CHAPTER-V
JURISDICTIONAL ISSUES RELATED TO E-CONTRACT

5.1 GENERAL

Netizens and websites are nowhere and everywhere, such is said to be the nature of the internet. Many websites do not even carry the geographical addresses.\(^1\) One doesn’t even know with whom one is transacting online and where the location of that person is. When a person buys a product from any website, he is not interested where the site is located geographically.\(^2\) The internet has led to the elimination of physical boundaries, hence, raising the question as to the jurisdiction. A world-famous view gaining ground is that the prevailing jurisdiction law is useless for the cyber world and a completely different set of rules are essential to manage jurisdictional issues over the internet which should be free from the restraints of geographical borders.\(^3\)

In the offline world, disputes are fundamentally settled through the traditional process of court litigation system which is primarily structured on a territorial basis, i.e., each country has its own laws and courts of the country use to decide disputes, if fall under their jurisdiction, mostly on the basis of the application of local laws.\(^4\) Under traditional legal systems, if parties are situated in different territorial jurisdictions, the transactions between them are governed either by the choice of law clause (the laws of the country which the parties agree to govern the transaction) or by the laws of the country in which the transaction takes place. As the internet is indifferent to locational constraints, the traditional laws of jurisdiction have not much significance to the activities carried over the internet. If the dispute arises on the internet and the parties to the dispute belong to the same jurisdiction, there is no problem as the dispute in such a case would be settled in the same way as any other offline dispute.\(^5\) For example, a company ‘A’ based in Mumbai is selling its products to its customers in Delhi through its website. In case of any dispute

\(^2\) Id.
\(^3\) Id.
\(^5\) Id.
between the company and its customers, it can be easily concluded that the dispute will be settled according to the laws applicable in India but the problem would arise when their customers are in countries different from the company of its own.

The dispute resolution mechanism based on territoriality faces a great number of challenges when used to settle the disputes arising on the internet. The internet is international in character and a person can have access to it from almost any place on the earth, hence, multi-jurisdictional. On the internet, digital data may travel through various countries and, hence, different jurisdictions in order to reach its destination. For example, a dispute arises between two parties belonging to two different countries who entered into a contract online. Now the question arises as to courts of which country should have jurisdiction to decide the dispute. As the internet has become a convenient tool of business and communication, a virtual world has come into existence which cannot be controlled with in a territorial limit, thereby making the issue of jurisdiction in cyberspace intricate.

Basically, cyberspace is regulated by the power exercised by its operators or users of World Wide Web leading freedom as to choice of rules and enforcing them in cyberspace which is independent of any territorial government. Hence, the preliminary issue is how the traditional territory based jurisdiction principle can be applied in the cyberspace.

By the term ‘Jurisdiction’ is meant the legal compliance which a state enjoys over the territory which belongs to it. The expression ‘Compliance’ is a wide term and includes judicial, legislative and administrative competence. Jurisdiction of a state may be divided into two categories: territorial and extra territorial jurisdiction.

According to Briggs, the fundamental importance to determine jurisdiction is to enable the parties to predict the magnitude of their liability and consider the legal and practical expense of defending a dispute in a specific jurisdiction. In order to determine the jurisdiction of a dispute between parties located in different jurisdictions, geography or location of the parties or the place where their commercial activities take place are used as

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fixed factors connecting the parties, their contract or their dispute to a particular jurisdiction according to international private law rules.  

5.1.1 Jurisdiction-Issues over the Internet

The internet is a network of networks, some of the networks are closed networks, not linked to other computers or networks while many of them are widely connected capable of rapidly transmitting information without direct human participation or control and also having the automatic ability to re-route the information if links are damaged. Messages on the internet, if required, travel through many routes. Internet is totally indifferent to the physical location of the machines between which the information is transmitted and there is no physical link between an internet address and a physical jurisdiction. It, therefore, presents various practical questions such as which court to hear a dispute arising out of internet activity, grounds on which a court may assume or deny jurisdiction, laws used to decide a particular dispute etc. another challenging question is whether the person posting any information on the website is subject to the laws of every state from where this information can be assessed, and, consequently, do the courts of every such state have personal jurisdiction over the person posting the information or operator of the website. What appears as the chief issues of concern are - jurisdiction to resolve a dispute at a particular location (a forum/site), the law applicable to the dispute or choice of law and the recognition and enforcement of judgment in courts in foreign jurisdictions, In absence of treaties to harmonize these issues, principles of international laws may be applied to the question of jurisdiction and enforcement.

One major and direct issue challenging legislators is that while most laws are based on territorial nexus, the internet denies the concept of

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8 http://ijlit.oxfordjournals.org/content/16/3/242.full#fn-23 (last visited on 7th May, 2014).

The distinctive nature of the internet has diluted the very basis of the traditional concept of jurisdiction and the territorial laws and their application. Traditionally, territorial jurisdiction has been exercised by the courts on a number of bases, such as where the defendant resides, whether the defendant is present within the forum and whether the defendant has property in the forum or not. The Internet has made these fundamentals largely immaterial.

With the advent of the internet, cross-border transactions have increased and also the disputes arising out of these transactions, raising more complex and numerous questions of jurisdiction and applicable law. Though cross border disputes and the resulting debate are as old as international trade itself, a number of special characteristics of internet-based communications have added novel dimensions to the whole issue which are as follows:

1. **Instant Global Presence**- Prior to evolution of internet, the sale or distribution of products/services in foreign market was through the physical presence of the seller in one form or the other. With the gigantic development of internet, a seller is not required to rely on the local sellers of a particular country to sell its products nor is he supposed to engage any of his agents over there. Through internet, any e-commerce website is immediately accessible from anywhere in the world. With such access, potential of contact with the judicial system of the country/ countries of the consumers has increased leading to the possibility of being litigated in the foreign court.

2. **Trade Relations**- Rising effect of internet on the commerce has not left the trade relations a matter of choice. Prior to internet, a seller used to decide in the location where he intends to sell his products. Decision used to be made at his suitability, discretion and on his initiative. However, electronic commerce has limited the seller’s discretion to enter into or leave the market. Once accessed market online, seller loses his control over it. The transactions are initiated by the buyers and the buyer may be in a country with which the seller never had any

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10 Supra n. 4 at p. 267.
11 Id.
12 Id.
dealings and had no information about its legal system. It is also impracticable to gain that information at the stage of receiving the order.\textsuperscript{13} There may not be time to do so (specially in case of transactions done through electronic agent), in addition, the value of the transaction may not match the cost of acquiring advice. It has, therefore, become more challenging for the seller of goods or services to forecast the situation that may arise in future and to take appropriate measures to deal with the risk of being bound either to sue or to defend a suit in a foreign court.\textsuperscript{14}

3. **Multiple Jurisdictions**- While transacting over the internet, one or more of the parties involved in the transaction including buyers, sellers, businesses, service and content providers may be and often are located in different countries having their own legal systems.\textsuperscript{15} Similarly, the assets of businesses and other processes used in transacting over the Internet like technology systems and computer servers may also be located in different jurisdictions. This leads to uncertainties and ambiguities as to the place of the disputed activities and the place where the consequences are being felt. These impugned activities can have intended and unintended consequences around the world, resulting in uncertainties as to the location of the dispute, the applicable law and the manner of getting enforcement.\textsuperscript{16}

4. **The role of Private International Law**- Private international law or conflict of laws is the body of law that strive for resolving issues that arise out of the presence of a foreign component in legal relationships. Globally, private international law is referred to resolve questions as to jurisdiction, applicable law and enforcement of foreign judgements. Generally, private international law is a part of the municipal law and essentially aims to regulate conduct between private parties. It assumes international character because of the existence of a foreign element in legal relationships. Cross-border movement of persons and goods, for business and other purposes existing for hundreds of years is the

\textsuperscript{13} Id. at p. 268.
\textsuperscript{14} Id.
\textsuperscript{15} Id. at p. 267.
\textsuperscript{16} Id.
primary catalyst of private disputes comprising foreign elements.

The following issues arise in the context of private international law:

1. Jurisdiction to adjudicate a dispute at a particular location (i.e.,
   the forum or situs);

2. Applicable law to the dispute; and

3. Enforcement of judgments in courts in foreign jurisdictions

Many of the transactions on the Internet are international in nature and possibly involve many jurisdictions having connection with a particular dispute in case a dispute arises. In such cases, if every court in possibly every country will assume jurisdiction over that dispute, it would certainly result in hampering trade.

