosen court be exclusive, but the true question is whether on its proper construction the clause *obliges* the parties to resort to the relevant jurisdiction, irrespective of whether the word “exclusive” is used. Where the agreement is governed by English law, and in the absence of explanation to the contrary, the court may conclude that if the nominated court would have had jurisdiction by right in the absence of the agreement, the agreement would be idle unless it conferred exclusive jurisdiction on the nominated court. But the parties may be provided for jurisdiction without realizing that this principle of interpretation exists, and it is submitted that the point should not be pressed too far.”

It was furthermore stated:

“**12-095** As a general rule, but subject to important exceptions, English courts (in common with the courts of other countries) will give effect to a choice of jurisdiction. If the English court is the chosen forum, the jurisdiction clause will be effective to confer jurisdiction on the English court; in certain circumstances, the court will have discretion not to exercise it. If a foreign court is the chosen forum, then the English court will give effect to the choice by staying proceedings brought in breach of the jurisdiction clause or by refusing to give permission to serve process outside the jurisdiction; but (except in case within the scope of Art.23 of the Judgments Regulation of Art.17 of the Conventions) the English court has a discretion to override the choice of jurisdiction”

Even, in a case of this nature where this petition can be equated with an anti-suit, an injunction ordinarily would not be granted to restrain proceedings in a foreign jurisdiction unless sufficient justification therefor exists.

In AIRBUS INDUSTRIE G.I.E. Respondents and PATEL, [1999] 1 A.C. 119. Lord Goff of Chieveley states the law, thus:

“I ask myself therefore whether there is any other aspect of the present case which would render the intervention of the English court consistent with comity. The facts upon which Airbus particularly relies are that there is a forum other than Texas, viz. India, which is indeed the natural forum for the dispute, but which is unable to grant effective injunctive relief restraining the defendants from proceeding in Texas because they are outside the jurisdiction of the Indian courts; however, since the defendants are amenable to the jurisdiction of the English courts, Airbus is in effect seeking the aid of the English courts to prevent the pursuit by the defendants of their

proceedings in Texas, which may properly be regarded as oppressive but which the Indian courts are powerless to prevent.

I must first point out that, for the English court to come to the assistance of an Indian court, the normal process is for the English court to do so by enforcing a judgment of the Indian court. However, as the present proceedings have demonstrated, that is not possible here. An attempt was made by Airbus to persuade Colman J. to enforce, or at least to recognise, the Indian judgment; but he declined to do so, and Airbus has not appealed from that part of Colman J.'s decision. So Airbus is relying simply on the English court's power of itself, without direct reliance on the Indian court's decision, to grant an injunction in this case where, unusually, the English jurisdiction has no interest in, or connection with, the matter in question. I am driven to say that such a course is not open to the English courts because, for the reasons I have given, it would be inconsistent with comity. In a world which consists of independent jurisdictions, interference, even indirect interference, by the courts of one jurisdiction with the exercise of the jurisdiction of a foreign court cannot in my opinion be justified by the fact that a third jurisdiction is affected but is powerless to intervene. The basic principle is that only the courts of an interested jurisdiction can act in the matter; and if they are powerless to do so, that will not of itself be enough to justify the courts of another jurisdiction to act in their place. Such are the limits of a system which is dependent on the remedy of an anti-suit injunction to curtail the excesses of a jurisdiction which does not adopt the principle, widely accepted throughout the common law world, of *forum non conveniens*.”

Reliance has been placed by Mr.Maninder Singh on another decision of the Supreme Court in *Hanil Era Textiles Ltd. Vs. Puromatic Filters Pvt. Ltd.* - 2004(4) SCC 671 wherein great stress had been laid on the terminologies used in regard to the

clause 'jurisdiction of one court in favour of the other'.

Our attention has also been drawn to a decision of a learned single judge of the Delhi High Court in Swatch Ltd. Vs. Priya Exhibitors Pvt. Ltd. - 2008(1) CTLJ 208(Del) wherein jurisdiction having been conferred on the Swedish courts, the Delhi High Court upon taking into consideration the British India Steel Navigation Co. Ltd. (Supra) opined that the Delhi High Court had no jurisdiction to entertain the suit.

