A. **INTRODUCTION**

The authority of a court to hear a case and resolve a dispute involving person, property and subject matter is referred as the jurisdiction of that court. It is the legislative function of the Government to enact laws and judicial and/or administrative function to enforce those laws. Thus, the principles of jurisdiction followed by a State must not exceed the limits which international law places upon its jurisdiction.

B. **INTERNATIONAL LAW AND JURISDICTION IN CYBERSPACE**

Jurisdiction is an aspect of state sovereignty and it refers to judicial, legislative and administrative competence. Although jurisdiction is an aspect of sovereignty, it is not co-extensive with it. International law circumscribes a state’s right to exercise jurisdiction.¹ The internet today is making a complete mockery of the law….not just the traditional laws but even the so-called modern laws. The very basis of any justice delivery system, the jurisdiction, which gives powers to a particular court to accommodate a particular case, is itself being threatened over the internet; leave alone the other traditional laws.²

1. **Meaning of Jurisdiction**

Jurisdiction is the authority of a court to hear a case and resolve a dispute involving person, property and subject matter. These principles of jurisdiction are enshrined in the constitution of a State and part of its jurisdictional sovereignty. All sovereign independent States possess jurisdiction over all persons and things within its territorial limits and all causes, civil and criminal, arising within these limits.³

2. **Issues of Jurisdiction**

The issue of jurisdiction has to be looked into from 2 perspectives:

i. **Prescriptive Jurisdiction**

It describes a State’s ability to define its own laws in respect of any matters it chooses. As a general rule, a State’s prescriptive jurisdiction is unlimited and a State may legislate for any matter irrespective of where it occurs or the nationality of the persons involved.

ii. **Enforcement Jurisdiction**

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A State’s ability to enforce those laws is necessarily dependent on the existence of prescriptive jurisdiction. However, the sovereign equality of States means that one State may not exercise its enforcement jurisdiction in a concrete sense over persons or events actually situated in another state’s territory irrespective of the reach of its prescriptive jurisdiction. That is, a State’s enforcement jurisdiction within its own territory is presumptively absolute over all matters and persons situated therein.

3. **Jurisdiction under the Information Technology Act, 2000**

The State legislative enactments primarily reflect its prescriptive jurisdiction. For example, the IT Act, 2000 provides for prescriptive jurisdiction as it States:

““The provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.””

Further this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

It is the legislative function of the Government to enact laws and judicial and/or administrative function to enforce those laws. Thus, the principles of jurisdiction followed by a State must not exceed the limits which international law places upon its jurisdiction.

4. **International Law**

International law governs relations between independent sovereign States. It is the body of rules, which are legally binding on States in their intercourse with each other. The rules are not meant only for the States but also for the international organizations and individuals. Furthermore, it attempts to regular the extent to which one State’s enforcement jurisdiction impinges or conflicts with others.

i. **Types of International Law**

International law can be studied under following 2 broad headings:

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4 The Information Technology Act, 2000; Section 75 (1)
5 *Ibid*; Section 75 (2)
a. **Public International law**

International law is also referred to as ‘public international law’ as it governs the relations of states.

b. **Private International law**

Private international law is that body of law, which comes into operation whenever a municipal court is faced with a claim that contains a foreign element. The resolution of such private disputes is resolved through the law of ‘conflict of laws’ – it is that part of the private law of a country, which deals with cases having a foreign element. It is a necessary part of the law of every country because different countries have different legal systems containing different rules.

ii. **Extra-territorial Jurisdiction**

a. **Meaning of Extra-territorial Jurisdiction**

The public international law reflects the juxtaposition of States (as a legal person) and subjects their jurisdictional sovereignties to certain limitations, i.e. there is a ‘general prohibition in international law against the extra-territorial application of domestic laws’.^6^

b. **Sources of Extra-territorial Jurisdiction**

It has been recognized under international law that a State may assert extra-territorial jurisdiction under certain circumstances. Following are the sources of these extra-territorial jurisdictions^7^:

➢ **Territorial Principle**

A State’s territory for jurisdictional purposes extends to its land and dependent territories, airspace, aircraft, ships, territorial sea and, for limited purposes, to its contiguous zone, continental shelf and Exclusive Economic Zone (EEZ). The principle as adopted by the national courts has been that all people within a State’s territory are subject to national law, save only for those granted immunity under international law.

The territorial principle has following 2 variants:

- ‘Objective’ territorial principle, where a State exercises its jurisdiction over all activities that are completed within its territory, even though some element constituting the crime or civil wrong took place elsewhere; and

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^6^ *U.S. v. Aluminium Co. of America*, 148 F 2d 416 (1945)

^7^ Supra note 1
• ‘Subjective’ territorial principle, where a State asserts its jurisdiction over matters commencing in its territory, even though the final event may have occurred elsewhere.

In *SS Lotus Case (France v. Turkey)*\(^8\), it was held by the Permanent Court of International Justice that “the first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.”

In view of components of acts involving territories of two or more States, the only way out to resolve the issue is through mutual negotiation, extradition to the most affected State (if extradition treaty exists between them) or simply by an exercise of jurisdiction by the State having custody of the accused.

➢ Nationality Principle

It is for each State to determine under its own law who are its nationals. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of that State. In *Nottebohm Case (Liechtenstein v. Guatemala)*,\(^9\) it was held that ‘the nationality serves above all to determine that the person, upon whom it is conferred, enjoys the rights and is bound by the obligations, which the law of the State in question grants to or imposes upon its nationals’.

Under the garb of nationality principle, a State may exercise jurisdiction over its own nationals irrespective of the place where the relevant acts occurred. A State may even assume extra-territorial jurisdiction.

\(^8\) *SS Lotus Case (France v. Turkey)*, PCIJ Ser A (1927), No. 9

\(^9\) *Nottebohm Case (Liechtenstein v. Guatemala)*, (Second Phase), ICJ Rep (1955) 4
Protective Principle

A State relies upon this principle when its national security or a matter of public interest is in issue. A state has a right to protect itself from acts of international conspiracies and terrorism, during trafficking, etc.

In Attorney-General of the Government of Israel v. Eichmann, the District Court of Jerusalem held: “The State of Israel’s ‘right to punish’ the accused derives, in our view, from two cumulative sources – (i) a universal source (pertaining to the whole of mankind), which vests the right to prosecute and punish crimes of this order in every State within the family of nations; and (ii) a specific or national source, which gives the victim nation the right to try any who assault its existence.”

Passive Personality Principle

It extends the nationality principle to apply to any crime committed against a national of a State, wherever that national may be. It is a way provides that the citizen of one country, when he visits another country, takes with him for his “protection” the law of his own country and subjects those, with whom he comes into contact, to the operation of that law.

The jurisdictional aspect of ‘passive personality’ has been elaborated further in the case of United States v. Yunis, where the US District Court, District of Columbia held: “This passive personality principle authorizes States to assert jurisdiction over offences committed against their citizens abroad. It recognizes that each State has a legitimate interest in protecting the safety of its citizens when they journey outside national boundaries.”

Though the principle may be referred to as a controversial one, because it extends the ‘arm of national laws further even in the foreign territories’, nevertheless, the principle has been adopted as a basis for asserting jurisdiction over hostage takers.

Effects Principle

It is an extra-territorial application of national laws where an action by a person with no territorial or national connection with a State, has an effect on that State. The situation is compounded if the act is legal in the place where it was performed.

The ‘effects doctrine’ is primarily a doctrine to protect American business interests and is applicable where there are restrictive trades or anti-competitive agreements between

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12 See, International Convention Against the Taking of Hostage, 1979
corporations. In *Hartford Fire Insurance Co. v. California*, the question was whether the London insurance companies refusing to grant reinsurance to certain US businesses, except on terms agreed amongst themselves are violative of the US anti-trust laws and tried in the United States. The US Supreme Court held that the US court did have jurisdiction and that there exists no conflict between domestic and foreign law.

- **Universality Principle**

  The canvass of the universality principle is quite vast. A State has jurisdiction to define and prescribe punishment for certain offences recognized by the community of nations as of universal concern. It includes acts of terrorism, hijacking of aircraft, genocide, war crimes etc.

  A state may assert its universal jurisdiction irrespective of who committed the act and where it occurred. The perspective is broader as it was deemed necessary to uphold international legal order by enabling any State to exercise jurisdiction in respect of offences, which are destructive of that order.

5. **International Law and State Law**

  This dichotomy underlines the fact that there is a ‘tug-of-war’ between the State law and the international law. Opposed to this ‘dualistic’ view is the ‘monistic doctrine’, which states that it is international law, which determines the jurisdictional limits of the personal and territorial competence of States.

i. **Application of International Law by Courts**

  In practice, it is the application of ‘statutory elements’ of both the State and international laws, which help the municipal courts to arrive at a decision.

  In *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, the House of Lords examined whether Augusto Pinochet, the ex-President of Chile, who ruled Chile from September, 1973 to March, 1990 was eligible under the State Immunity Act, 1978 as the Kingdom of Spain had asked for his extradition. Against the Division Court order, the Crown Prosecution Service and the Kingdom of Spain appealed in respect of the determination that Pinochet was entitled to immunity from proceedings as a former Head of State.

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14 *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.3)*, [1999] 2 WLR 827, House of Lords
Earlier, in *Ex parte Pinochet Ugarte (No. 1)*, the House of Lords ruled that Pinochet did not enjoy immunity from extradition proceedings because no immunity arose under customary international law in respect of acts of torture and hostage taking and also no personal immunity arose under the State Immunity Act, 1978.