5.1.2 Jurisdiction over the Internet Transactions

The whole concern with internet jurisdiction starts with the presence of multiple parties located in various parts of the world having merely a virtual connection with each other. One gets perplexed where to sue if he wants? Traditionally, two areas are required to be determined to decide upon the jurisdiction—firstly, the place where the defendant resides, or secondly, where the cause of the action arises. However, due to extra-territorial nature of internet, both of these are challenging to establish with any certainty. Even a childishly simple transaction can create a mind-boggling issue of jurisdiction on the Net. For example, A, in India, decides to download an article from a website, and pays money for it through credit card and then is unable to perform the download. He wants to sue the owner of the site. But the owner is in Thailand. The website itself is based in server in Brazil. Where does the defendant reside? The transaction occurred on the net, where the cause of action arose—was it in India or in Brazil?17

Issues of such kind have added to the entire confusion and conflicts that flooded judicial decisions in the area of Internet jurisdiction. Bearing in mind the absence of physical boundaries on the Internet, is it possible to go beyond the court’s territorial jurisdiction to drag a defendant into its court for the activities in ‘cyberspace’?

17 Id.
5.2 LEGAL PRINCIPLES ON JURISDICTION IN ENGLAND

“As the idea of the Internet as a globalized playground subject to no single nation retreats into pre-history, states are increasingly involved in what is being named as the new virtual “land-grab”: attempting to exercise control via their courts and their laws over activities which effectively arise in cyberspace, but affect their territory, citizens or economies.¹⁸

“The fundamental jurisdictional basis of the common law is the physical presence of an individual, either actual or constructive, within the jurisdiction trying to assume authority over him. The body of the individual action may be located in the jurisdiction, the individual may perform an action that has physical effects within the jurisdiction or the individual boundaries of the jurisdiction itself are defined in physical geographical terms.”¹⁹

Furthermore, it is also agreed that the dematerialised nature of online commercial activities makes it difficult to determine the location of the parties and the place where those activities take place. Despite apprehensions about the continued role and effectiveness of international private law vis-à-vis electronic commerce,²⁰ international private law rules must continue to determine which jurisdiction will hear a cross-border dispute regardless of mode of communication used by parties in different jurisdictions. The choice of law applicable to an e-contract is determined, in the first place, by the autonomy of the parties, who may freely choose the law by which they wish to govern entire or a part of the contract. The choice of law clause is particularly wide in the case of B2B e-contracts, because the contract is not subject to a series of conditions applicable to consumer contracts which may result in a choice of law clause being abusive in a B2C contract.²¹ Such choice of law may be express or unambiguously implied from the terms of the agreement or the circumstances of the case. In absence of an express choice of law clause,

the fact that the parties have given one or more jurisdictional bodies exclusive jurisdiction for such disputes, if arise, between the parties may be used as one of the relevant factors while determining whether the choice of law may be clearly inferred from the terms of the contract. However, the free choice by the parties as to the applicability of the foreign law regarding will not preclude continuing application of all compulsory provisions of the law of the country where all of the other elements of the transaction are located allowing jurisdiction to that country. Hence, merely by exercising the freedom of choice allowing application of the foreign law, the contracting parties cannot escape application of compulsory rules that are naturally applicable to the transaction due to its connection with a given country, thereby taking away the jurisdiction from that country.  

5.2.1 Sources of Law

The main sources of English law on this subject are:

- The Brussels Convention and Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters which is now replaced by Brussels 1 Regulation and has been referred in the Civil Jurisdiction and Judgements Act 1982 at many places.

- Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels 1 Regulation)

- The Civil Jurisdiction and Judgement Order 2001

- English common law. Jurisdictional rules have largely been codified in the Civil Procedural Rules (“CPR”)

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22 Id.

5.2.1.1 Civil Jurisdiction and Judgements Act 1982

The principal legal rules regarding jurisdiction in England are derived from the Civil Jurisdiction and Judgements Act 1982 (“the 1982 Act”). The main purpose of this Act was to incorporate the Brussels/Lugano Convention and, more recently the Brussels I Convention, into UK Law.24 Rule 1 of section 2 of the 1982 Act provides that “The Brussels Conventions shall have the force of law in the United Kingdom, and judicial notice shall be taken of them”25, thereby expressly enforced the Brussels Convention. In addition, the 1982 Act makes explicit provision to take into account by the judiciary of both the wording of the Brussels/Lugano Conventions and the Brussels I Regulation and of any decision of the European Court of Justice on the meaning or effect of the Conventions or Regulation.26

Section 3 provides that:

“(1) Any question as to the meaning or effect of any provision of the Brussels Conventions shall, if not referred to the European Court in accordance with the 1971 Protocol, be determined in accordance with the principles laid down by and any relevant decision of the European Court.

(2) Judicial notice shall be taken of any decision of or expression of opinion by, the European Court on any such question.”27

In the same way, section 3A and 3B deals with the Lugano Convention. Rule 1 of section 3A provides “The Lugano Convention shall

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26 Supra n. 23.
have the force of law in the United Kingdom and judicial notice shall be taken of it.”

Section 3B provides that:

“(1)In determining any question as to the meaning or effect of a provision of the Lugano Convention, a court in the United Kingdom shall, in accordance with Protocol No. 2 to that Convention, take account of any principles laid down in any relevant decision delivered by a court of any other Lugano Contracting State concerning provisions of the Convention.

(2)Without prejudice to any practice of the courts as to the matters which may be considered apart from this section, the report on the Lugano Convention by Mr. P. Jenard and Mr. G. Moöller (which is reproduced in the Official Journal of the Communities of 28th July 1990) may be considered in ascertaining the meaning or effect of any provision of the Convention and shall be given such weight as is appropriate in the circumstances.”

Section 16 and Schedule 4 deal with Allocation of jurisdiction within U.K. in certain civil proceedings. Section 16 provides:

“(1)The provisions set out in Schedule 4 (which contains a modified version of Chapter II of the Regulation) shall have effect for determining, for each part of the United Kingdom, whether the courts of law of that part, or any particular court of law in that part, have or has jurisdiction in proceedings where-

(a) the subject-matter of the proceedings is within the scope of the Regulation as determined by Article 1 of the

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28 Civil Jurisdiction and Judgements Act 1982.
Article 1:
1. This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. It shall not extend, in particular, to revenue, customs or administrative matters.
2. The Regulation shall not apply to:
   (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
   (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
   (c) social security;
   (d) arbitration.
3. In this Regulation, the term “Member State” shall mean Member States with the exception of Denmark.

Article 22:
The following courts shall have exclusive jurisdiction, regardless of domicile:
1. in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated. However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;
2. in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;
3. in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;
4. in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of a Community instrument or an international convention deemed to have taken place.
Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction, regardless of domicile, in proceedings concerned with the registration or validity of any European patent granted for that State;
5. in proceedings concerned with the enforcement of judgments, the courts of the Member State in which the judgment has been or is to be enforced.
(a) regard shall be had to any relevant principles laid down by the European Court in connection with Title II of the 1968 Convention or Chapter II of the Regulation and to any relevant decision of that court as to the meaning or effect of any provision of that Title or that Chapter; and

(b) without prejudice to the generality of paragraph (a), the reports mentioned in section 3(3) may be considered and shall, so far as relevant, be given such weight as is appropriate in the circumstances.

(4) The provisions of this section and Schedule 4 shall have effect subject to the Regulation, the 1968 Convention and the Lugano Convention and to the provisions of section 17.

Schedule 4 of the 1982 Act provides whether the correct jurisdiction in which proceedings should be brought is England, Scotland, Wales or Northern Ireland when the Defendant is domiciled in the UK. Schedule 4 also assigns jurisdiction between Scotland, England, Wales and Northern Ireland in civil and commercial cases which have no non-UK element but in which a Defendant is domiciled in any part of the UK. There are few instances when the rules contained in Schedule 4 of the 1982 Act do not apply. These are specified in section 17 and Schedule 5 of the 1982 Act.

Rule 1 of the Schedule 4 provides that

“Subject to the rules of this Schedule, persons domiciled in a part of the United Kingdom shall be sued in the courts of that part.”

Rule 2 of the Schedule 4 provides that

“Persons domiciled in a part of the United Kingdom may be sued in the courts of another part of the United Kingdom only by virtue of rules 3 to 13 of this Schedule”.

Rule 3(a) of the Schedule 4 provides that

“A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, be sued-

(a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;

(b) ……………
Rule 4 of the Schedule 4 provides:

Proceedings which have as their object a decision of an organ of a company or other legal person or of an association of natural or legal persons may, without prejudice to the other provisions of this Schedule, be brought in the courts of the part of the United Kingdom in which that company, legal person or association has its seat. 31

Rule 5 provides:

A person domiciled in a part of the United Kingdom may, in another part of the United Kingdom, also be sued-(a)where he is one of

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31 S.43 of 1982 Act: Seat of corporation or association for purposes of Article 16(2) and related provisions.