We may also notice the decision of the High Court of Bombay in Rhodia Limited, Rhodia Chemicals India Limited and Rhodia Organique Fine Limited Vs. Neon Laboratories Limited - 2005(1) ALLMR 703 wherein it was opined:-

“38. Having heard the rival parties, the contentions of the defendants is that by reason of the provisions in the agreements which state that the agreements will have to be governed by English Law, the question whether or not the English Court will have exclusive jurisdiction has to be determined not by applying the law of India but by applying the law of England alone. In nutshell, the contention is that under the English law, a provision of the nature found in Articles 15 and 8 of the respective agreements, results in ouster of the jurisdiction of all the Courts except English Courts as such the English Courts alone will have jurisdiction to entertain and try the suit arising out the said agreements. In my view, this question is open for consideration to a limited extent, in the sense, the learned single Judge while deciding Civil Revision Application No. 710 of 2002 vide his order dated 15th July, 2002 in para-19 thereof has considered the question of applicability of law and recorded a positive finding that the parties have expressly agreed that subject agreements to be governed by and construed in accordance with the English law.

The finding recorded in this behalf reads as under:

"19. In the ultimate analysis, I hold that by virtue of Article 15.1 and 8.1 of the respective agreements, the parties have expressly intended the subject Agreements to be governed by and construed in accordance with the English law."

(Emphasis supplied)

In *Modi Entertainment Network v. W.S.G. Cricket Pte. Ltd.*- 2003(4) SCC 341, it was inter alia opined by the Apex Court:-

“10. The courts in India like the courts in England are courts of both law and equity. The principles governing grant of injunction — an equitable relief — by a court will also govern grant of anti-suit injunction which is but a species of injunction. When a court restrains a party to a suit/proceeding before it from instituting or prosecuting a case in another court including a foreign court, it is called anti-suit injunction. It is a common ground that the courts in India have power to issue anti-suit injunction to a party over whom it has personal jurisdiction, in an appropriate case. This is because courts of equity exercise jurisdiction in personam. However, having regard to the rule of comity, this power will be exercised sparingly because such an injunction though directed against a person, in effect causes interference in the exercise of jurisdiction by another court.”

We may also notice the decision of the Court of Appeal in *Bloom v Harms Offshore AHT “Taurus” GmbH & Co KG* , (2010) 2 WLR 349 wherein the law is laid down in the following terms:-

“26. The reluctance of the court to interfere with proceedings in a foreign court by the grant of anti-suit injunctions is demonstrated by the important judgment of the Privy Council in *Soci t  Nationale Industrielle Aerospatiale v Lee*

Kui Jak [1987] AC 871. In that case, the question was where a civil claim should be tried. In such cases questions of forum non conveniens arise, although, as the judgment makes clear, the inconvenience of a forum is of itself not a sufficient justification for the grant of injunctive relief. The present case is different. The question is not where a dispute as to liability or damages should be determined, but whether the creditor companies should be able to continue their proceedings before the district court so as to secure the benefit of their attachments, and thus promote themselves from unsecured to secured creditors. In such cases, as the Privy Council pointed out in the *Aerospatiale* case [1987] 1 AC 871, 892H, the purpose of the anti-suit injunction may be said to be to protect the jurisdiction of the English court. In *Mitchell v Carter* [1997] 1 BCLC 673, 687 Millett LJ said:

“The position today is that stated by Hoffmann J in *Barclays Bank plc v Homan* [1993] BCLC 680. There must be a good reason why the decision to stop foreign proceedings should be made here rather than there. The normal assumption is that the foreign judge is the person best qualified to decide if the proceedings in his court should be allowed to continue. Comity demands a policy of non-intervention.”

27. The court should exercise its powers so as to enable the administrators to exercise their statutory functions and to fulfil their statutory duties, so far as necessary in any particular case. The comity owed by the courts of different jurisdictions to each other will normally make it inappropriate for the court to grant injunctive relief affecting procedures in a court of foreign jurisdiction.”