However, this judgement was set aside by the House of Lords in *Ex parte Pinochet Ugarte (No. 2)*, and the entire case was reheard in the House of Lords again as *Ex parte Pinochet Ugarte (No. 3)*, and it ruled that in principle a head of State had immunity from the criminal jurisdiction of the United Kingdom for acts done in his official capacity as head of State by virtue of Section 20 of the State Immunity Act, 1978. Also, that Section 2 of the Extradition Act, 1989 required that the alleged conduct, that was the subject of the extradition request, should be a crime in the UK at the time the offence was committed.

The House of Lords observed that the extra-territorial torture did not become a criminal offence in the UK until Section 134 of the Criminal Justice Act, 1988 came into effect on September 29, 1988; it therefore followed that all allegations of torture prior to that date which did not take place in Spain were not extraditable offences i.e. under the ordinary law of extradition, Pinochet cannot be extradited to face charges in relation to torture occurring before September 29, 1988.

However, it further ruled that torture was an international crime and after the coming into effect of the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, it was crime of universal jurisdiction. Moreover, since the Convention had been ratified by Spain, Chile and UK by December 8, 1988, there could be no immunity for offences of torture or conspiracy to torture from December 8, 1988 at the latest. Therefore, extradition proceedings on these charges could proceed.

Thus, if the *Pinochet Case* represents interplay of jurisdiction of both State and international laws, then one may find jurisdiction of International Tribunals over persons as an example of progressive quality of international law to invoke principles of universal jurisdiction and try individuals accused of war crimes, crimes of aggression and crimes against humanity.

### ii. Application of International Law by International Tribunals

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15 *Ex parte Pinochet Ugarte (No. 1)*, [1998] 3WLR 1456
16 *Ex parte Pinochet Ugarte (No. 2)*, [1999] 2WLR 272
17 Supra note 14
The International Tribunals have travelled a long way from the time of International Military Tribunals (IMT) at Nuremberg and Tokyo after the Second World War to the establishment of International Criminal Tribunals for the former Yugoslavia (1993) and Rwanda (1994).

Nuremberg and Tokyo stood as symbols and signposts of the change from the national State of the 19th century to creation of a supranational body. It announced for the first time that States were accountable to the world community and that international tribunals had jurisdiction over individuals for their violations of international law.

International law has come out as a dynamic law. It has evolved over time and is far more international community centric now than it was fifty years ago. The traditional principles of international jurisdiction that have been developed and adopted over a period of time are now being extended over to cyberspace to formulate new idiom of cyber jurisdiction.

6. Jurisdiction in Cyberspace

In simple terms, cyber jurisdiction is the extension of principles of international jurisdiction into the cyberspace. Cyberspace has no physical (national) boundaries. It is an ever-growing exponential and dynamic space. With a ‘click of a mouse’ one may access any website from anywhere in the world. Since the websites come with ‘terms of service’ agreements, privacy policies and disclaimers – subject to their own domestic laws, transactions with any of the websites would bind the user to such agreements. And in case of a dispute, one may have recourse to the ‘private international law. In case the “cyberspace offences” are either committed against the integrity, availability and confidentiality of computer systems and telecommunication networks or they consist of the use of services of such networks to commit traditional offences, then one may find oneself in the legal quagmire.19

The question is not only about multiple jurisdictions but also of problems of procedural law connected with information technology. The requirement is to have broad based convention dealing with criminal substantive law matters, criminal procedural questions as well as with international criminal law procedures and agreements.

i. Convention on Cyber crime

The Convention on Cyber crime was opened at Budapest on 23\textsuperscript{rd} November, 2001 for signatures. It was the first ever-international treaty on criminal offences committed against or with the help of computer networks such as the Internet.

The Convention deals in particular with offences related to infringement of copyright, computer-related fraud, child pornography and offences connected with network security. It also covers a series of procedural powers such as searches of and interception of material on computer networks. Its main aim is to pursue “a common criminal policy aimed at the protection of society against cyber crime, inter alia by adopting appropriate legislation and fostering international co-operation.”

ii. Extraditable Offences

Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. Thus, sufficient evidence has to be produced to show a \textit{prima facie} case against the accused and the rule of specialty protects the accused from being tried for any crime other than that for which he was extradited.

In \textit{Daya Singh Lahoria v. Union of India},\textsuperscript{20} the Supreme Court observed that: “A fugitive brought into this country under an Extradition Decree\textsuperscript{21} can be tried only for the offences mentioned in the Extradition decree and for no other offences and the criminal courts of India will have no jurisdiction to try such fugitive for any other offence.”

“There is no rule of international law which imposes any duty on a State to surrender a fugitive in the absence of extradition treaty. The law of extradition, therefore, is a dual law. It is ostensibly a municipal law; yet it is a part of international law also, inasmuch as it governs the relations between two sovereign States over the question of whether or not a given person should be handed over by one sovereign State to another sovereign State. This question is decided by national courts but on the basis of international commitments as well as the rules of international law relating to the subject.”\textsuperscript{22}

Despite the treaty, a State may refuse extradition. In \textit{Hans Muller of Nuremberg v. Superintendent Presidency Jail, Cal.},\textsuperscript{23} the Court held that even if there is a requisition and a good cause for extradition, the government is not bound to accede to the request, because

\textsuperscript{20} \textit{Daya Singh Lahoria v. Union of India}, (2001) 4 SCC 516
\textsuperscript{21} The Extradition Act, 1962; Section 21 provides that if a person is brought into India under an extradition decree, he cannot be tried in respect of an offence, which does not form part of the decree.
\textsuperscript{22} Ibid.
\textsuperscript{23} \textit{Hans Muller of Nuremberg v. Superintendent Presidency Jail, Cal.}, AIR 1955 SC 367
Section 3 (1) of the Indian Extradition Act, 1903 (based on Fugitive Offenders Act, 1881 of the British Parliament) gives the government discretionary powers.

Extradition is usually granted for an extraditable offence regardless of where the act or acts constituting the offence were committed. The extraditable offences are: Murder or other willful crime against a Head of State or Head of Government or a member of their family, aircraft hijacking offences, aviation sabotage, crimes against internationally protected persons including diplomats, hostage taking, offences related to illegal drugs, or any other offences for which both contracting states have the obligation to extradite the person pursuant to a multilateral international agreement.

In *R v. Governor of Braxton Prison and another, ex parte Levin*, a Russian hacker has hacked in the US territory using a Russian computer but because as his activities constituted various crimes under British law and the conduct had effect within the American territory. He was arrested in England and extradited to the US.

It is possible that a criminal commits offences under other legislation where jurisdiction is not statutorily defined. There the court takes a flexible approach suitable for the fact situation in the case. In *R v. Governor of Pentonville, ex parte Osman*, the court held that while it is possible to hold that the act of appropriation might have occurred in more than one jurisdiction (that is perilously close to accepting that a crime might occur in more than one place) the jurisdiction was conferred to the jurisdiction with most significant link.

In the modern world, extradition works on a host of bilateral and multilateral treaties on extradition. Extradition is a procedure that may be appropriate for any crime (generally serious crimes), the treaties generally limit the number of extradition crimes. It is perhaps not fair to say that always formal extradition is required, for example, between England and Ireland a wanted person may be arrested in one state sent to another on the basis of a warrant and backed in the extraditing state.

### iii. Cyber crimes – Are they Extraditable Offences?

The Convention on Cyber crime has made cyber crimes extraditable offences. The offence is extraditable if punishable under the laws in both contracting parties by imprisonments for more than one year or by a more severe penalty. The aforesaid provision

24 *R v. Governor of Braxton Prison and another, ex parte Levin*, [1996] 3 WLR 657
25 *R v. Governor of Pentonville, ex parte Osman*, (1989) 3 All ER 701
26 Backing of Warrants Act, 1965 in UK; Extradition Act, 1965 in Ireland
27 The Convention on Cyber crime; Article 24
applies to extradition between parties for the criminal offences established in accordance with other provisions\textsuperscript{28} of this Convention, provided that they are punishable under the laws of both parties concerned by deprivation of liberty for a maximum period of at least one year, or by a more severe penalty.

**Table: The Extraditable Offences under the Convention**

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<tr>
<th>Extraditable Offences under Convention</th>
<th>Offences</th>
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<tr>
<td>Title 1 Offences against the confidentiality, integrity and availability of computer data and systems.</td>
<td>Illegal access (Article 2)</td>
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<td>Illegal interception (Article 3)</td>
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<td>Title 4 Offences related to infringements of copyright and related rights</td>
<td>Offences related to infringements of copyright and related rights (Article 10)</td>
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<td></td>
<td>Attempt and aiding or abetting (Article 11).</td>
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</table>

Almost every kind of cyber crimes have been made extraditable under the Convention. Moreover, the Convention has the force of international law behind it. In other words, to investigate, search, seize, arrest, prosecute and extradite cyber criminals for cyber crimes, a proper legal framework is already in place.

India is still not a signatory to the Cyber Crime Convention and the bilateral extradition treaties, which it has signed with around 50 countries so far, do not mention ‘cyber crime’ as extraditable offences. But it may not deter the Indian government from granting extradition, as it was held in \textit{Rambabu Saxena v. State},\textsuperscript{29} that “if the treaty does not enlist a particular offence for which extradition was sought, but authorizes the Indian government to grant extradition for some additional offences by inserting a general clause to this effect, extradition may still be granted.”

Nevertheless, problems related to extradition remain as the legislations of the European Union forbid not only its own nationals but also persons, of any nationality, wanted

\textsuperscript{28} \textit{Ibid}; Article 2-11

\textsuperscript{29} \textit{Rambabu Saxena v. State}, AIR 1950 SC 155
by any country, to be extradited for crimes, which award the capital punishment for such crimes.