(1)The following provisions of this section determine where a corporation or association has its seat for the purposes of-
(a).........
(b) rules 4 and 11(b) in Schedule 4; and
(c)............
(2)A corporation or association has its seat in the United Kingdom if and only if-
(a) it was incorporated or formed under the law of a part of the United Kingdom; or
(b) its central management and control is exercised in the United Kingdom.
(3)A corporation or association has its seat in a particular part of the United Kingdom if and only if it has its seat in the United Kingdom and-
(a)subject to subsection (5), it was incorporated or formed under the law of that part; or
(b)-being incorporated or formed under the law of a state other than the United Kingdom, its central management and control is exercised in that part.
(4)A corporation or association has its seat in a particular place in Scotland if and only if it has its seat in Scotland and-
(a)it has its registered office or some other official address in that place; or
(b)it has no registered office or other official address in Scotland, but its central management and control is exercised in that place.
(5)A corporation or association incorporated or formed under-
(a)an enactment forming part of the law of more than one part of the United Kingdom; or
(b)an instrument having effect in the domestic law of more than one part of the United Kingdom, shall, if it has a registered office, be taken to have its seat in the part of the United Kingdom in which that office is situated, and not in any other part of the United Kingdom.
(6)Subject to subsection (7), a corporation or association has its seat in a Contracting State other than the United Kingdom if and only if-
(a) it was incorporated or formed under the law of that state; or
(b)its central management and control is exercised in that state.
(7)A corporation or association shall not be regarded as having its seat in a Contracting State other than the United Kingdom if-
(a)it has its seat in the United Kingdom by virtue of subsection (2)(a); or
(b)it is shown that the courts of that other state would not regard it for the purposes of Article 16(2) as having its seat there.

(c) .............
a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
(b) as a third party in an action on a warranty or guarantee or in any other third party proceedings, in the court seized of the original proceedings, unless these were instituted solely with the object of removing him from the jurisdiction of the court which would be competent in his case;
(c) on a counter-claim arising from the same contract or facts on which the original claim was based, in the court in which the original claim is pending;
(d) in matters relating to a contract, if the action may be combined with an action against the same defendant in matters relating to rights in rem in immovable property, in the court of the part of the United Kingdom in which the property is situated.

Rule 7 provides:

(1) In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this rule and rules 8 and 9, without prejudice to rule 3(e) and (h)(ii), if-
(a) it is a contract for the sale of goods on instalment credit terms; or
(b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
(c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the part of the United Kingdom in which the consumer is domiciled or, by any means, directs such activities to that part or to other parts of the United Kingdom including that part, and the contract falls within the scope of such activities.

(2) This rule shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a
combination of travel and accommodation, or to a contract of insurance.

Rule 8 provides:

1. A consumer may bring proceedings against the other party to a contract either in the courts of the part of the United Kingdom in which that party is domiciled or in the courts of the part of the United Kingdom in which the consumer is domiciled.
2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the part of the United Kingdom in which the consumer is domiciled.
3. The provisions of this rule shall not affect the right to bring a counter-claim in the court in which, in accordance with this rule and rules 7 and 9, the original claim is pending.

Rule 9 provides:

The provisions of rules 7 and 8 may be departed from only by an agreement-

a) which is entered into after the dispute has arisen; or
b) which allows the consumer to bring proceedings in courts other than those indicated in those rules; or

c) which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same part of the United Kingdom, and which confers jurisdiction on the courts of that part, provided that such an agreement is not contrary to the law of that part.

Rule 10: Allocation within U.K. of jurisdiction with respect to trusts and consumer contracts.

1. The provisions of this section have effect for the purpose of allocating within the United Kingdom jurisdiction in certain proceedings in respect of which the 1968 Convention or the Lugano Convention confers jurisdiction on the courts of the United Kingdom generally and to which section 16 does not apply.
Any proceedings which by virtue of Article 5(6) (trusts) are brought in the United Kingdom shall be brought in the courts of the part of the United Kingdom in which the trust is domiciled.

Any proceedings which by virtue of the first paragraph of Article 14 (consumer contracts) are brought in the United Kingdom by a consumer on the ground that he is himself domiciled there shall be brought in the courts of the part of the United Kingdom in which he is domiciled.

5.2.1.2 English Common Law/ Civil Procedural Rules

In cases where the 1982 Act doesn’t apply, the English jurisdictional rules are derived from the common law or specific set of principles contained in statutes, statutory instruments of the UK (where common law is codified). Common law in England is an unwritten body of law derived from precedents and case laws as established by the English courts. One of the central features of the common law rules regarding jurisdiction in England is that a Defendant, who is served with a claim form in England, is subject in personam to the jurisdiction of that Court, regardless of how momentary his presence might be (H.R.H Maharanee Seethadevi Gaekwar of Baroda v Wildenstein\(^\text{32}\); Colt Industries Inc. v Sarlie\(^\text{33}\)). In England, no specific protective rules are being created for non-EU Defendants. The common law rule provides that the Defendant can be served with a claim form if he is present within the jurisdiction, even though the presence is for a very short duration. The main rule regarding cross-border jurisdiction is based on common law rules which are now largely been reiterated and incorporated in the Civil Procedural Rules (CPR). Part 7 of the CPR provides that a Defendant should be sued in the jurisdiction where the claim form is served on him. Rule 6.20 of the CPR provides for the service of a claim form out of jurisdiction. Rule 6.20(5) provides: “...a claim form may be served out of the jurisdiction with the permission of the court if a claim is made in respect of a contract where the contract – (5) (a) was made within the jurisdiction; (b) was made by or through an agent trading or residing within the jurisdiction; (c) is governed by

\(^{32}\) [1972] 2 W.L.R 1077.
\(^{33}\) [1966] 1 W.L.R 440.
English law; or (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract. (6) a claim is made in respect of a breach of contract committed within the jurisdiction.”

This means that it is no longer a requirement for the Defendant to be present within the jurisdiction for proceedings to be commenced against him. The defendant can be sued in England provided the contract was made within the jurisdiction or the agent of the defendant trade or reside within the jurisdiction or contract is governed by English law or the parties by clause confer the jurisdiction or the breach of contract takes place within the jurisdiction. However, the Court may decide not to assume jurisdiction on the basis of *forum non conveniens* if it finds itself not the most appropriate forum to hear the case. Section 49 of Act 1982 allows courts to stay, sist, strike out or dismiss proceedings on the ground of *forum non conveniens* or inconsistency with the conventions. Section 49 provides:

“Nothing in this Act shall prevent any court in the United Kingdom from staying, sisting, striking out or dismissing any proceedings before it, on the ground of *forum non conveniens* or otherwise, where to do so is not inconsistent with the 1968 Convention or, as the case may be, the Lugano Convention.”

5.2.1.3 The Civil Jurisdiction and Judgments Order 2001

The 1982 Act was introduced to incorporate the Brussels/Lugano Conventions into UK Law. As a result both the main body of the 1982 Act and Schedule 4 reproduce the law of the Conventions. The Civil Jurisdiction and Judgments Order 2001 (UK Statutory Instrument 2001/3929) was passed in light of the Brussels I Regulation, to preserve the current position of European jurisdiction in the UK and to bring out legislation into line with the new regulation.

English Courts can assume jurisdiction over a Defendant who is outside the jurisdiction provided the Defendant has been properly served with the claim form. In non-Brussels Convention cases, the Claimant must first satisfy the Court that the case should continue in the English Courts. CPR Part 6.20 sets out when permission is required for service out of jurisdiction and
the grounds on which permission may be sought. The Courts have the power to stay, sist or strike out proceedings in England, whenever it is necessary to prevent an injustice, under the principle of forum non conveniens on the ground that the courts believe that England is not an inappropriate forum to bring the action. The case of Spilada Maritime Corporation v Cansulex Ltd.,\textsuperscript{34} upheld three main issues to be considered before staying proceedings:\textsuperscript{35}

(i) whether there is another forum available which is more appropriate;

(ii) whether England is not a natural or appropriate forum and the alternative forum is more natural and appropriate (this will involve looking at which forum will have the most real and substantial connection to the action); and

(iii) whether it is just that the Claimant be deprived of the right to trial in England.

5.2.2 Forum Non Conveniens

The basic principle for granting stay and not assuming jurisdiction is based on the ground of forum non conveniens. According to which a court can decline jurisdiction if it is satisfied that there is some other available forum having jurisdiction which is more appropriate forum for trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the ends of justice.

5.2.3 Another Available Forum Which is Clearly More Appropriate

Once the suit is filed, the burden of proof to show another available forum which is clearly or distinctly more appropriate than the English forum is on the Defendant. It is not sufficient merely to show that England is not the natural or appropriate forum for trial nor is it sufficient to establish a mere balance of convenience in favour of the foreign forum.

The country with which the action has the most real and substantial connection will be the appropriate forum (as stated per Lord Keith in Rockware Glass Ltd v MacShannon [1978] AC 795 at 829). The Court will consider all the connecting factors and the connecting factors will include not only factors affecting convenience or expense (such as availability of

\textsuperscript{34} [1986] 3 WLR 972, 3 All ER 843, [1987] A.C. 460.
\textsuperscript{35} Supra n. 23.
witnesses) but other factors as well such as the law governing the relevant transaction and the place where the parties reside or carry on their business.  