[See also *West Tankers Inc v. Allianz SpA* (formerly *RAS Riunione Adriatica di Sicurtà SpA*), (2009) 1 AC 1138 and *Turner Vs. Grovit* (2005) 1 AC 101]

It would be relevant to notice that in the ‘Rome I Regulation on the Law Applicable to Contractual Obligations’ by Andrea Bonomi, a Professor at the University of Lausanne in Yearbook of Private International Law, Volume 10(2008), pp.165-176, the learned author stated at page 169:-

“III. Freedom of Choice.

A. A Broad Recognition of Party Autonomy, But No Choice of Non-State Rules

The freedom of choice of the applicable law by the parties, which was one of the cornerstones of the Rome Convention, has been reaffirmed in the Regulation.

As was the case under the Convention, the parties to the contract will have the right:

- to choose the law of a State even if their relationship has no other objective connection with that State;
- to ‘split’ the contract by making a partial choice of law, and
- to conclude a choice of law agreement at any time, i.e., before or even after the conclusion of their contract.

On the question of the admissibility of a choice of non-State rules, however, the final text of the Regulation takes a rather conservative approach. Contrary to the Commission’s Proposal, which allowed the choice of the ‘the principles and rules of the substantive law of contract recognized internationally or in the Community’, the final text of Art.3 still refers, as did the Rome Convention, to the ‘law chosen by the parties’, thus implicitly excluding the choice of such ‘rules of law’ not belong to a national system.

It was stated:

“The effects of incorporation, however, are obviously different from those of a true choice of law. Since the ‘choice’ of non-State rules is not recognized as a valid choice of law, the applicable law is to be determined through the objective connecting factors of Art.4 of the Regulation. The ‘incorporation’ is only effective insofar the parties are free to determine the content of their contract under the applicable domestic law. As a result, *all* mandatory rules concerning the applicable law (and not only the ‘overriding mandatory rules’ of Art.9) always take priority over the non-State rules chosen by the parties.

As we have previously mentioned, this solution is not satisfactory because it implies an unnecessary restriction of party autonomy. It is inconsistent with the admission of *depeçage* in Art.3 of the Regulation and it also runs counter to the solution that will normally prevail if the dispute is submitted to arbitration, since arbitrators tend (and are generally allowed) to respect the parties’ choice even if it refers to non-State rules.”

In Dicey, Morris & Collins ‘The Conflict of Laws’ (14th edition), 2006, it is stated:-

“**32-004** English courts had led the way in developing party autonomy as the basis of choice of law in contract. Early formulations referred to the law to which “the parties had a view” or by which “the parties intended that the transaction should be governed or...to what general law it is just to presume that they have submitted themselves in the matter.” The general principle of party autonomy developed in the nineteenth century and the early part of the twentieth century was that a contract was governed by the law to which the parties had submitted it, or to which

they must be presumed to have submitted it. In the 20th century the test of the presumed intention came to be replaced in some countries (especially England, Germany and France) by a test based on objective connections of the transaction with a system of law. Under the influence of Beale, there was considerable resistance in the United States to party autonomy, but the prevailing view in the United States came to be (and is) that, in the absence of a choice of law by the parties, the applicable law is the law which has the most significant relationship to the transaction and the parties.

32-007 At common law it was well established that the “proper law” of the contract determined its material or essential validity, its interpretation and effect, and its discharge. There was considerable judicial authority also for a rule (or exception to the basic rule that validity depended on the proper law) that a contract (whether lawful by its proper law or not) was, in general, invalid in so far as its performance was unlawful by the law of the country where the contract was to be performed (*lex loci solutionis*). The continued relevance of this proposition, based on *Ralli Bros v Compania Naviera Sota y Aznar*, is considered below. The formation of a contract (offer and acceptance, consideration, and reality of consent) was governed by the law which would have been the governing law had the contract been validity concluded, although not all of the authorities were clear and consistent. What law governed an individual’s capacity to contract was not the subject of modern authority, and is considered below, since the Rome Convention does not deal (except to a very limited extent) with capacity. A contract was formally valid if made either in accordance with the law of the place where it was made or in accordance with the governing law.