Moreover, procedures of ‘Letter Regoratory’\(^{30}\) that enable investigation of crime in a foreign country are not easy and are hopelessly out of tune with the scope of computer crime and swiftness with which the evidence can be destroyed. It is important to note that about 140 letters regoratory sent to different countries seeking their cooperation in investigations have still remained unanswered. One of the reasons of unanswered letters regoratory is the apprehension at the foreign court’s end that the evidence may be used for capital punishment. In certain cases, courts have demanded undertaking that the evidence would not be used to award death sentence to the accused. It is thus imperative that there is a need to sign mutual legal assistance treaties (MLTs) with more number of countries till necessary amendments are made in the Cr.P.C. Currently, India has MLTs signed with 19 countries to attain legal compatibility. Even under the Cr.P.C. prior permission of the Central Government is required to inquire into or try offences committed outside the country,\(^{31}\) which puts shackles on the investigating agency’s work.

These things are bound to affect the extra-territoriality application of the Information Technology Act, 2000.

C. PERSONAL JURISDICTION IN CYBERSPACE

1. **Introduction**

E-commerce is 24/7 commerce. It is an online activity involving exchange of goods and services for a consideration (money). Such activity may lead to disputes, which could be: (a) municipal (domestic) or (b) international. The question is how to resolve these disputes keeping in view the complexity of online activity.

From the point of identifying the jurisdiction, it is important to know the nature of the dispute and for that purpose the following questions are necessary\(^{32}\):

i. What has happened?

ii. Where did it happen? and

iii. Why did it happen?

\(^{30}\) The Code of Criminal Procedure, 1973; Section 166 A and Section 166 B

\(^{31}\) *Ibid.*, Section 188

\(^{32}\) *Somnath Case*, Case No. 33/78 [1978] E.C.R. 2183
The answers would provide not only the necessary information related to the business model of the website but also the extent of commercial interaction between the service provider (website owner) and the user.

The traditional principles of domestic and international jurisdiction that have been developed and adopted over a period of time are now being extended to cyberspace to formulate a new idiom of cyber jurisdiction. This adoption would maintain continuity of established law and practice even in the realm of online activities.

2. **U.S. Approach to Personal Jurisdiction**

It is important to understand the traditional principles of jurisdiction, like personal jurisdiction, local state’s long-arm statute and the due process clause of the US Constitution to know how these principles have been used by various courts to resolve e-commerce related disputes.

Computer crimes because of their transitional nature involve certain difficult jurisdictional questions. Suppose a hacker operating from a computer in country A, enters a database in country B, and after routing the information through several countries causes a consequence in C. here atleast three jurisdictions are involved and who shall try him? The dilemma was described very appropriately by La Forest, J., in *Libman v. The Queen*,\(^{33}\) in following words: “one is to assume that the jurisdiction lies in the country where the crime is planned or initiated. Other possibilities include the impact of the offence is felt, where it is initiated, where it is completed or again where the gravamen or the essential element of the offence took place. It is also possible to maintain that any country where any substantial or any part of the chain of events constituting an offence takes place may take jurisdiction.

i. **Personal Jurisdiction**

a. **Meaning of Personal Jurisdiction**

Personal Jurisdiction is the competence of a court to determine a case against a particular category of persons (natural as well as juridical). It requires a determination of whether or not the person is subject to the court in which the case is filed.

Personal jurisdiction looks into an issue from the point of ‘physical presence’, whether the person was a resident or a non-resident. If he is a resident, then there is no doubt about his being subject to municipal (domestic) laws. The problem arises, if he is a non-

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\(^{33}\) *Libman v. The Queen*, (1985) 21 CCC 3d 206
resident, what laws would be applicable – municipal laws of the state where he is residing or municipal laws of the state whose laws he has transgressed?

b. **Types of Personal Jurisdiction**

It may be further classified into following 2 types:

- **General Jurisdiction**

  The “general” jurisdiction subjects a person to the power of the applicable court with respect to any cause of action that might be brought. It has historically relied on very close contacts of the person with the state, such as residency or domicile within the state, physical presence in the state at the time of service of process, or some other substantial “continuous and systematic” contact with the forum state.

- **Specific Jurisdiction**

  The “specific” jurisdiction, refers to the power of the applicable court with respect to a particular cause of action based upon some set of “minimum contacts” with the forum state that relate to that cause of action.

ii. **Enactments of long-arm Statute**

The principle ‘long-arm statute’ authorizes the courts to claim personal jurisdiction over a non-resident defendant whose principal business is outside the state on the ground that their action (tortuous or any other) falls within the nature of activity required to qualify for jurisdiction.

iii. **Due Process of Law**

The ‘due process of law’ as given in the US Constitution\(^{34}\) limits the powers of the courts to exercise traditional notions of fair play and substantial justice. The US Constitution provides that “……no state shall…..deprive any person of life, liberty or property without due process of law.”\(^{35}\)

In *Burger King Corp. v. Rudzewicz*,\(^{36}\) it was held that the exercise or personal jurisdiction over an out-of-state defendant must comport with constitutional due process. In *Doe v. Unocal Corp.*\(^{37}\), it was held that when an exercise of personal jurisdiction is

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\(^{34}\) The US Constitution; 5\(^{th}\) Amendment

\(^{35}\) Ibid; 14\(^{th}\) Amendment

\(^{36}\) *Burger King Corp. v. Rudzewicz*, 471 US 462, 471-72 (1985)

\(^{37}\) *Doe v. Unocal Corp.*, 248 F. 3d 915, 922 (9\(^{th}\) Cir. 2001)
challenged, the burden is on the plaintiff to demonstrate why the exercise of jurisdiction is proper.

In Ballard v. Savage,\textsuperscript{38} it was held that the plaintiff can satisfy this burden of proof by showing the following 3 things: (a) the defendant purposefully availed itself of the privilege of conducting activities in the forum state by invoking the benefits and protections of the forum state’s laws; (b) the plaintiff’s claim arises out of the defendant’s forum-related activities; and (c) the exercise of jurisdiction over the out-of-state defendant is reasonable.

The idea is to invoke both long-arm statute and due process of law provisions to allow the court to exercise personal jurisdiction over any non-domiciliary defendant.\textsuperscript{39}

iv. Establishing Personal Jurisdiction

The credit to establish ground rules for establishing personal jurisdiction for the non-resident lies with the US Supreme Court judgement in International Shoe Co. v. State of Washington, Office of unemployment Compensation and Placement et al.\textsuperscript{40} It held that a court’s exercise of personal jurisdiction over a non-resident defendant is proper if that defendant has had certain ‘minimum contacts’ with the forum state such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’

It established the following 3 criteria for establishing “minimum contacts”:

(i). the defendant must “purposeful avail” himself of the privilege of doing business with the forum state,

(ii). the cause of action arises from defendant’s activities in the forum state, and

(iii). the exercise of jurisdiction would be fair and reasonable.\textsuperscript{41}

The ‘minimum contact’ principle laid the foundation of state’s jurisdiction over other state’s subject. It advocated establishment of ‘minimum contacts’ to give rise to obligations between the defendant and the forum state. Primarily, it does not look into the issue whether the contacts were sufficient or insufficient to establish “purposeful availing”.

The International Shoe Company’s Case was decided in the year 1945 and at that time there were no state long-term statutes.

\textsuperscript{38} Ballard v. Savage, 65 F. 3d 1495, 1498 (9th Cir. 1995)
\textsuperscript{39} G.R. Ferrera and D.S. Lichtenstein, Cyber Law –Text and Cases, USA, 2000, p. 21
\textsuperscript{40} International Shoe Co. v. State of Washington, Office of unemployment Compensation and Placement et al, 326 U.S. 310, 316 (1945); See also Hess v. Pawiolski, 274 US 352 (1927)
\textsuperscript{41} Ibid.
Long-arm statute went a step ahead of ‘minimum contacts’ to look into whether the contacts were sufficient to establish “purposeful availment”, like:

i. Purposefully and successfully solicitation of business from forum state residents

ii. Establishment of contract with the forum state residents

iii. Associated with other forum state related activity

iii. Substantial enough connection with the forum state

Once the court determined that sufficient ‘minimum contacts’ existed to exercise specific jurisdiction over the defendant, the court then would have to consider whether it was reasonable to subject the non-resident defendant to the personal jurisdiction of the forum to the extent that federal constitutional requirements of due process will allow.

The importance of the International Shoe Company’s case is that it established for the first time that personal jurisdiction might exist even though the defendant had no physical presence in the forum state. It acted as a precursor to the state’s long-arm statutes. Later, with the advent of e-commerce, this judgment has been used by the courts all over the United States as an established law in identifying “minimum contacts” to claim personal jurisdiction over a non-resident.

v. Establishing Personal Jurisdiction in Cyberspace

The courts have been borrowing the principles of personal jurisdiction and extending them to the cyberspace setting. The principles of jurisdiction, which were earlier applied to physical establishments, are now being successfully applied to online business establishments (websites).

A website represents a virtual business model. In order to fix the place of jurisdiction, one may have to look into the nature of the website model – whether it is ‘business oriented’ or ‘information oriented’. Other key elements that have to be taken into consideration are: geographical location of users, website owner and web serve. Even the terms of service agreements, disclaimers and choice of law or forum clauses play an important role.42

vi. Nature of the Website

An online forum of business may exist in the following forms:

a. Passive Website

A ‘passive’ website is meant for information purposes only.