Where the factors fail to prove more appropriate forum abroad, the Courts will ordinarily deny to stay proceedings. One such example is when an action arises out of a collision on the high seas and accordingly no natural forum exists. Similarly, where England is identified as the natural forum, a stay will be refused. Where the Court has permitted service of proceedings out of the jurisdiction, the Court has already decided that England is the appropriate forum.

5.2.4 The Requirements of Justice

“If there is some other available forum which prima facie is clearly more appropriate for the trial of the action, the court will generally grant a stay unless there are circumstances by reason of which justice requires that a stay should nevertheless not be granted.  

Once it has been proven that there is evidently a more appropriate forum for trial abroad, the burden of proof gets shifted to the Claimant to justify proceeding of suitin England. As a general rule, the Court will not refuse to grant a stay merely because the claimant shows that he won’t get any financial assistance (e.g. legal aid) in the appropriate forum, whereas the same will be available to him in England. However, in Connelly v RTZ Corpn. Ltd the House of Lords refused to stay proceedings despite the fact, which was accepted by the Claimant, that Namibia was the jurisdiction with which the action had the closest connection on the ground of non-availability of financial assistance to the Claimant. However, this was an exceptional case as it was clear that the nature and complexity of the case was such that it could not be tried at all without the benefit of financial assistance.

In determining whether justice requires that a stay should not be granted, all of the circumstances of the case will be taken into account, for example; (i) where the judiciary is not independent; (ii) where a Claimant, who had an arguable claim, finds his claim summarily rejected; (iii) an inordinate delay before the action comes to trial (i.e. 10 years); (iv) the

36 Spiliada Maritime Corpn v Cansulex Ltd 3 WLR 972, 3 All ER 843, A.C. 460.
37 Id.
imposition of a derisory low limit on damages; (v) where the Claimant would be liable to imprisonment if he were to return to the alternative forum.

5.2.5 **Lis Alibi Pendens or Multiplicity of Proceedings**

In *Cleveland Museum of Art v Capricorn Art International SA*[^39^], there were concurrent proceedings in Ohio and England, Hirst J applied the basic principle stated in the *Spiliadacase*. He examined all the factors in the case, including the undesirable consequences of concurrent litigation and granted a stay of the English proceedings.

In contrast, in *E I Du Pont de Nemours and Co v Agnew and Kerr*[^40^], it was not shown that Illinois was clearly more appropriate than England. The undesirability of concurrent litigation was outweighed by the other factors including that the contract was governed by English law, that questions of English public policy would arise and doubts as to whether any foreign Court could fairly resolve them and accordingly, a stay was refused.

In *The Coral Isi*[^41^], a case involving a collision in international waters between two ships of different nationalities, a stay was refused on the basis that no country was the natural forum for trial.

The weight to be attached to the factor of multiplicity of proceedings will depend on the circumstances of the case. It is not a decisive factor. An English choice of jurisdiction clause may outweigh the multiplicity of proceedings factor and a stay may be refused.

5.2.6 **Non-EU Jurisdiction Agreements**

In determining the “appropriateness” of forum, an agreement by the parties to trial in a foreign country is a strong indication that the appropriate forum is abroad and operates as a weighty factor in favour of a stay of the English proceedings being granted under the doctrine of *forum non conveniens*.

Where the English Court has undoubted jurisdiction over actions properly instituted here, there is an inherent discretion for the court to disregard an express foreign jurisdiction clause. Nonetheless, in accordance with the principle that a contractual undertaking should be honoured, there is a prima

facie rule that an action brought in England in defiance of an agreement to submit to a foreign jurisdiction will be stayed. However, the Court has discretion in the matter and may allow the English action to continue if it considers that the ends of justice will be better served by a trial in this country.

The principle that the parties should abide by their agreement is of great importance in cases involving an exclusive jurisdiction clause. The starting point is that the English proceedings should be stayed if there is such a clause providing for the exclusive jurisdiction of a foreign Court. Under the *forum non conveniens* discretion the starting point is that an action properly commenced in England should be allowed to continue.

### 5.2.7 Applicability

The rules that the English courts will apply in considering questions of jurisdiction in relation to a contractual dispute depend upon the domicile of the defendant.

- Contractual disputes involving a defendant domiciled in the EU will be subject to the Brussels Regulation.
- Contractual disputes involving a defendant domiciled in the European Free Trade Association (EFTA) excluding Lichtenstein will be subject to the Lugano Convention.
- Contractual disputes involving other defendants will be subject to the rules of English common law.

### 5.2.8 Choice of Jurisdiction

Choice of law clauses and choice of jurisdiction clauses (sometimes called choice of forum clauses) must be distinguished. Whilst choice of law clauses relate to the law that will be used to interpret a contract, choice of jurisdiction clauses specify the courts (or other decision making bodies) that will resolve disputes arising under the contract. For example, a contract could specify that it should be interpreted in accordance with English law, whilst at the same time granting exclusive jurisdiction to the courts of Germany to resolve disputes arising under the contract.

In any contract entered into between the parties, agreement generally states about the forum to be approached in case of any dispute. In a contractual dispute it is common for the parties to have elected for disputes to be subject to the jurisdiction of the courts of a particular state. The parties to a B2B
contract are generally free to choose in which jurisdiction a dispute may be litigated (although there are a few exceptions). In UK, Consumer contracts are dealt somewhat differently. Where the Brussels Regulation or Lugano Convention applies, consumer contracts (as defined in the Regulation and the Convention) are different. Under the Regulation and the Convention, jurisdiction clauses can only add to consumers’ rights to litigate, not subtract from them. So, if a consumer has a right to bring proceedings against a supplier under the rules discussed above, that right cannot be removed by means of a contractual jurisdiction clause. Similarly, where a supplier is obliged to bring proceedings against a consumer in the consumer’s jurisdiction of domicile, then that obligation cannot be altered by a choice of jurisdiction clause.

5.2.9 Default Jurisdiction under the Regulation and Convention

Where the Brussels Regulation or the Lugano Convention applies, then the defendant may usually only be sued in: (a) the courts of his domicile; or (b) in the courts of the place of performance of the obligation in question (presumed to be the place or intended place of the delivery of goods or the supply of services in a contracting state). There are, however, a number of exceptions to this general rule, including where:

- the dispute is subject to a contractual jurisdiction clause;
- the dispute concerns a contract classes as a consumer, insurance or employment contract.

5.2.10 Consumer Contracts

The new provisions for consumer contracts are contained in Articles 5 and 15 to 17. Article 5 of the Brussels I Regulation derogates from the general principle contained in Article 2, which gives the claimant the opportunity to proceed against the defendant in a member state in which the defendant is not domiciled. Under this provision, it contains seven matters, one of which, Article 5(1), deals with matters relating to a contract. This general rule does not apply to insurance, consumer and employment contracts. 42

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42 Article 5 of Brussels Regulation I:
A person domiciled in a Member State may, in another Member State, be sued:
1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
- in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
- in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,
Articles 15 and 16 provide rules for on-line consumer contracts. The new Regulation states, inter alia:

1. **Article 15**

   1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:
      
      (a) it is a contract for the sale of goods on instalment credit terms; or
      
      (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
      
      (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

   2. Where a consumer enters into a contract with a party who is not domiciled in the Member State but has a branch, agency or other establishment in one of the Member States, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in that State.

   3. This Section shall not apply to a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation.

2. **Article 16**

   1. A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.

   2. Proceedings may be brought against a consumer by the other party to the contract only in the courts of the Member State in which the consumer is domiciled.

   3. This Article shall not affect the right to bring a counter-claim in the court in which, in accordance with this Section, the original claim is pending.

Irrespective of contractual jurisdiction clauses, consumers under such contracts can sue, and can only be sued, in the state of their domicile. Ways to
reduce the risk of becoming subject, under the Regulation or Convention, to
the jurisdiction of a particular country’s courts, may include: using national
flags to indicate to whom a website is directed; limiting the currencies and
languages used on a website; and using technical filtering to prevent
consumers in the relevant jurisdiction from using the website or purchasing
the products and services offered on the website. Otherwise any state wherever
a website is selling goods, the seller is supposed to direct its activities to its
jurisdiction.\footnote{Id.}

To sum up, there are three kinds of jurisdiction: general jurisdiction,
special jurisdiction and exclusive jurisdiction.