32-024 For the purposes of the Rome Convention (as the common law) the fact that an agreement between the parties would not be regarded as a contract (e.g. because it was made without consideration) will not prevent its

terms being regarded as giving rise to a contractual obligation; indeed the Rome Convention is intended to apply to the consensual aspects of some *inter vivos* gifts. In France it has been doubted whether the Convention applied to public law contracts, but this is based on an analogy with the 1968 Convention, which is expressly confined to “civil and commercial matters.”

Extra Territorial Jurisdiction:

There cannot be any doubt or dispute that in certain circumstances, the courts may exercise extra territorial jurisdiction, but it would depend upon the context in which it is exercised.

In Suresh Narain Sinha Vs. Akhauri Balbhadra Prasad & Ors. - AIR 1957 Patna 256, whereupon Mr. Vaidyanathan placed reliance, Ramaswami, CJ (as the learned Judge then was) in a case involving the provisions of Section 128 of the Indian Contract Act, namely, a suit against surety wherein guarantees have been furnished and which suit had been decreed in regard to the question as to whether the decree passed against the surety was without jurisdiction or not, held as under:-

“5. Lastly, a contention was put forward that the decree of the trial Court against defendant No. 5 was without jurisdiction. It was pointed out that defendant No. 5, the Modern Bank of India, Ltd., had its registered office at Dacca within the territory of Pakistan. It was argued that the claim of the plaintiff against defendant No. 5 was a claim in personam; and since defendant No. 5 was not a resident within the jurisdiction of the Jehanabad Court, no decree could be pronounced by that Court against defendant No. 5.

In support of this Proposition Counsel referred to the well known judgment of Lord Selborne in Sirdar Gurdyal Singh v. Rajah of Faridkote 21 IA 171 (PC) (P). It was explained by Lord Selborne in that case that in all

personal actions the courts of the country in which the defendant resides, and not the Courts of the country where cause of action arose, should be resorted to and that no territorial legislation could give jurisdiction which any foreign Court ought to recognise against absent foreigners who owe no allegiance or obedience to the sovereign power which so legislates.”

Quoting in extenso the decision of Lord Sirborn, it was opined:

“In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in absentem by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorised by special local legislation) in the country of the forum by which it was pronounced.

But the principle of this case is not really in point. The question is not whether the Pakistan Courts would recognise the decree of the Jehanabad Court against defendant No. 5 as a valid decree and executable against defendant No. 5 within the limits of Pakistan; the question, on the contrary, is whether the decree granted by the Jehanabad Court against defendant No. 5 is a decree pronounced with Jurisdiction so far as Jehanabad Court is concerned.”

It was furthermore held:

“It was true that according to the principles of international law a Court has jurisdiction to entertain a suit against a foreigner who did not permanently or temporarily reside within its jurisdiction and who had not submitted to its

Jurisdiction. But if the legislature confers jurisdiction upon the Court situated in a particular territory to entertain suits against foreigners, where cause of action, wholly or partly arises within its jurisdiction, then such a Court undoubtedly has jurisdiction, if the conditions provided by the law to which it is subject exist.

The rule of private international law is, therefore, in this regard subject to the rules of Municipal law;.....”

In this case, moreover, the petitioners reside outside the territory of India. They are not bound by the Indian law. The contract is also not governed by the Indian law.

In *Haridas Exports v. All India Float Glass Manufacturers' Assn.* - 2002(6) SCC 600, it has been held:

“57. In our opinion, the MRTP Commission has no extraterritorial jurisdiction. The action of an exporter to India when performed outside India would not be amenable to jurisdiction of the MRTP Commission. The MRTP Commission cannot pass an order determining the export price of an exporter to India or prohibiting him to export to India at a low or predatory price.”