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In *Bensusan Restaurant Corp. v. King*[^43] a New York jazz club operator sued a Missouri club owner claiming trademark infringement, dilution and unfair competition over the use of the name “the Blue Note”. The defendant maintained a website promoting his Missouri “Blue Note” club and providing a Missouri telephone number through which tickets to the club could be purchased. The issue was whether the existence of the website was sufficient to vest the court with personal jurisdiction over the defendant under New York’s long-arm statute. The court held that it did not. The Court considered whether the existence of the website and telephone ordering information constituted an “offer to sell” the allegedly infringing “product” in New York, and concluded it was not. The court noted that, although the website is available to any New Yorker with Internet access, it takes several affirmative steps to obtain access to this particular site, to utilize the information contained there, and to obtain a ticket to the defendant’s club. These steps would include the need to place a telephone call to Missouri and to physically travel to Missouri to pick up the tickets ordered. Therefore, the court concluded that any infringement that might occur would be in Missouri, not New York. “The mere fact that a person can gain information on the allegedly infringing product is not the equivalent of a person advertising, promoting, selling or otherwise making an effort to target its product in New York”. It found that the defendant did nothing to “purposefully avail” himself of the benefits of New York. There was no evidence of the defendant actively encouraging New Yorkers to visit the site.

### b. Interactive Websites

An ‘interactive’ website is a dynamic website and provides more than ‘mere’ information.

In *Cody v. Ward*[^44], a Connecticut resident brought suit in Connecticut against a California resident, claiming reliance on fraudulent representations made by the defendant resulting in a loss. The court held that it had valid jurisdiction over the defendant based solely upon bulletin board messages posted by the defendant on an online service’s “Money Talk” bulletin board and e-mail messages and telephone conversations from the defendant in California to the plaintiff in Connecticut. It simply concluded that the “purposeful availment” requirement was satisfied by the defendant’s electronic contacts with the plaintiff.

In *CompuServe, Inc. v. Patterson*, CompuServe, an Ohio Corporation with its main offices and facilities in Ohio, sued one of its commercial shareware providers, a resident of Texas. The suit was filed in Ohio and the defendant asserted that the Federal District Court in Ohio lacked jurisdiction over him, claiming never to have set foot in Ohio. The appellate court measured the defendant’s “contacts” with Ohio and concluded that jurisdiction was proper because: (a) the defendant had “purposefully availed” himself of the privilege of doing business in Ohio by subscribing to CompuServe and subsequently accepting online CompuServe’s Shareware Registration Agreement (which contained an Ohio choice of law provision) in connection with his sale of shareware programmes on the service, as well as by repeatedly uploading shareware programmes to CompuServe’s computers and using CompuServe’s e-mail system to correspond with CompuServe regarding the subject matter of the lawsuit; (b) the cause of action arose from Patterson’s “activities” in Ohio because he only marketed his shareware through CompuServe; and (c) it was not unreasonable to require Patterson to defend himself in Ohio because by purposefully employing CompuServe to market his products, and accepting online the Shareware Registration Agreement, he should have reasonably expected disputes with CompuServe to yield lawsuits in Ohio.

In *Hanson v. Denckla*, the court held that “the unilateral activity of those who claim some relationship with the non-resident defendant cannot satisfy the requirement of contact with the forum state. The application of that rule will vary with the quality and nature of the defendant’s activity, but it is essential in each case that there be some act by which the defendant purposefully avails himself of the privilege of conducting business within the forum state, thus invoking the benefits and protections of its laws.

In *EDIAS Software International v. BASIS International Ltd.*, an Arizona based software distributor brought suit in Arizona against a New Mexico software development company arising out of the termination of an agreement between the companies and public statements made by the defendant about the termination. The defendant had no offices in Arizona. The defendant’s contacts with Arizona analyzed under the “purposeful availment” test consisted of: (a) a contract with the plaintiff (executed in New Mexico with a New Mexico choice of law provision); (b) phone, fax and e-mail communications with plaintiff in

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45 *CompuServe, Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996);
Arizona; and (c) sales of software products to the plaintiff and other Arizona residents; and visits to Arizona by officers of the defendant. The court upheld the plaintiff’s claim of personal jurisdiction over the defendant.

In *Quill Corp. v. North Dakota,*
the court outlined following 5 relevant factors:

a. The defendant’s burden in defending in the foreign forum,
b. The interest of the forum state in adjudicating the dispute,
c. The plaintiff’s interest in securing ‘convenient and effective’ relief,
d. The interest of the judicial system in ‘obtaining the most effective resolution of controversies, and
e. The shared interest of several states in furthering fundamental substantive social policies.

If one analyses the aforesaid three cases, then one may conclude that all the three cases fall in the category of ‘interactive website’, though their degree of interactivity differ.

<table>
<thead>
<tr>
<th>Passive Website</th>
<th>Interactive Website</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provides only information</td>
<td>Provides information and facilitates purchasing decisions</td>
</tr>
<tr>
<td>Does not solicit business</td>
<td>Purposefully solicits business</td>
</tr>
<tr>
<td>Not a revenue model per se</td>
<td>Represents a revenue model</td>
</tr>
<tr>
<td>Personal jurisdiction does not exist</td>
<td>Personal jurisdiction may or may not exist depending upon fulfillment of the ‘minimum contacts’ test</td>
</tr>
</tbody>
</table>

Application of ‘minimum contacts’ and ‘long-arm of statute’ principles have been used by the courts to determine personal jurisdiction by differentiating between ‘passive’ and ‘interactive’ websites. An important element of minimum contacts is that the contacts need to be of such a character and degree that a defendant could reasonably have expected to be hauled into court in the distant state.

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c. Interactive ‘Mixed’ Websites

Now supposing that if a company maintains a website for the purpose of soliciting business, then would it be called an ‘interactive’ website?

In *Maritz, Inc. v. Cybergold, Inc.*49 the court looked at the very basic issue of maintaining a website by the company by framing the due process issue as whether “maintaining a website which can be accessed by any internet user, and which appears to be maintained for the purpose of, and in anticipation of being accessed and used by any and all internet users, amounts to promotional activities or active solicitations such as to provide the minimum contacts necessary for exercising personal jurisdiction over a non-resident.” The court concluded that because the maintenance of a website is a more efficient and faster means of reaching a global audience, and “through its website, CyberGold has consciously decided to transmit advertising information to all internet users, knowing that such information will be transmitted globally. Thus, CyberGold’s contacts are of such a quality and nature, albeit a very new quality and nature for personal jurisdiction jurisprudence that they favour the exercise of personal jurisdiction over the defendant.” The court reasoned that setting up a website is a stronger basis for jurisdiction than maintaining a telephone number or a mailing address, since (a) a company’s establishment of a telephone number, is not as efficient, quick, or easy way to reach the global audience that the internet has the capability of reaching, and (b) if a forum resident sends a letter to defendant, the defendant would have the option as to whether to mail information to the forum resident, whereas defendant automatically and indiscriminately responds to each and every internet user who accesses its website.

In other words, specially maintaining a website for soliciting business i.e. advertising and promoting the offline activities in an online medium, exemplifies the fact that the website is an ‘interactive’ one, though of a lesser degree.

vii. Sliding Scale Approach

The abovementioned judgements reflect the growing acceptance of the fact that the personal jurisdiction depends on the level of interactivity.

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In *Zippo Manufacturing Company v. Zippo Dot Com, Inc.*, the issue of specific personal jurisdiction arose again in the context of a trademark dilution, infringement and false designation under the Federal Trademark Act. Zippo Manufacturing Company, a Pennsylvania based corporation has been well known among other things for “Zippo” tobacco lighters. Zippo Dot Com, Inc. California Corporation has been providing free news services through its website. In addition, the defendant also provided a fee based service to permit the subscriber to view and/or download Internet news group messages that are stored on the defendant’s server in California. The defendant, a California Corporation, was sued in Pennsylvania. Dot Com maintained no offices, employees or agents in the State of Pennsylvania. It has been posting information about its service on its web pages, which are accessible to Pennsylvania residents via the Internet. The defendant had 140,000 paying customers worldwide and out of which around 2%, i.e. 3,000 were Pennsylvania residents. In addition, it had contracted with several Internet access providers in Pennsylvania to permit the Pennsylvania subscribers to access the Dot com’s new service.

Court’s task was to determine whether Dot Com’s conducting of e-commerce with Pennsylvania residents constitutes the purposeful availment of doing business in Pennsylvania. Dot Com not only chose to process Pennsylvania residents’ applications but also assigned them passwords. The Dot Com argued that its forum–related activities were not numerous or significant enough to create a “substantial connection” with Pennsylvania. It pointed out to the fact that only 2% of its subscribers were Pennsylvania residents.

The court concluded that this level of contact with the state justified the exercise of specific personal jurisdiction. The court noted that the case reveals a “sliding scale”, in which, “at one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper, (e.g. *Compuserve v. Patterson*). At the opposite end are situations where a defendant has simply posted information on an Internet website, which is accessible to users in foreign jurisdictions. A passive website that does little more than make information available to those who are interested in it is not grounds for the exercise of

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51 *Supra note 45*
personal jurisdiction, (e.g. *Bensusan Restaurant Corp. v. King*).\(^{52}\) The middle ground is
occupied by interactive websites where a user can exchange information with the host
computer. In these cases, the exercise of jurisdiction is determined by examining the level of
interactivity and the commercial nature of the exchange of information that occurs on the
website, (*Maritz, Inc. v. Cybergold, Inc.*)\(^{53}\).”

To sum up, the sliding scale approach classifies the websites on the basis of interactivity.

The above judgements have underlined the fact that “Personal jurisdiction must adapt
to progress in technology” and the likelihood that personal jurisdiction can be constitutionally
exercised is directly proportional to the nature and quality of commercial activity that a
business entity conducts over the Internet.