\subsection{5.2.11 Exclusive Jurisdiction}

A well-drafted contract, which has factual links with more than one
country, will contain a choice of jurisdiction or court clause.\footnote{Dr. Faye Fangfei Wang, “Obstacles and Solutions to Internet Jurisdiction: A
Comparative Analysis of the EU and US laws”, Journal of International Commercial
Law and Technology Vol. 3, Issue 4 (2008).} This is often
referred to as an “exclusive” clause, providing that all disputes between the
parties arising out of the contract must be referred to a named court or the
courts of a named country.\footnote{Morris, McClean and Beever, The conflict of laws, Sweet 
& Maxwell, London (2005), p.87.} If the jurisdiction clause includes a choice of a
particular court, Article 23 of Brussels Regulation is to confer jurisdiction on
that court, but not on other courts in the same country. However, A and B can
also choose the other courts, for instance the French court, instead of the
Italian or German courts to hear the case, because Article 23 does not “require
any objective connection between the parties or the subject matter of the
dispute and the territory of the court chosen”.\footnote{Castelletti v. Trumpy [1999] ECR I-1597.}
Moreover, A and B can also
conclude a further exclusive jurisdiction agreement varying the earlier
agreement, because Article 23 is based on the principle of party autonomy and
it does not prevent parties from changing their decisions.\footnote{Sinochem v. Mobil [2000] 1 Lloyd’s Rep 670.} However, Article
23(3) includes an exemption to parties, none of whom is domiciled in a
member state. In this situation, the chosen courts have discretion to determine
the existence and exercise of their jurisdiction in accordance with their own
The courts of the other members shall have no jurisdiction over the disputes unless the chosen court or courts have declined jurisdiction. In the e-contracting cases, to insert a choice of jurisdiction clause in the standard terms and conditions on the website can avoid further ambiguity about which court has jurisdiction when disputes arise. For example, the website owner can incorporate a choice of jurisdiction clause into an interactive click-wrap agreement that the buyer needs to click the “I agree” button to assent to it.  

5.2.12 General Jurisdiction

Persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that state. Furthermore, domicile rules within the Brussels I Regulation govern the domicile of individuals and domicile of corporations. With contracts made over the Internet it is difficult to determine where the party is domiciled, even though the plaintiff can identify the party and locate the transaction. On the Internet, since the decision of the e-transaction might be made following discussion via video conferencing between senior officers who reside in different states, it has become more difficult to ascertain the location of the central administration. According to the UN Convention on the Use of Electronic Communications in International Contracts (the UN Convention), “the location of the parties” is defined as “a party’s place of business”. If a natural person does not have a place of business, the person’s habitual residence should be deemed as a factor to determine jurisdiction.

5.2.13 Special Jurisdiction

Jurisdiction that derogates from the general principle of jurisdiction which gives the claimant the opportunity to proceed against the defendant in a

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48 Id.
50 Article 2 and Article 59 of Brussels I Regulation.
51 Article 60 of Brussels I Regulation.
52 Fawcett, Harris and Bridge (2005), p.511.
53 Id.
54 Article 6 of the UN Convention on the Use of Electronic Communications in International Contracts, A/RES/60/21, 9 December 2005.
55 Article 6(1) of the UN Convention.
56 Article 6(3) of the UN Convention; Article 15(4)(b) of the UNCITRAL model Law on Electronic Commerce.
member state in which the defendant is not domiciled as is allowed in case of consumer contracts under Brussels Regulation I.

5.3 LEGAL PRINCIPLES ON JURISDICTION IN THE UNITED STATES OF AMERICA

Due to the fact that U.S. companies are at the forefront of Internet technology, litigation regarding e-commerce in the United States is more advanced than anywhere else in the world. Similar to the EU Brussels regime (general and special jurisdiction), U.S. Law has two types of jurisdictions: general and specific. General jurisdiction is jurisdiction over the defendant for any cause of action, whether or not related to the defendant’s contacts with the forum state; whereas specific jurisdiction exits when the underlying claims arise out of, or are directly related to, a defendant’s contacts with the forum state. It is worth examining the decision in *Cybersell, Inc. v. Cybersell, Inc.* as a typical example of a fact situation involving a conflict over jurisdiction. The case involved a service mark dispute between two corporations, one at Orlando and another in Arizona. The Court had to address the issue of whether the mere use of a website by the Florida Corporation was sufficient to grant the Court, in Orlando, jurisdiction. The Court answered the question in the negative, focusing on traditional analysis established by the US Supreme Court concerning the due process aspects of personal jurisdiction: “It is essential in each case that there should be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws”. The Court rejected the plaintiff’s argument that by employing a web page, without more, a web publisher was subject to jurisdiction in the plaintiff’s forum. The Court also rejected the plaintiff’s reliance on the “effect test”, holding that the test does not apply with the same force to a corporation as it does to an individual “because a corporation does not suffer harm in particular geographic location in the same sense that an individual does.”

58 1997 U.S. App. LEXIS 33871 (9th Cir., December 2, 1997).
Facts situations such as this, raise multifarious questions that are difficult, if not impossible, to answer with the application of contemporary legal principles. Then, to what extent should we force old models and analogies on this new way of communicating and doing business?\footnote{Bradley A. Slutsky, “Jurisdiction Over Commerce On The Internet”, available at http://www.kslaw.com/menu/jurisdiction.htm (last visited on 5 May 2011).}

In these circumstances, the courts could, and do, assume jurisdiction over the offence and try the offender within their own jurisdictions, resulting in situations where persons located in a completely different jurisdiction may be tried in a court of a given territory. There have been various examples of foreign courts assuming jurisdiction over a matter that \textit{prima facie} arose in a different jurisdiction, on the strength of the long arm statutes of that state.

5.3.1 Rules Determining Extra-Territorial Jurisdiction

The most common examples of extra-territorial jurisdiction have arisen from various decisions of the Federal Courts of the US, in relation to interstate jurisdictional issues. Constitution of the United States has provided that a state can assert jurisdiction over a non-resident defendant, only if there are certain ‘minimum contacts’ between that non-resident and the state in question.

5.3.1.1 Minimum Contacts

In 1945, the United States Supreme Court in \textit{International Shoe v. Washington},\footnote{326 U.S. 310 (1945).} created a “minimum contacts” test for States to use as a basis for exercising jurisdiction over an out-of-state defendant. The Court stated that to the extent that a corporation enjoys the privilege of conducting activities within a state, it also enjoys the protections and benefits of that state. Since these privileges may also give rise to obligations which arise out of or are connected to the activities within the state, requiring a corporation to answer to a suit in that state is not an undue burden.\footnote{Kulko v. Superior Court, 436 U.S. 84 (1978).} This test has been modified, to include even individuals, and not just corporations.\footnote{471 U.S. 462 (1985).}

The \textit{Burger King v. Rudzewicz},\footnote{NandanKamath, “Law Relating to Computers, internet and E-commerce”, (4th Ed. 2009), p. 23 Universal Law Publishing Pvt. Ltd., New Delhi.} the Court reasoned that the “Purposeful availment” requirement is satisfied when the defendant’s contacts with the forum “proximately result from actions by the defendant himself that
create a ‘substantial connection’ with the forum State,” and are such that he “should reasonably anticipate being hauled into court there.” Hence, contacts that are simply “random, fortuitous, or attenuated” do not provide an adequate basis for the exercise of personal jurisdiction.\(^65\) Recently, the US Supreme Court narrowed its analysis of purposeful availment of the forum in *Asahi v. Superior Court of California.*\(^66\) The Court observed that, “the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State.” Additional conduct on the part of the defendant is necessary to establish an act purposefully directed toward the forum State.

### 5.3.1.2 Advertising on the Web

The US courts have issued strongly divergent opinions on whether jurisdiction can be based on an internet presence, without any contractual relationship between plaintiff and defendant.\(^67\) Some cases have held advertising on the internet enough to create jurisdiction, while other cases reach the opposite conclusion.\(^68\)

In *Inset Systems, Inc. v. Instruction Set, Inc.*,\(^69\) the court held that advertising over the internet was purposefully directed toward the forum state. The plaintiff Inset Systems, Inc. (“Inset”) was a Connecticut corporation with office and principal place of business in Connecticut. The defendant, Instruction Set, was a Massachusetts corporation, with office and principal place of business in Massachusetts. Instruction Set did not have employees in Connecticut, nor regularly conduct business there. Inset involved a dispute between one company’s trademark and another’s Internet domain name. Since 1986, Inset had owned the federally-registered trademark “INSET.”

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\(^{65\text{Here, the Court cited Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984). The Court listed additional factors to be considered in appropriate cases such as: “the burden on the defendant”; “the forum State’s interest in adjudicating the dispute”; “the plaintiff’s interest in obtaining convenient and effective relief”; “the interstate judicial system’s interest in obtaining the most efficient resolution of controversies”; and the “shared interest of the several States in furthering fundamental substantive social policies.”}}\)

\(^{66\text{480 U.S. 102 (1987).}}\)

\(^{67\text{Supra n. 62, p. 29.}}\)

\(^{68\text{Peter Brown, “US Courts used internet to assert jurisdiction over foreign dependants: Jurisdiction can be based on acts in cyberspace, but which acts?” at http://www.ilpf.org/events/jurisdiction/presentations/ishiguro_a1.htm. (last visited on 6 June 2011).}}\)

\(^{69\text{937 F. Supp. 161 (D. Conn. 1996).}}\)
Thereafter, Instruction Set obtained “INSET.COM” as its Internet domain address. Instruction Set also used the telephone number “1-800-US-INSET” to advertise its goods and services. Inset brought this suit for trademark infringement.