We have noticed heretofore the different provisions of the agreement and are of the opinion that the preliminary objections raised by Mr. Maninder Singh, is liable to be upheld. We are of the opinion that by virtue of clause 9.6 of the contract between the parties herein, the provisions of Section 28 of the Indian Contract Act, will have no application to the facts and circumstances of the case and in any event the provisions of the said Act and the Regulations do not confer any jurisdiction upon this Tribunal. So far as the second aspect of the matter is concerned, we have also taken into consideration the fact that although the provisions of Interconnection Regulations *stricto sensu* may not have any application so far as the jurisdiction of this Tribunal to determine the dispute between the two service providers are concerned, there cannot be any doubt or dispute

whatsoever that in the event it is held that the Regulations framed by the TRAI are not applicable to the factual situation involving the present matter, by reason of the Section 14 of the said Act alone, we are of the opinion that this Tribunal will have no jurisdiction. We say so because the terms “service provider” has been defined. A service provider is required to render some service within the territory of India. The Act does not contemplate any rendition of services outside the territory of India. We are of the opinion that the terms of the contract between the parties are governed by the contract itself and the same is not governed by any statute. In order to bring the dispute within the purview of the said Act, a service provider not only should be one within the meaning of the provisions of the said Act and the Regulations framed thereunder but also must specify certain rights which has accrued in its favour so as to enable it to obtain a specific relief from this Tribunal.

Injunction:

For the purpose of considering the matter relating to grant of injunction in a mandatory form, as has been prayed for by the petitioners, existence of a strong prima facie case must be established. Before us, even no arguable case at the trial has been made out. Even the bonafide of the respondents in a situation of this nature cannot prima-facie be doubted. At first, only one of the channels, namely; Zee Punjabi was taken off and only thereafter when sufficient proof could be gathered by the respondents, transmission of three other channels was disturbed, and had the respondent been acting malafide, it could have terminated the contract itself.

Mr.Vaidyanathan, however, would submit that the fact that the petitioners are not at fault would be evident from two aspects of the matter, namely, one of the channels of the respondents is being shown on the same platforms viz. Jadoo TV and

Karishma TV although no contract has been entered into by and between the parties hereto in relation thereto despite disconnection and some other channels are being aired despite disconnection and, thus, it cannot be said that the petitioners have any hands in respect thereof.

This may be so but the allegations against them appear to be serious. The respondents have strong suspicions that the petitioners also have a hand in it.

Furthermore, grant of an injunction in mandatory form, as distinguished to the grant of injunction in prohibitory form stand on somewhat different footings. It would require a strong prima facie case and if, the petitioner prays for an order of injunction in mandatory form he must be able to show that there has been a breach of contract which is governed by a statute.

In *State Bank of Patiala v. Vinesh Kumar Bhasin*, (2010) 4 SCC 368, it has been held:

“20. The principles relating to grant of interim ex parte orders by the High Court in writ jurisdiction are well settled. The Courts should not grant interim orders in a mechanical manner, on the assumption that the aggrieved party can always seek vacation. Grant of ex parte interim orders, that too mandatory orders, routinely or merely for the asking, on ground of sympathy or otherwise, will interfere with justice leading to administrative chaos, rather than serving the interests of justice.

21. Where the writ petition does not make out a prima facie case or where there is any doubt about the maintainability of the writ petition or the jurisdiction of the court or the tenability of the claim, the High Court will not issue any interim order, that too when there is no irreparable loss or injury. At all events, the High Court will

desist from issuing an ex parte mandatory injunction or direction which virtually has the effect of allowing the petition ex parte without hearing the respondents.

22. Mandatory interim orders are issued in exceptional cases, only where failure to do so will lead to an irreversible or irretrievable situation. In service matters relating to retirement, there is no such need to issue ex parte mandatory directions. When the writ petition disclosed that the respondent was retired after thirty years of service in accordance with the Bank's regulations, there was no question of any irreparable injury or urgency."