Interestingly, *Zippo* has also been followed in Canada. In *Braintech v. Kostuik*,\(^{54}\) the
plaintiff technology company was incorporated in Nevada, domiciled in British Columbia
and maintained a research facility in Texas. It obtained a judgement in a Texas defamation
action, alleging that the defendant, a resident of British Columbia, had posted defamatory
material on an internet bulletin board. The computer hosting this bulletin board was not
located in Texas, and there was no evidence that anyone in Texas has actually viewed the
offending material. The British Columbia Court refused to recognize the Texas judgement
because it found no purposeful commercial activity has been carried on by the defendant in
Texas. Accordingly, there was no real or substantive connection between the litigation and
that State and held that “the plaintiff must offer better proof that the defendant has entered
Texas then the mere possibility that someone in that jurisdiction might have reached out to
cyberspace to bring the defamatory material to a screen in Texas.”\(^{55}\)

**viii. Limit of Interactivity Criterion**

Over a period of time, the courts have moved away in some cases from the sliding-
scale prognosis that personal jurisdiction is directly proportional to the nature and quality of
commercial activity that a business entity conducts over the Internet. For example, in
*CyberSell Inc. v. CyberSell Inc.*,\(^ {56}\) the court held that “mere operation of a website is

\(^{52}\) *Supra note 43*

\(^{53}\) *Supra note 49*

\(^{54}\) *Braintech v. Kostuik*, (1999) 63 BCLR (3d) 156 (British Columbia Court of Appeal)

\(^{55}\) *Id. at 158*

\(^{56}\) *CyberSell Inc. v. CyberSell Inc.*, 130 F. 3d 414 (9th Cir. 1997)
insufficient to support personal jurisdiction; ‘something more’ is required to indicate that the defendant purposefully directed his activity in a substantial way to the forum state”.

Similarly, the courts from the other states have not been willing to accept that interactivity of a website alone constitutes “purposeful availment” of the forum state. Cases in which interactive features of a website were found insufficient to support jurisdiction include: 3D Systems, Inc. v. Aarotech Laboratories, Inc.,57 (defendant operated a website describing its subsidiary’s products, and received e-mail inquiries via that site, but merely forwarded them to its subsidiary for response); American Information Corp. v. American Infometrics, Inc.,58 (prospective employees could submit their resumes via the website); Ecotecture, Inc. v. Wenz,59 (website allowed visitors to subscribe to an online journal); People Solutions, Inc. v. People Solutions Inc.,60 (website “contains interactive pages that allow customers to test defendant’s products, download product demos, obtain product brochures and information, and order products online”); JB Oxford Holdings Inc. v. Net Trade, Inc.,61 (visitors could apply for a securities trading account online); Desktop Technologies Inc. v. Colorworks Reproduction & Design, Inc.,62 (site allowed exchange of files via FTP and e-mail); Agar Corp. v. Multi-fluid, Inc.,63 (site included links allowing visitors to provide feedback and register).

It seems that the courts have started appreciating and analyzing the website in a holistic fashion rather than in a piecemeal manner. To them, interactivity is not the only criteria for proclaiming personal jurisdiction. Similarly, the features on the website, like toll-free number and/or link to send an e-mail do not make such website interactive. For example, in Osteotech, Inc. v. GenSci Regeneration Sciences, Inc.,64 (placement of defendant’s phone number or e-mail address on its website is not relevant to the jurisdictional analysis, since inclusion of this information “has no more of an impact on any particular forum than a website without such information”); Edberg v. Neogen Corp.,65 (no jurisdiction, where site included both a toll-free number and a link for sending e-mail to the defendant); Grutkowski

v. Steamboat Lake Guides & Outfitters, Inc.,\textsuperscript{66} (inclusion of an e-mail link and local telephone number does not make site interactive); Conseco, Inc. v. Hickerson,\textsuperscript{67} (no jurisdiction, where site included e-mail link); Transcraft Corp. v. Doonan Trailer Corp.,\textsuperscript{68} (no jurisdiction, where site includes a toll-free number and invites inquiries by e-mail).

ix. Interactivity: Online + Offline

As already discussed, on the scale of interactivity, the ‘plaintiff-defendant’ interaction in EDIAS Software International v. BASIS International Ltd.,\textsuperscript{69} has been identified as the highest, since the online interaction between them has been further supported by offline activities, like sale of the goods and visits to Arizona by officers of the defendant.

Increasingly, courts have been going beyond the online interaction and looking whether there has been some “additional contacts” to satisfy due process requirements for jurisdiction. For example, in Starmedia Network Inc. v. Star Media Inc.,\textsuperscript{70} the defendant’s website allowed visitors to register, download dealer applications, obtain password-protected product and pricing information the court argued that though the website was an interactive one under the Zippo criteria, but found that its interactivity was “limited”. It held, however, that the due process requirements for jurisdiction were satisfied in view of “additional contacts” that defendant had with the forum state. Similarly, in Hsin Ten Enterprise USA, Inc. v. Clark Enterprises,\textsuperscript{71} the court did not ground jurisdiction on defendant’s interactive website alone, but noted that defendant sent representatives to attend trade shows in the forum state, maintained independent affiliates there, and had sold its products to residents of the forum state.

Hence, it is important to note that the meaning of website interactivity does no longer imply online interaction only. The courts have been looking into some “additional offline contacts” for proper application of personal jurisdiction.

x. Forum State Targeting

Another trend that has been emerging is that the courts now increasingly taking cognizance of the commercial involvement of the residents of the forum state. The earlier

\textsuperscript{67} Conseco, Inc. v. Hickerson, 698 N.E. 2d 816 (Ind. App. 1998)
\textsuperscript{68} Transcraft Corp. v. Doonan Trailer Corp., 45 U.S.P.Q. 2d (BNA) 1097 (N.D.III. 1997)
\textsuperscript{69} Supra note 47
\textsuperscript{70} Starmedia Network Inc. v. Star Media Inc., 2001 WL 417118 (S.D.N.Y. 2001)
\textsuperscript{71} Hsin Ten Enterprise USA, Inc. v. Clark Enterprises, 138 F. Supp. 2d 449 (S.D.N.Y. 2000)
concept of ‘general interaction’ has given way to ‘specific interaction’ for the purpose of invoking ‘specific personal jurisdiction’. For example, in *Millennium Enterprises Inc. v. Millennium Music, LP*, the plaintiff, which operated music stores in Oregon under the name “Music Millennium” claimed that defendant violated its trademark in that name by operating in South Carolina under the name “Millennium Music.” Defendant’s website allowed visits to purchase compact disks, join a discount club, and request franchising information, but no residents of Oregon had made any purchases via the website or engaged in any online communication with the defendant. The court rejected the view that potential interactivity is sufficient to satisfy due process. It held that there must be an addition to some “deliberate action” within the forum state, consisting of either transaction with residents of the forum state or other conduct purposefully directed at them. The court opined, “Until transactions with Oregon residents are consummated through defendant’s website, defendants cannot reasonably anticipate that they will be brought before this court”.

Also, in *Quokka Sports, Inc. v. Cup Int’l Ltd.*, the defendants, a company and individuals based in New Zealand, operated websites under domain names that allegedly infringed plaintiff’s trademarks. The court found that “the content of the website reflected the defendant’s intention to target the U.S. market.” In reaching that result the court relied on the facts that: (1) defendants purposefully went to the United States Registrar, NSI, to get a ‘.com’ domain name, rather than staying at home and registering a ‘country specific’ ‘.nz’ domain; (2) the website featured banner advertisements from ten U.S. companies, some of the ads, when clicked, displayed a page designed for U.S. consumers; (3) defendants quoted advertising rates to prospective advertisers in U.S. dollars; (4) the website offered to sell travel packages that were priced in U.S. dollars; and (5) the website offered books for sale, in affiliation with Amazon.com, a U.S. company.

Both the aforesaid cases point out that the targeting of the forum state is an important criterion in establishing personal jurisdiction.

**xi. “Effect Test” and Online Interaction**

Another criterion that has been accepted by the courts has been “effects” of online interaction on the forum state. The US Supreme Court in *Calder v. Jones*, held that the

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73 *Quokka Sports, Inc. v. Cup Int’l Ltd.*, 99 F. Supp. 2d 1105 (N.D. Cal. 1999)
“minimum contacts” due process requirement may be satisfied on the basis of the “effects” that out-of-state conduct has in the forum state. In that case, the Court held that a California court could assert jurisdiction over a Florida publisher that published an article defaming the plaintiff, in view of the facts that plaintiff resided in California. The court reasoned that the defendants had engaged in “international, and allegedly tortuous, actions that were expressly aimed at California,” and that “they knew that the brunt of the injury would be felt” by the plaintiff in California.

The “effect test” is a further extension of the ‘forum state targeting’, as it also takes into consideration the effect that “out-of-state” conduct has in the forum state. Thus, in order to have personal jurisdiction, there must be: (1) intentional actions, (2) expressly aimed at the forum state, and (3) causing harm, the brunt of which the defendant knows is suffered or likely to be suffered in the forum state.

What separates the “effect test” from other personal jurisdiction approaches is that the focus is on the “knowledge” or “likelihood” of causing harm in the forum state. All the previous approaches put more focus on the level of either online or online as well as offline interactions. That’s why more and more cases involving defamation or infringement of intellectual property rights have been decided on the basis of this test. For example, in Telco Communications v. An Apple a Day,75 (The Virginia plaintiff sued the Missouri defendant for, inter alia, defamation in Internet press releases from which the plaintiff’s stock prices suffered. The court held the exercise of jurisdiction to comport with due process since the defendant knew the statements would be damaging to the plaintiff and was aware of the location of the plaintiff in Virginia; PurCo Fleet Services, Inc. v. Towers,76 (defendant registered domain name corresponding to plaintiff’s trademark, and set up website that forwarded visitors to its own site); 3DO Co. v. Poptop Software Inc.,77 (defendant’s website allowed visitors to download software that allegedly infringed plaintiff’s copyright and misappropriated plaintiff’s trade secrets); Bunn-O-Matic Corp. v. Bunn Coffee Service, Inc.,78 (defendant’s website included terms that allegedly infringed plaintiff’s trademarks); Digital Equipment Corp. v. AltaVista Technology, Inc.,79 (the court drew an analogy between trademark infringement that occurs on a website and infringement that arrives in the state via

76 PurCo Fleet Services, Inc. v. Towers,38 F. Supp. 2d 1320 (D. Utah 1999)
other means of communication like telex, telephone and mail and held that “using the Internet under the circumstances of this case is as much knowingly ‘sending’ into Massachusetts the allegedly infringing and therefore tortious uses of Digital’s trademark as is a telex, mail, or telephonic transmission”).