In deciding personal jurisdiction, the court looked to the Connecticut long arm statute and applied the due process, minimum contacts analysis. The court found that Instruction Set had repeatedly solicited business over the Internet, and thus satisfied the long arm statute. Finding the travel distance between Connecticut and Massachusetts to the “minimal”, the court concluded that jurisdiction comported with fair play and substantial justice. The US District Court for the Eastern District of Missouri reached a similar conclusion in Maritz, Incv. CyberGold, Inc., finding that it had jurisdiction over a California defendant in a trademark infringement case where the defendant’s only contact with the state was through its California-based website, which was accessible in Missouri. These cases are later analyzed in the context of active and passive web sites.

On the other hand, in Bensusan Restaurant Corporation V. King, no personal jurisdiction was found where a web publisher in Missouri published a general access web page that contained ticketing and event information about a jazz club known as “The Blue Note” in Columbia, Missouri. Tickets, however, were not available directly from the web site. The club owner was sued in New York by a New York corporation that owned “The Blue Note”, a popular jazz club in Greenwich Village and which owned the rights to the “The Blue Note” federal mark.

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70 The court ruled that the defendant purposefully availed itself of the privilege of doing business in Connecticut by directing its advertising activities –via the Internet and its toll free telephone number - to Connecticut and other states. In making this determination, the court relied upon a statistic that the defendant’s online advertising could theoretically reach as many as 10,000 users in Connecticut alone.

71 It is noteworthy that though a similar commercial situation was presented in PresKap, Inc v. System One, Direct, but the court recognized the special nature of online transactions.


73 The defendant had established the website in order to develop an e-mail mailing list, which it planned to make available to advertisers, for a fee. Those who accessed the website could register to receive information on areas of interest. The site had been accessed more than 300 times from Missouri, and the defendant had transmitted information to Missouri registrants more than 100 times. The court found the defendant’s actions had caused a tortuous injury in Missouri.

The court found that the exercise of personal jurisdiction would violate Constitutional due process, stating that “creating a site, like placing a product into the stream of commerce, may be felt nationwide or even worldwide but, without more, it is not an act of purposefully directed toward the forum state.” The court found that Bensusan’s argument that King should have foreseen that New York users would access his site is insufficient to satisfy due process requirements.

Thus, even though the net has become one of the fastest growing of all media, courts are yet to evolve consistent rulings over confusing aspects such as jurisdiction.

5.3.1.3 Active and Passive Websites

For jurisdiction purposes, web sites are split into two groups: passive and interactive. Passive sites provide information in a read-only format. Interactive sites encourage the browser to enter information identifying the browser and/or providing background on the browser’s interests or buying habits. It is not surprise that courts are more willing to find that a web publisher who solicits information about the forum’s residents is purposefully availing itself of the forum’s benefits than a publisher who simply provides information about the publisher, its products and services.\(^{75}\)

Thus in \textit{Zippo mfg. Co. v. Zippo Dot Com, Inc.}\(^{76}\), purposeful availment was found based on the defendant’s interactive web site and contracts with 3000 individuals and seven internet access providers in Pennsylvania in a trademark infringement suit. The websites here allowed browsers to sign up for the defendant’s internet news service. Defendant was a California company, its employees were located in California, and it maintained no offices in Pennsylvania, where the suit was brought.

No matter where parties may fall on the spectrum, they should recognize that engaging in commercial activity over the internet may spawn liability in foreign jurisdictions if that activity consists of something more than simple posting of information.

\(^{75}\) \textit{Supra n. 62}, p. 34.

\(^{76}\) 952 F.Supp 1119, 1124 (W.D. Pa. 1997).
In a trademark infringement case similar to Zippo, a Georgia defendant was hauled into a New York court. A New York plaintiff sued the Georgia defendant for trademark infringement and unfair competition in the U.S. District Court for the Southern District of New York. The plaintiff, a provider of similar consulting services to those provided by the defendant, claimed the mark used by the defendant, <America.net>, “infringed the plaintiff’s mark <American.net>. New York’s long-arm statute includes a provision for jurisdiction over an out of state tortfeasor when harm is felt within the state if defendant derived substantial revenue from interstate or international commerce. Since the plaintiff’s business was located in New York, and the defendant was aware of such, it was reasonable for the defendant to expect that the publication of the offending mark on the Internet would result in harm suffered in New York. The court, looking further to due process, stated that the web page alone would not necessarily have been enough, but that additional contacts with six New York subscribers to the advertised services established purposeful availment. Additionally, the court held that those subscribers evidenced the defendant’s efforts to market his services in New York, making New York court appearance a reasonable expectation. Since marketing was the basis for the cause of action, the defendant’s online actions were found to be directly related to the complaint.

Passive activity is considered a “posting” of information, lacking interaction and is typically advertisement on the Web. As mentioned earlier, one of the first federal cases deciding whether an advertisement posted on the website is sufficient to confer jurisdiction over an out-of-state

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77 Zippo’s analysis has also been adopted in the context of emails – aspect discussed in detail later. In Resuscitation Technologies, Inc v. Continental Health Care Corporation, No IP 96-1457, 1997 WL 148567 (S.D. Ill. March 24, 1997) the plaintiffs, a corporation in Indiana, had an interactive web site seeking capital for its company. The defendants responded to the solicitation through email. Through numerous and continuous email messages over a period of months, the court found a quality of interactive electronic contacts whose intended object was to transact business in Indiana. The court concluded that jurisdiction was proper and noted the commercial nature of the contacts and that the contacts were focused on Indiana.


defendant was *Inset Systems, Inc. v. Instruction Set, Inc.* 80 This case was based on the claim of trademark infringement, but it yields a different finding of personal jurisdiction. The court held that the defendant was subject to jurisdiction in Connecticut because its advertising activities were purposefully directed to Connecticut. Taken one step further, this would suggest that advertising over the Internet confers jurisdiction in any state or country where it could be accessed. The court concluded that since the defendant “purposefully” directed its advertising activities toward this state on “continuing basis”, it could reasonably anticipate the possibility of being hauled into court here. To avoid such an untenable result, one should keep in mind the particular facts of the *Inset* case, namely that jurisdiction was established in Connecticut over Massachusetts Corporation, implying that the reasonableness prong played an important role. Perhaps the court should have insisted on the presence of some other factor, in addition to those it relied upon, for the establishment of jurisdiction. *Maritz,* (refer above) was decided relying on *Inset.* Once again a court found that advertising on the web is enough in itself to suggest that the defendant is purposefully availng the forum and could reasonably anticipate being hauled into court there. 81

Another internet advertising case with a bit of twist is *Minnesota v. Granite Gate Resorts, Inc.* 82 which involved a suit brought by the Minnesota Attorney General alleging, deceptive trade practices, false advertisings and consumer fraud against the defendant, a Nevada corporation advertising an online gambling service. The advertisement was not active and visitors to the site were directed as to where and how to sign up for the service. The site also

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81 It has been suggested that the Court’s ruling can be distinguished from *Inset* because the site was interactive in that it responded automatically to all internet users requesting to be placed on the mailing list. The court noted that even though the defendants characterized their web site as “passive”, its intent was to reach all internet users, however that does not necessarily make it “active”. The court mentioned that the website automatically and discriminately responded to each and every internet user who accessed CyberGold’s website. At best this simply creates an argument that the site is active, but it does not appear the Court was concerned with this aspect of interaction, because if it were, it probably would not label the site interactive. A better argument is that a computer which automatically and indiscriminately responds to those who access its web site cannot be said to be “purposefully availing itself” of the protection of the forum especially when contacts that are “random, fortuitous, or attenuated” do not provide adequate basis for jurisdiction.
contained a bold notice to the users to check with their state and local authorities regarding this type of wagering before registering with the defendant. Despite the language the defendant employed and the passive nature of its website, the court found that the defendant had established a sufficient number of contacts with the state and could reasonably anticipate being hauled into court in Minnesota. Regarding the quantity of advertising acts and contacts with the forum and supporting inset, the court stated that, “once the defendant place an advertisement on the internet, that advertisement is available 24 hours a day, seven days a week, 365 days a year to any internet user until the defendant take it off the internet”. As in Maritz, regarding the number of times a resident of the forum contacted the defendant’s page, the Court noted that at least 248 computers located in Minnesota accessed the defendant’s website.