In this case there are serious allegations of breaches of contract made by the respondent against the petitioner. This may be true or may not be true. Ultimately, the petitioner may be able to show that it had no hands therein nor was there any intention on its part to help the grey market to grow. Before an appropriate forum, it is possible for it to show that the technologies are not so developed so as to enable it to have a foolproof agreement to see that no hacking of the system is possible. Whereas, according to the petitioner it even did not know of the Jadoo TV platform or Karishma TV platform, as at present advised, we are of the opinion that it as an agent of the respondents broadcasters and furthermore as their distributor throughout the world except India it had a contractual obligation to see that its interests are protected. The downlinking having been done in Israel and from that country only re-transmission of signals throughout the world having been contemplated, it is difficult to see although it may not be possible to provide a foolproof system to prevent such hacking, it was at least possible to find out as to whether the same was being done or not. The respondents had provided ample proof to the petitioner to show that its channels were being shown on the TVs at least in the United States of America and Canada on Jadoo TV platform and Karishma TV platform. The petitioner does not say nor could it, that the respondent had entered into in arrangements with the aforementioned Jadoo TV or Karishma TV platforms. Only on the basis of information and proof they received from the respondents, the petitioners made enquiries as

to how the same have been done. The petitioners at least could not be negligent in this behalf. The petitioner must have failed to carry out its part of obligations under the contract to the aforementioned extent. If, in a situation of this nature, the respondents have lost faith and confidence in the petitioner, no exception can be taken.

If the breach of contract is qua contract, having regard to the provisions contained in Section 14(a) of the Specific Relief Act, 1963 as also Section 41(e) thereof, no injunction can be granted.

We may notice the said provisions:

- “14. Contracts not specifically enforceable.-(1) The following contracts cannot be specifically enforced, namely:--
- (a) a contract for the non-performance of which compensation in money is an adequate relief;
41. Injunction when refused.-An injunction cannot be granted-
- (e) to prevent the breach of a contract the performance of which would not be specifically enforced;”

The remedy of the petitioner, therefore, is to sue the respondents for damages. If the law of India is to govern the parties, the limitations to be in the matter of exercise of jurisdiction of this Tribunal for the purpose of grant of injunction may also be taken into consideration for the purpose of determination of jurisdiction. This has been so held in Petition No.220(C) of 2010 (Viacom 18 Media Vs. MSM Discovery) disposed of on 27.07.2010. Moreover, having regard to the fact that the petitioners can be sufficiently compensated in terms of money, we are of the opinion that no case has been made out for grant of an order of injunction.

Even otherwise ordinarily (we do not want to lay down as a law applicable to all cases), an injunction in mandatory form would be granted, if special circumstances exist. [See Dorab Cawasji Warden v. Coomi Sarob Warden - (1990) 2 SCC 117].

In State of Haryana Vs State of Punjab,(2004) 12 SCC 673 a distinction has been made between a prohibitory injunction and a mandatory injunction. The ratio of the said decision was followed in Rikhabsoo Nathusao Jain v. Corpn. of the City of Nagpur - (2009) 1 SCC 240 stating:-

“29. Even, however, assuming that the court has the implied power to grant injunction and that too mandatory in nature dehors the provisions of Section 286(5) of the Act, certain principles therefor must be borne in mind. We may, in this regard, only notice the legal principles as enunciated by this Court, from time to time in this behalf.”

Conclusion:

We, therefore, hold:

1. The agreement between the parties is a valid one.
2. Having regard to clause 9.6 of the agreement, the parties could exercise their rights in respect of ‘choice of law’ as well as ‘choice of forum’.
3. Having regard to the doctrine of party autonomy, only the English Law of Contract would apply and the London Courts would have jurisdiction to determine the dispute between the parties, the court being situated at a neutral place and its effect thereat could have been felt. [See Vodafone International Holdings B.V. Vs. Union of India &

Anr. - (2009) 311 ITR 46 (Bombay) and Haridas Exports Vs. All India Float Glass Manufacturers' Assn. & Ors. - 2002 (6) SCC 600].

4. The agreement being not governed under the provisions of 'the said Act' and the 2004 regulations, the Tribunal does not have the exclusive jurisdiction to determine the issues between the parties. This Tribunal having no jurisdiction, and even otherwise, prima-facie no injunction can be granted in favour of the petitioner as prayed for.

For the reasons aforementioned, the prayer for injunction is rejected and this petition is dismissed as not maintainable.

There cannot be any doubt that the petitioner may seek remedy before the appropriate forum.

The petitioners shall pay and bear the costs of the respondents.

.....J
(S.B. Sinha)
Chairperson

.....
(G.D. Gaiha)
Member

.....

(P.K. Rastogi)
Member