The application of the “effect test” in the online environment is to establish the tortious liability of the defendant and the long-arm reach of the plaintiff’s forum state to have personal jurisdiction over such defendants.

In *Northwest healthcare Alliance Inc v. Healthgrades.com*, the plaintiff was a home health care provider in Washington State. Defendant Healthgrades.com was a Delaware corporation with its principal place of business in Colorado. The defendant operated a website that purported to rate home health care providers, one of which was the plaintiff. The plaintiff brought an action against the defendant in Washington State Court alleging defamation and violation of Washington’s Consumer Protection Act after the plaintiff learned that it had received what it considered an unfavourable rating on the defendant’s website. The Ninth Circuit Court of Appeal held that the effects test could be employed in such a case when the harm allegedly suffered by the plaintiff sounded in tort. Under this approach, the exercise of personal jurisdiction over an out-of-state defendant was proper if the defendant: (a) engaged in intentional actions; (b) expressly aimed at the foreign state; (c) causing harm, the brunt of which is suffered and which the defendant knows is likely to be suffered in the form state.

xii. Jurisdiction on the Basis of Online Contract

Online contracts come with ‘terms of service’ agreements and disclaimers. These agreements impose restrictions on the users regarding the choice of law and forum selection. In *Bremen v. Zapata Off-Shore Co.*, the judicial view arrived was that “such clauses (forum selection) are *prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be ‘unreasonable’ under the circumstances.” This rule applies, under the federal law, both if the clause was a result of negotiation between two business entities, and if it is contained in a form of contract that a business presents to an individual on a take-it-or-leave-it basis.

xiii. Forum Selection Clauses: Click-trap Contracts

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80 *Northwest healthcare Alliance Inc v. Healthgrades.com*, 2002 WL 31246123 [9th Cir. (Wash)]

81 *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-10 (1972)
It makes a good legal sense for the online service providers to limit their exposure to one jurisdiction only. Defending lawsuits at multiple locations could be both expensive and frustrating. Thus, the online service provider has no other choice but to subject themselves to only one set of forum and applicable laws only. The user has no other choice, but to accept the service provider’s ‘terms of service’ conditions by clicking an on-screen button that says “I Agree”, “I Accept” or “Yes”.

In Groff v. America Online, Inc.,\(^\text{82}\) the plaintiff, an individual in Rhode Island who subscribed to America Online, sued the company in Rhode Island state court, alleging violations of state consumer protection legislation. The process of becoming a member of AOL includes a step in which the applicant must assent to AOL’s terms of service by clicking an “I Agree” button. The terms of service “contains a forum-selection clause which expressly provides that Virginia law and Virginia courts are the appropriate law and forum for the litigation between members and AOL.” AOL moved to dismiss this suit from the Rhode Island Superior Court for improper venue on the ground that a forum selection clause in the parties’ contract mandated that the suit be brought in Virginia, where AOL’s base of operations was located. The court agreed, and dismissed the suit. The court held that the plaintiff assented to AOL’s terms of service online by the click of an “I agree” button. The terms of service included a clause mandating that suits concerning the service brought in Virginia. AOL customers must first click on an “I agree” button indicating assent to be bound by AOL’s terms of service before they can use the service. Thus button first appears on a web page in which the user is offered a choice either to read, or simply agree to be bound by, AOL’s terms of service. It also appears at the foot of the terms of service, where the user is offered the choice of clicking either an “I agree” or “I disagree” button, by which he accepts or rejects the terms of service. The court held that a valid contract existed, even if the plaintiff did not know of the forum selection clause. Citing Bremen v. Zapata,\(^\text{83}\) the court looked to whether enforcement of the clause would be “unreasonable”. It did so by application of a nine-factor test, including such criteria as the place of execution of the contract, public policy of the forum state, location of the parties and witnesses, relative bargaining power of the parties, and “the conduct of the parties.” The court concluded that enforcement of the clause would not be unreasonable, and so dismissed the case.


\(^{83}\) Supra note 81
In the above case, the court had also taken into consideration the ‘place of execution’ of the online contract. It opined that, “the place where the transaction has been performed appears to take place where defendant’s mainframe is located (Virginia) and not the place (Rhode Island) when plaintiff clicked the ‘I Agree’ button.” In other words, the courts have also started realizing the location of equipment (computer network) as one of the important elements to assert personal jurisdiction.

Similarly, in, *Steven J Caspi et al v. The Microsoft Network, L.L.C., et al.*, the user could not use Microsoft Network unless she clicked the “I agree” button next to a scrollable window containing the terms of use. Each plaintiff clicked the “I agree” button to use Microsoft Network, indicating their assent to be bound by the terms of the subscriber agreement and thus forming a valid licence agreement. The Superior Court of New Jersey held that the forum selection clause contained in Microsoft Network subscriber agreements was enforceable and valid.

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xiv. Jurisdiction Based on Location of a Web Server

Asserting personal jurisdiction based on the defendant’s use of IT infrastructure of a service provider, located in the forum state, to host its website may also compel the forum state to exercise its jurisdiction over such defendant.

In Jewish Defense Organization, Inc. v. Superior Court, the plaintiff brought an action for defamation in a California court. Defendant’s only relevant contacts with California consisted of contracting with Internet service providers, “located in California,” to host a website which they maintained from their residence in New York. The court concluded that the defendant’s conduct of contracting, via computer, with Internet service providers, which may be California corporations or which may maintain offices or databases in California, is insufficient to constitute ‘purposeful availment. But in 3DO Co. v. Poptop Software Inc., the court found it relevant that “defendants use a San Francisco-based company as a server to operate a website that distributes allegedly infringing copies of software.”

Thus, location of a web server alone cannot be taken as a sufficient cause to constitute purposeful availment. Hosting a website means allotting “some space” on the web server. One may have to look into the kind of services provided by the web hosting company and the frequency of their utilization by the web promoter to establish ‘purposeful availment’ of the forum state where the server is located.

Hence, now the courts are beginning to understand the true nature of websites. The decisions given by them are more or less based on interpreting the ‘revenue’ model of the website and the level of interaction it achieved while managing a business transaction. The courts have also realized the fact that ‘online’ business has ‘offline’ manifestations as well and it is not prudent to ignore the latter. The ‘online’ promoter has certain advantages vis-à-vis the user, i.e. in terms of selecting the forum. Location of the web server has a role to play in deciding the question of personal jurisdiction but again it is the level of interaction between the service provider and the user, which would establish ‘purposeful availment’ of the forum state.

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86 Supra note 77
3. **European Approach to Personal Jurisdiction**

The European approach to personal jurisdiction in cross-border dispute is rather different from the American approach. The rules determining which country’s courts have jurisdiction over a defendant are set out in a regulation issued by the Council of the European Union, known as the ‘Brussels Regulation’. This new regulation is an update of a 1968 treaty among European countries, known as the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters.

i. **Brussels Regulation**

The Brussels Regulation, which became effective on March 1, 2002, (The Regulation replaces Brussels Convention of 1968. It is applicable to all European Council countries except Denmark, which will continue to follow the rules of the Brussels Convention and the EFTA countries (Iceland, Liechtenstein, Norway, Switzerland and Poland), where rules of the 1988 Lugano Convention will be applicable.

ii. **Applicability of Brussels Regulation in Online Environment**

The Brussels Regulation has become the established law to resolve disputes concerning jurisdiction and enforcement of judgments in civil and commercial matters. The Regulation is also applicable to resolve online commercial disputes.

On the issue of jurisdiction the Brussels Regulation sets the rule: “subject to the provisions of this Regulation, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State”. Further, a person domiciled in a Contracting State may, in another Contracting State, be sued ‘in matters relating to contract, in the courts for the place of performance of the obligation in question’. Further, the domicile of a company or other association (including a partnership) is where it has its statutory seat (i.e., its registered office), its central administration or its principal place of business.

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87 1990 O.J. (C.189) 2 (consolidated).
89 The Brussels Regulation; Article 2
90 Ibid; Article 51
91 Ibid; Article 60
From the point of promotions and sale, the Regulation says that the consumer may sue at home if the trader pursues commercial activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State.92

As websites are generally accessible from anywhere, thus a trader with a website might said to be directing its activities to all EU countries. In case of a dispute, a consumer has a right under Article 15 to take legal action in his or her home court. Any judgment given there would be enforceable in the trader’s own country. Article 15 has broadened the scope of trader’s liability, as they can now be sued in foreign courts, i.e. for an online trader defending lawsuits at multiple locations could be both expensive and frustrating.

It would be for the European Court of Justice to decide what constituted “directed activities”. A website may be seen “directed to other states” if it offers a choice of the languages or currencies of those states, or gives product specifications or delivery times or prices for them. It amounts to a marketing exercise whereby a website is promoting or targeting its products or services to consumers in specific EU states.93

iii. Rome Convention

To resolve such cross-border consumer contractual disputes, the EU Member States became signatories to the Rome Convention, 1980. It decides which country law would applies in contractual disputes. The Convention gave freedom of choice to the contracting parties, as it states that “a contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonably certainty.”94 It further states that “the mandatory rules of the consumer’s country of habitual residence will always apply whatever choice of law is made.”95

In the absence of choice of law “the contract is to be governed by the law of the country with which it is most closely connected”.96 It is presumed that “the contract is most

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92 Ibid; Article 15
93 The UK Department of Trade and Industry (DTI) had proposed a way out, that if the website is ‘directed’ at a particular foreign territory, then the consumer can bring proceedings against the trader in their home state, but if the website is a general site, and not especially directed at the consumer’s territory, then trader’s own local law would be applicable.
94 The Rome Convention; Article 3.1
95 Ibid; Article 5.1
96 Ibid; Article 4.1
closely connected with the country where the party who is to effect the performance which is characteristic of the contract, has his habitual residence or its central administration”.  

A choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence. Thus, the ‘mandatory rules of the law’ cannot be limited or excluded by contractual agreement. They include the rights given to consumers by national legislations. Therefore, if the contract meets one of the following 3 tests, then the court will apply the law of the consumer’s country in deciding the parties’ rights and obligations under the contract, regardless of any choice of law to the contrary:  

i. If in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all steps necessary on his part for the conclusion of the contract, or  

ii. If the other party or his agent received the consumer’s order in that country, or  

iii. If the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer’s journey was arranged by the seller for the purpose of inducing the consumer to buy.  

iv. **Applicability of the Rome Convention in Online Environment**  

Both the Brussels Regulation and the Rome Convention highlights the ‘consumer oriented’ provisions stating that “the consumer may bring proceedings against the trader in the state of the consumer’s domicile/habitual residence, if the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising.” The questions are – whether these provisions are applicable to an online environment also? and does a website promoted by a trader amount to a specific invitation?  

<table>
<thead>
<tr>
<th>Brussels Regulation</th>
<th>Rome Convention</th>
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97 *Ibid; Article 4.2*  
98 *Ibid; Article 5.2*
Article 15 states that the consumer may sue at home if the trader pursues commercial activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State. Article 5 states that the protection is granted to the consumer by the mandatory rules of the law of the country in which he has his habitual residence, if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all steps necessary on his part for the conclusion of the contract.

Applying the Conventions in an online setting would require an interpretation of the phrase “preceded by a specific invitation addressed to him or by advertising” i.e. whether an Internet website constitutes advertising in the state of the consumer’s domicile. The answer lies in the nature and form of “specific invitation”. If the website provides information in the ‘country specific language’ and offers goods and services in such currency, then it may fulfill the criteria of “specific invitation”. In such a case a website is to be seen as the one being ‘directed’ at that specific country and the consumer can bring proceedings against the trader in their specific home country. For example, a website giving information in French and quoting prices in Franc, cannot be said to be ‘directed’ towards the UK consumers.

As far as the applicable law is concerned, the courts within the EU apply the Rome Convention even where the applicable law is that of a third country or the parties are not resident or established in the EU.99

4. **Indian Approach to Personal Jurisdiction**

It is within the power of the Indian courts to grant injunction or anti-suit injunction100 to a party over whom it has personal jurisdiction, in an appropriate case. This is because courts of equity exercise jurisdiction in *personam*. This power is to be used sparingly as thought it is directed against a person, but may cause interference in the exercise of jurisdiction by another court. More so, as the courts have to observe the rule of comity101 which states that “the recognition which one nation allows within its territory to the

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99 US has not agreed to the Brussels and Rome Convention
100 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.
legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law.”

Keeping in view the nature of the online commerce involving business-to-business (B2B) or business-to-consumer (B2C) contracts, it is important that the issue of personal jurisdiction should be looked into from all possible sources: (a) forum of choice, (b) Civil Procedure Code, 1908, (c) choice of law, and (d) Criminal Procedure Code. These sources do not constitute mutually exclusive categories. In fact they are dependent upon each other.

i. **Jurisdiction Based on Forum of Choice**

In fact, the parties may themselves agree beforehand that for resolution of their disputes, they would either approach any of the available courts of natural jurisdiction or to have the disputes resolved by a foreign court of their choice as a neutral forum according to the law applicable to that court. Thus, it is open for a party for his convenience to fix the jurisdiction of any competent court to have their dispute adjudicated by that court alone. In other words, if one or more courts have the jurisdiction to try any suit, it is open for the parties to choose any one of the two competent courts to decide their disputes. In case parties under their own agreement expressly agree that their dispute shall be tried by only one of them then the parties can only file the suit in that court alone to which they have so agreed.102

In *Modi Entertainment Network v. W.S.G. Cricket Pvt. Ltd.*,103 it was held that it is a well-settled principle that by agreement the parties cannot confer jurisdiction where none exists, on a court to which CPC applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court. In *Hakam Singh v. Gammon (India) Ltd.*,104 the Supreme Court held that: “where two courts or more have, under the Code of Civil Procedure, jurisdiction to try a suit or proceeding, an agreement between the parties that the dispute between them shall be tried in one of such courts is not contrary to public policy. Such an agreement does not contravene Section 28 of the Indian Contract Act, 1872.”

102 *Shriram City Union Finance Corporation Ltd. v. Rama Mishra*, (2002) 9 SCC 613
104 *Hakam Singh v. Gammon (India) Ltd.*, (1971) 1 SCC 286
Further, in *Dhannalal v. Kalawatibai*, the Supreme Court has ruled that: “There is no wrong without a remedy (*Ubi jus ibi remedium*). Where there is a right, there is a forum for its enforcement. The plaintiff is *dominus litis*, that is, master of, or having dominion over the case. In case of conflict of jurisdiction the choice ought to lie with the plaintiff to choose the forum best suited to him unless there be a rule of law excluding access to a forum of the plaintiff’s choice or permitting recourse to a forum will be opposed to public policy or will be an abuse of the process of law.”

Thus, the forum of choice is discretionary and at the instance of the contractual parties. The parties may submit themselves to the exclusive or non-exclusive jurisdiction of either natural or neutral forum.

**ii. Jurisdiction Based on Code of Civil Procedure, 1908**

In all civil matters, the Code of Civil Procedure (CPC), 1908, basically formulates the Indian approach to jurisdiction. Under CPC, one or more courts may have jurisdiction to deal with a subject matter having regard to the location of immovable property, place of residence or work of a defendant or place where cause of action has arisen. Where only one court has a jurisdiction, it is said to have exclusive jurisdiction; where more courts than one have jurisdiction over a subject matter, they are called courts of available or natural jurisdiction. The jurisdiction of the courts to try all suits of civil nature is very expansive as is evident from the provisions of CPC.

**a. Basis of Jurisdiction**

To formulate whether the jurisdiction of the courts is exclusive or non-exclusive, in the Internet setting, one must involve the following jurisdictional principles as highlighted in the CPC:

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106 The Code of Civil Procedure, 1908; Section 9
i. Pecuniary
ii. Subject-matter
iii. Territory and
iv. Cause of action

Pecuniary jurisdiction limits the power of the court to hear cases up to a pecuniary limit only. “Nothing shall operate to give any Court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits of its ordinary jurisdiction.”\textsuperscript{107}

Jurisdiction also depends on where the subject-matter of the suit is situated,\textsuperscript{108} where a suit is for compensation for wrong done to the person or to movable property,\textsuperscript{109} or where defendants reside or cause of action arise.\textsuperscript{110}

Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the said Courts.\textsuperscript{111}

Further CPC provides that every suit shall be instituted in a 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) any 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 personality works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part arises.\textsuperscript{112}

\textsuperscript{107} Ibid; Section 6
\textsuperscript{108} Ibid; Section 16
\textsuperscript{109} Ibid; Section 19
\textsuperscript{110} Ibid; Section 20
\textsuperscript{111} Supra note 107
\textsuperscript{112} Supra note 108
A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause arising at any place where it has subordinate office, at such place.\textsuperscript{113}

In \textit{Gupta Sanitary Stores v. Union of India},\textsuperscript{114} while interpreting the expression ‘carries on business’ the court summed up the legal position in the following terms: “I take the test to be this: What is the nature and purpose of the activity in question? If it is commercial in character, the suit can be filed at the principal place of business or principal office, and also at the place where the cause of action arises wholly or in part.\textsuperscript{115} In most cases where the business is not of a commercial nature, the suit must be filed against the government at the place where the cause of action arises wholly or in part. For example, if the contract is entered into at Calcutta, the Courts at Calcutta will have the jurisdiction.”\textsuperscript{116}

In \textit{Rajasthan High Court Advocate’s Association v. Union of India},\textsuperscript{117} the Supreme Court held that the expression ‘cause of action’ has acquired a judicially settled meaning: “Compendiously the expression means every fact, which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Every fact, which is necessary to be proved, as distinguished from every piece of evidence, which is necessary to prove each fact, comprises in “cause of action”. It has to be left to be determined in each individual case as to where the cause of action arises.