5.3.1.4 Jurisdiction and Choice of Law in Internet Contracts

An Internet contract is typically a contract that is entered into through the medium of the Internet either by using one of the various constructs of the World Wide Web (such as click wrap contracts) or through the exchange of email stating offer and acceptance of the terms and conditions of a particular transaction. It is similar to traditional contracts in that it sets out the rights and duties, obligations and liabilities of the contracting parties, as well as the services to be rendered and the consideration to be received by the parties. At the same time, it is distinct from the traditional concept of contracts in that our understanding of the concepts, offer and acceptance, must necessarily undergoes a change consistent with the nature of the medium.  

Under traditional law, where both parties to the contract are located within the territory of the same state, the law governing the contract will typically be the law of the state in which the transaction occurred, unless the parties agree in their contract to the application of the law of another jurisdiction. If, however, the parties are located in different jurisdictions, there is choice of law rule that govern which law would properly apply to the dispute. The provisions of private international law set out the principles

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relating to the determination of the proper law of the contract. Two situations arise:
(i) the parties state in the contract their choice of law for the contract;
(ii) the contract is silent in respect of the choice of law.

Where the parties have expressly and unequivocally stated in the contract their choice as to what law should govern the contract, this choice of the parties is normally accepted by the courts as being the proper law of the contract. This derives from the doctrine of autonomy, which propounds that parties are, within certain limitations; free to choose what law they would like their contract to be governed by.

In most circumstances, the choice would be the national law of some country, though in some cases, the parties may validly choose a specific convention (such as the Vienna Sales Convention or the Hague-Visby Rules) as governing the contract. Where the choice is for the national law of a country, it is advisable to choose the law of a country that has some nexus with the subject matter of the contract. Where the choice of law is not expressed in the contract, in the event of a dispute, it is up to the court to decide as to what law would govern the contract. In coming to a conclusion as to what the proper law of contract would be, the court would, in the case of traditional, non-internet contracts, normally consider factors, such as the law of the country which has the closest connection to the contract.

Indeed, the fact that the contract expressly stated the laws of the State of Ohio to be the express choice of law of the parties was, in CompuServe v. Patterson, one of the main reasons why the court in Ohio assumed jurisdiction over the matter even in the face of evidence presented by the defendant that it had, through its conduct, indicated a preference to be governed by the laws of a different venue.

This court has stated that the question of whether, defendant has purposefully availed itself of the privilege of doing business in the forum state is the sine qua non for in personam jurisdiction.

When parties complete a commercial transaction through a World Wide Web-site, it is virtually impossible to ascertain, from a territorial point of

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85 Mohasco Indus, 401 F 2d at 381-82.
view, where the contract was concluded or where the effect of the contract is most likely to be felt. For one thing, webpage operators normally change the web server on which the Website is located without notice. It is, therefore, difficult to estimate where exactly the contract was concluded. Even if the location of the Website could be identified at the time of execution of the contract, it is usually of little help in determining the proper law of the contract as the physical location of the server has very little to do with locus of the parties contracting through it.

An attempt has been made through legislation to come to some sort of rational basis for determining the proper law of certain types of contracts and the recent draft of the Uniform Commercial Code (the Draft of 2nd March 1997), attempts to address the law relating to multi-jurisdictional transactions. Section 2B-105 has been reproduced here:

5.3.1.5 The Law relating to Multi-Jurisdictional Transactions86 (Section 2B-106)

(a) A choice-of law term in an agreement contract is enforceable.
(b) If an agreement contract does not have an enforceable choice of law term, the following rules apply:

(1) In an access or other online contract or a contract providing for delivery of a copy by electronic communication, the contract is governed by the law of the jurisdiction in which the licensor is located when the transfer [activation] of rights occurred or was to have occurred.

(2) In a consumer contract not governed by sub-section (b) (1) in which the contract requires delivery of a copy on a physical medium to the consumer, the contract is governed by the law of the jurisdiction in which the copy is located when the licensee receives physical possession of the copy or, in the event of non-delivery, the jurisdiction in which receipt was to have occurred.

(3) In all other cases, the contract is governed by the law of the State with the most significant relationship to the contract where the licensor is located.

(c) If the jurisdiction whose law applies as determined under sub-section (b) (2) is outside the United States, sub-section (b)(2) applies only if the laws of

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86 Supra n. 83.
that jurisdiction provide substantially similar protections and rights to the party not located in that jurisdiction as are provided under this article. Otherwise, the rights and duties of the parties are governed by:

1. The law of the jurisdiction in the United States or in the most substantial connection with the transaction; or
2. If no such jurisdiction exists, the law of the jurisdiction in the United States in which the licensee is located.

(d) A party is located at its place of business if it has one place of business, at its chief executive office if it has more than one place of business, or at its place of incorporation or primary registration if it does not have a physical place of business. Otherwise, a party is located at its primary residence.

To paraphrase, under the proposed code in respect of online transactions, the country in which the licensor was situated at the time when the transfer of license rights took place would have jurisdiction over the dispute. In respect of all other computer transactions where physical delivery of the physical media is of the essence, the place where the transfer took place or was to have taken place would be the country with jurisdiction over the dispute. In other situations, the country with the most significant connection would assume jurisdiction.

This brings us to the test of substantial connection with the subject matter of the contract. Given that most contracts concluded over the Internet relate to activities or services to be performed on the Internet itself rather than at a given physical location, it is almost impossible to determine who has jurisdiction over such contracts. The courts have attempted to assume jurisdiction by drawing a substantial nexus between the physical location of one or more party to the transaction and the contract.

5.3.1.6 Jurisdiction and Electronic Mail Transactions

Sending e-mail to an individual whose location is known to the sender is similar to sending regular mail addressed to an individual at a known location. Thus, one could argue that there is little reason not to exercise jurisdiction over the sender in the location to which the email was sent.87

87 Supra n. 62, p. 44.
Thus, in *Resuscitation Technologies Inc v. Continent Health Care Corp*\(^8\), the New York defendant had extensive communication with the Indiana plaintiff, including 80 emails. The court in Indiana found the level of activity directed to Indiana was substantial, thus, Indiana has personal jurisdiction over the defendant.\(^9\)

Similarly, in *Cody v. Ward*\(^9\), the Court found that the defendant’s telephone calls and emails were sufficient contacts to satisfy due process. In that case the defendant communicated with potential stock investors through a computer bulletin board. The defendant further communicated with the plaintiff directly through the telephone and email. The Court reasoned that given the nature and number of the defendant’s fraudulent misrepresentations to the plaintiff, he could reasonably foresee being sued in Connecticut.

However, the issue is far from this simple. Technology behind the Internet has introduced a number of complications. Firstly, an email address does not always indicate the geographical address of the sender. For example, james@hotmail.com could be located anywhere in the world. Similarly, even if one has an e-mail address with a geographical tag, such as james@bangaloremail.com, one can arrange for it to be forwarded to another account or one may access the account from a location outside Bangalore. All these factors have fuelled judicial confusion with regard to the effect of email. As the District Court recognized in *ACLU v. Reno*\(^9\), “an email address provides no authoritative information about the addressee, who may use an e-mail, ‘aliases’ or an anonymous e-mailer. With the possible exception of an e-mail to a known recipient, most content providers cannot determine the identity and age of every user accessing their material.” Thus, except for e-mail sent to a known recipient, it may be difficult to say that e-mail distribution is a method by which a company “purposefully avails itself of the privilege of conducting activities within the recipient’s forum state”.\(^9\)

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\(^8\) 1997 WL 148567 (S.D. Ind. 1997).
\(^9\) 954 F. Supp. 43 (D.Conn. 1997).
\(^9\) 929 F. Supp. at 85.
Email may also contribute to a finding of personal jurisdiction. Many Websites allow users to contact a business or individual via email. Although e-mail alone probably will not confer jurisdiction, its routine use may suffice to find jurisdiction in the same way that frequently sending or receiving regular mail from a state leads to jurisdiction.\footnote{See for example, Blackburn v. Wholesale Rug Outlet v. Walker Oriental Rug Galleries, Inc., No. 97-5704, 1998 WL 166861 (E.D. Pa. Apr. 9, 1998). Cited from, Dale M. Cendaliand Rebecca L. Weinstein, “Personal jurisdiction in Cyberspace internet Activity Could Subject Parties to Suit”, New York Law Journal, July 20, 1998.}

For instance, in \textit{Scherr v. Abrahams}\footnote{No. 97 C 5453, 1998 WL 299678 (N. D. Ill. May 29, 1998).} the court denied jurisdiction even though the defendant’s site allowed users to contact him via e-mail and he sent his publication to them via e-mail. However, as cases like \textit{Cody v. Ward} demonstrate, courts will simply look at the volume of e-mail exchanged to grant jurisdiction. Again, as witnessed above, in the presence of contacts besides the internet, the courts are fairly comfortable in granting jurisdiction. Such jurisdiction may even extend to a “general nature”, subjecting the party to suit in a forum on the ground of action not related to the internet itself.