In \textit{Casio India Co. Ltd. v. Ashita Tele Systems Pvt. Ltd.},\textsuperscript{118} the plaintiff was aggrieved by the registration of the domain name www.casioindia.com by the defendant with its registered office in Mumbai. It filed a suit for trademark infringement in the Delhi High Court under the relevant provisions of the trademarks Act, 1999 alongwith an interim injunction application under Order 39 Rule 1 & 2 CPC, 1908. On the issue of territorial jurisdiction, the defendant contended that it carried on business in Mumbai only and no cause of action arose in Delhi. The plaintiff, however, averred that the website could be accessed from Delhi also. After referring to \textit{Gutnick}, Justice Sarin observed that “once access to the impugned domain name website could be has from anywhere else, the jurisdiction insuch matters cannot be confined to the territorial limits of the residence of the defendants.” Hence,

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\textsuperscript{113} Ibid; Explanation
\textsuperscript{114} Gupta Sanitary Stores v. Union of India, AIR 1985 Del.122 (FB)
\textsuperscript{115} Ibid; see also Shri Ram Rattan Bhartia v. Food Corporation of India, AIR 1978 Delhi 183 (FB)
\textsuperscript{116}Nalanda Ceramic v. N.S. Chaudhary & Co., AIR 1977 SC 2142
\textsuperscript{117} Rajasthan High Court Advocate’s Association v. Union of India, (2001) 2 SCC 294
\textsuperscript{118} Casio India Co. Ltd. v. Ashita Tele Systems Pvt. Ltd., (2003) 70 DRJ 74
\end{flushleft}
it was held that ‘the fact that the website of the defendant can be accessed from Delhi is sufficient to invoke the territorial jurisdiction of this court.’

b. Cause of Action and Contractual Obligations

The expression ‘cause of action’ signifies that bundle of facts, which the petitioner must prove, if traversed, to entitle it to a judgment in its favour by the court. In Oil & Natural Gas Commission v. Utpal Kumar Basu & Others,119 the petitioner learnt about tenders being invited for a particular project at Hazira in Gujarat from advertisements appearing in the Times of India in circulation in West Bengal by reading it at Calcutta, submitted its offer from Calcutta, made representations and also sent fax messages from Calcutta and received reply thereto at Calcutta. A writ petition was filed before the Calcutta High Court on the plea of part of cause of action having arisen at Calcutta. In view of the aforesaid facts, holding lack of jurisdiction on the part of Calcutta High Court, which it had assumed by passing impugned order, while allowing the appeal, the Supreme Court laid down in the following terms: “merely because it read the advertisement at Calcutta and submitted the offer from Calcutta and made representations from Calcutta would not in our opinion, constitute facts forming an integral part of the cause of action. So also the mere fact that it sent fax messages from Calcutta and received a reply thereto at Calcutta, would not constitute an integral part of the cause of action.”

Where the cause of action arises from contract, and the parties have not effectively selected the governing substantive law, the relevant criteria in a choice-of-law analysis are: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the location of the parties.

iii. Choice of Law

Because on its own assessment of the contractual obligations involved, a Court will apply the choice of law rules to determine “what law should be applied?” The two choices are: (a) either to apply the law of the forum (lex fori), or (b) to apply the law of the site of the transaction, or occurrence that gave rise to the litigation in the first place (lex loci). The modern theory of Conflict of Law recognizes and, in any event, prefers the jurisdiction of the

state, which has the most intimate contact with the issues arising in the case. Ordinarily jurisdiction must follow upon functional lines.\textsuperscript{120}

In \textit{National Thermal Power Corporation v. The Singer Company},\textsuperscript{121} the Supreme Court held that: “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 can be clearly inferred from the contract itself or its surrounding circumstances, such intention determines the proper law of the contract. 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. 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 \textit{bona fide} and it should not be opposed to public policy.”

In the absence of an express statement about the governing law relating to commercial contract between the parties belonging to different countries, the inferred intention of the parties determines that law. The true intention of the parties, in the absence of an express selection, has to be discovered by applying “sound ideas of business, convenience and sense to the language of the contract itself”. In such a case, selection of courts of a particular country as having jurisdiction in matters arising under the contract is usually an indication of the intention of the parties that the system of law followed by those courts is the proper law by which they intend their contract to be governed.

Where the parties have not expressly or impliedly selected the proper law, the Courts impute an intention by applying the objective test to determine what the parties would have as just and reasonable persons intended as regards the applicable law had they applied their minds to the question. The judge has to determine the proper law for the parties in such circumstances by putting himself in the place of a “reasonable man”. He has to determine the intention of the parties by asking himself “how a just and reasonable person would have regarded the problem.”

For this purpose the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference

\textsuperscript{120} Surinder Kaur v. Harbax Singh, AIR 1984 SC 1224-1226
\textsuperscript{121} National Thermal Power Corporation v. The Singer Company, AIR 1993 SC 998
to the courts having jurisdiction and such other links are examined by the courts to determine the system of law with which the transaction has its closest and most real connection.

In *Satya v. Teja Singh*,122 the Supreme Court held that “every case which comes before an Indian court must be decided in accordance with Indian law. It is another matter that the Indian conflict of laws may require that the law of a foreign country ought to be applied in a given situation for deciding a case, which contains a foreign element. Such recognition is accorded not as an act of courtesy, but on considerations of justice. It is implicit in that process that a foreign law must not offend our public policy.”

Thus, it can be inferred from the abovementioned judgements of the Supreme Court that the Courts do have a judicial right to determine the choice of law by identifying the system of law with which the transaction has its closest and most real connection. There is no bar that law of a foreign country cannot be applied or an Indian party could not be subject to foreign jurisdiction. The emphasis is on to select proper law.

iv. **Jurisdiction based on the Criminal Procedure Code, 1973**

The Cr.P.C. lays down that the ordinary place of trial and inquiry is the court in whose jurisdiction the crime has been committed.123 However, the subsequent provisions of the Cr.P.C. dilute the strict necessity of territorial jurisdiction.

The place of commission of an offence is uncertain, the offence is continuing or it has been committed partly in one and partly in another or it is several acts in several places, a court having jurisdiction in any place may try the case.124

An offence can be tried where the consequence ensues.125 These provisions are very relevant with regard to computer offences, in which the place of commission is very difficult to locate.

In case of offence by letters or telecom messages, jurisdiction lay with the court where the message was sent or received.126 Thus, this provision shall be resorted to in case of offences involving an e-mail.

Further the Cr.P.C. provides that no sentence or order of a criminal court can be set aside for wrong jurisdiction.127

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122 *Satya v. Teja Singh*, AIR 1975 SC 105-108
123 The Criminal Procedure Code, 1973; Section 177
124 *Ibid.*, Section 178
125 *Ibid.*, Section 179
126 *Ibid.*, Section 182
127 *Ibid.*, Section 462
v. Criteria of Accepting Foreign Judgment

A foreign judgment is not conclusive in certain circumstances in India. In this context, the Code of Civil Procedure, 1908 provides¹²⁸ that: “A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except-

(a) Where it has not been pronounced by a court of competent jurisdiction;
(b) Where it has not been given on the merits of the case;
(c) Where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
(d) Where the proceedings in which the judgment was obtained are opposed to natural justice;
(e) Where it has been obtained by fraud;
(f) Where it sustains a claim founded on a breach of any law in force in India.”

In Smita Conductors Ltd. v. Euro Alloys Ltd.,¹²⁹ the Supreme Court observed that, a foreign award cannot be recognized or enforced if it is contrary to (a) fundamental policy of Indian law; or (b) the interests of India; or (c) justice or morality.

Once it is held that an award is a foreign award,¹³⁰ the provisions of Foreign Awards (Recognition and Enforcement) Act, 1961 would apply and where the conditions for enforcement of such an award exit, the court shall order the award to be filed and shall proceed to pronounce judgment granting award and upon the judgment so pronounced, decree shall follow.

In Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.,¹³¹ the court held that it is now established law that for enforcement of a foreign award there is no need to take separate proceedings, one for deciding the enforceability of the award to make it a rule of the court or decree and the other to take up execution thereafter. In one proceeding the Court enforcing a foreign award can deal with the entire matter.

¹²⁸ The Civil Procedure Code, 1908; Section 13
¹²⁹ Smita Conductors Ltd. v. Euro Alloys Ltd., (2001) 7 SCC 728
¹³⁰ The Foreign Awards Act, 1961 defines ‘foreign award’ as an award made on or after 11-10-1960 on differences arising between people out of legal relationships, whether contractual or not, which are considered to be commercial under the law in force in India.
The CPC provides that, “the Court shall presume, upon the production of any document purporting to be a certified copy of a foreign judgment, that such judgment was pronounced by a court of competent jurisdiction, unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction.”

The Foreign Awards Act, 1961 is a complete code in itself providing for all the possible contingencies in relation to foreign awards. In order to qualify as a foreign award under the Act, the award should have been made in pursuance of an agreement in writing for arbitration to be governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, and not to be governed by the law of India. Furthermore such an award should have been made outside India in the territory of a foreign State notified by the Government of India as having made reciprocal provisions for enforcement of the Convention.

In this chapter, three legal systems – American, European and Indian, which have been examined, provide a maze of legal principles to understand the dynamics behind personal jurisdiction in their respective jurisdiction. American Courts have been successful in interpreting the personal jurisdiction principles in online setting. In fact, their case law is growing and courts have introduced new measures to resolve disputes, like nature of website, sliding-scale method, and geographical location of users, website owner and web server. Even the traditional measures, like the terms of service agreements, disclaimers and choice of law or forum clauses are playing an important role. Across Atlantic, in Europe the approach is more convention and directive based and the Brussels Regulations is one such step to harmonize e-commerce rules and regulations at least in European Union countries.

One fact that has emerged out clearly is that the Indian law system is in harmony with other law systems and definitely gives due credence to the international private law and conflict of laws approaches. If in the US, the emphasis is on “minimum contacts” and “purposeful availment” to establish personal jurisdiction, than in India, the emphasis is on “cause of action.”

In India, since the case law on e-commerce dispute resolution is still non-existent, it would be prudent on the part of the judges to take cognizance of the US case law but not at the cost of already established ‘Indian principles’. Though, it is necessary to understand the

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132 Supra note 128, Section 14
technology issues involved while deciding the question of personal jurisdiction, but law should not be made subservient to technology.

D. REVIEW

Jurisdiction is an aspect of state sovereignty and it refers to judicial, legislative and administrative competence. Although jurisdiction is an aspect of sovereignty, it is not co-extensive with it. International law circumscribes a state’s right to exercise jurisdiction. The very basis of any justice delivery system, the jurisdiction, which gives powers to a particular court to accommodate a particular case, is itself being threatened over the internet. In this chapter, three legal systems – American, European and Indian, which have been examined, provide a maze of legal principles to understand the dynamics behind personal jurisdiction in their respective jurisdiction.