\subsection*{5.3.1.7 Cyber Jurisdiction in Click Wrap Contracts}

A click-wrap contract refers to electronic contracts requiring users to express their consent by clicking on an “I accept” button, or an equivalent, even before completing their purchase. Frequently, the users never really read the fine print. In addition to acceptance among courts, the state and federal legislation gives statutory support to these new contract forms. The court in \textit{Comb v. Paypal Inc.}\footnote{218 F. Supp. 2d 1165, 1172(N.D. Cal. 2002).} held that the click-wrap agreement was unconscionable because it was a standardized contract, imposed and drafted by the party who had the superior bargaining position. Customers only had the opportunity to accept or reject the agreement, and not for negotiation of any of the terms. The court found a “lack of mutuality” in such agreement terms which provided that it could be changed by Paypal at any time and without prior notice, subject to Paypal posting the revised agreement on the website and also, in the event of dispute, Paypal could restrict accounts and withhold funds until such time as it was proven that the customer was entitled to the funds in dispute. Paypal could not show that “business realities” justified such one-sidedness.
5.4 LEGAL PRINCIPLES ON JURISDICTION IN INDIA

The Indian jurisprudence with regard to jurisdiction over the Internet is almost non-existent. Hence, there has been precious little by way of development of private international law rules in India. Furthermore, there have been few cases in the Indian courts where the need for the Indian courts to assume jurisdiction over a foreign subject has arisen. Such jurisprudential development would, however, become essential in the future as the Internet sets out to shrink borders and merge geographical and territorial restrictions on jurisdiction.

It is worthwhile to consider the issue of jurisdiction at two levels. In the first place, given the manner in which foreign courts assume jurisdiction over the Internet related issues (as evidenced by the cases discussed above), the consequences of a decree passed by a foreign court against an Indian citizen must be examined. In other words, under what circumstance the decision of a foreign court can be enforced against an Indian citizen or a person resident in India. It is also necessary to examine the circumstance under which the Indian courts would assume jurisdiction over foreign citizens in order to better understand the rights of an Indian citizen who is affected by the act of a foreign citizen.

5.4.1 Effect of Foreign Judgments

Under the Code of Civil Procedure, the effect of foreign judgments has been spelled out under the provisions of s. 13, which reads as follows:

5.4.1.1 When Foreign Judgment not Conclusive

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;

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96 Supra n. 83.
97 Id. p. 18.
(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 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

Except for the six grounds specifically mentioned in the section, the Indian courts are bound to accept the decree of a foreign court as being conclusive order to enforce a foreign judgment, care must be taken to ensure that the judgment is not flawed in any of these ways. The courts have built up considerable case law with regard to the interpretation of the various provisions of this section, the substance of which has been reproduced here.

As is obvious from the language of the section, if the foreign court did not have jurisdiction over the matter, any decree passed by such a court would not be conclusive, as far as an Indian court is concerned. In various cases, the court has stated that where there has been voluntary consent to submit to the jurisdiction of the court, the court would be recognized internationally to have competent jurisdiction over the matter and such jurisdiction would be binding.\(^98\) This principle is grounded on the foundation that a party having taken a chance of a judgment in his favor by submitting to the jurisdiction of the court, should not be allowed to turn round when the judgment goes against him, to say that the court had no jurisdiction.\(^99\) As a corollary, in the event an ex parte decree is passed by a court, in a matter where the person against whom the decree is passed, does not contest or even appear in court, the party cannot be said to have submitted to the jurisdiction of the court.

However, using the requirements of sub-section (b) of the section, the mere fact that the decision was passed ex parte, does not constitute sufficient grounds for declaring that the relevant court did not have jurisdiction, as it will


have to be seen whether the decision was merely passed as a formality or after a consideration of the plaintiff’s case.\textsuperscript{100}

This position of law assumes significance in relation to the judgment of foreign courts over internet related disputes as in most such litigation, the main argument on behalf of the defendant is that the foreign court has no jurisdiction to try the matter. In the first place, it appears that a decree of a foreign court in a personal action, that was passed \textit{in absentium} and in respect of which the defendant did not even appear before the foreign court, would not be deemed to have been passed by a court of competent jurisdiction. This apparently opens the doors for Indian defendants to avoid the consequences of foreign decisions by staying away from the forum where the proceedings are taking place. Not being present at the trial, the decisions of the court cannot be enforced against them in India. However, courts in India have not struck to this narrow view and have at times enforced the ex-parte decrees of foreign courts, where the decision has been arrived after a consideration of the evidence and where the proceedings have in general not taken place in a summary manner.

An important aspect that the court must take into consideration is the fact that the decision of the foreign court must have been taken strictly in accordance with the principles of natural justice. It is well-settled that a mere error in procedure in a foreign court will not affect its conclusive nature under s. 13 of CPC provided that error in procedure does not amount to a violation of natural justice under s.13(d) of CPC. There is no doubt that the nature of the violation must be substantial and not a minor violation of natural justice.

So also, where the judgment of the court has been obtained by fraud, the decree is liable to be set aside. However, in these matters, it is more relevant to consider whether the court has obtained jurisdiction by fraud, rather than to examine whether the decision on the merits of the case was so obtained.

Finally, the last sub-section of s.13 states that the foreign judgment is not conclusive, if the judgment sustaining the claim is founded on a breach of Indian law. Without putting too fine a point on it, the import of this section is

\textsuperscript{100} Govindan v. Sankaran AIR 1958 Ker 203; Rajaratnam v. Muthuswami AIR 1958 Mad 203.
merely this: where a dispute is governed by Indian law, the final judgment of the foreign court should not be in violation of Indian law.

Thus, where the claim is not based on Indian law and where the court has accepted the plea that the law governing the dispute is not Indian law, no objection can be taken to the judgment under s. 13(l)(c) on the grounds that it sustains a claim based on Indian law.

In summary, the courts in India are not averse to upholding the decree of a foreign court and can, in fact, only hold the decree of a foreign court to be non-conclusive, if such a decree does not fulfill the criteria set out in s. 13 of the Code of Civil Procedure. Thus, in the event a decree is passed against an Indian citizen in respect of any perceived breach of the laws of another state, the decree will be upheld in India, against the Indian citizen, provided it does not suffer from any of the infirmities listed under s.13.

Moving back to our primary issue of jurisdiction over the Internet, in the event a foreign court passes extra-territorial judgment over a citizen of India, the case law examined above would clearly indicate that the courts in India would have no hesitation in upholding a reasoned and sound decision of a foreign court. Indian citizens, who establish a presence on the Internet would therefore need to be careful to follow the principles of law, set out in international jurisdictions to avoid prosecution under those laws. It is therefore not enough to be mindful of local laws alone. Any venture on the Internet appears to be open to challenge from virtually any jurisdiction and from any country that has Internet access.

This is a situation that is perhaps uncomfortable from the point of view of carrying out a business on the Internet. Commercial entities that are looking to use the Internet as a medium through which to conduct their business would be constantly looking over their shoulders, as it were, for the first signs of litigation. As a lawyer, it is difficult to advise clients as to the strategy to be adopted in situation such as these. While on the one hand, the promise of the internet is extremely attractive to commerce, on the other hand, the potential risks are virtually impossible to calculate. It is difficult to categorically state that a particular brand name that a businessman chooses to use on the Internet is an original mark and that such use would not be tantamount to the violation of the intellectual property rights of someone, somewhere on the net. In such
circumstances, businessmen should proceed to take a commercial risk to get out on the Internet and to tackle any potential litigation as and when it arises. There is no mechanism at present to conclusively state that a given act of an entity on the Internet violates the rights of another person on the Internet.

5.4.1.2 Jurisdiction of Indian Courts over Foreign Citizens or Residents

Under s. 16 of the Code of Civil Procedure, a suit in respect of immovable property or in respect of movable property that is actually under attachment or distraint, is required to be instituted in the court within whose local jurisdiction, the subject matter is situated. It is, therefore, not possible for an Indian court to assume jurisdiction over immovable property situated within the jurisdiction of a foreign state. However, Internet and computer related disputes rarely relate to immovable property and a discussion on this section of the Code will be futile.\(^{101}\)

Under s. 19 of the Code of Civil Procedure, a suit for the compensation of the wrong done to the person or to movable property may be instituted either at the place of residence or the place of business of the defendant or at the place where the wrong was committed.

However, the main section in the Code dealing with the jurisdiction of Indian courts over matters relating to personal injuries or damage to movable property is s. 20 which has been extracted here for reference.

5.4.1.3 Other suits to be instituted where the defendant resides or cause of action arises. (s. 20)

Subject to the limitations aforesaid, 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 personally works for gain, provided that in such

\(^{101}\) Supra n. 83, p. 21.
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) Where the cause of action, wholly or in part, arises.

**Explanation** - A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

The principle behind this section appears to be that a suit against a given person may be brought at the place where such person resides or at least has his place of business. This is apparently prompted by the rationale that the defendant, not being the person who instituted the suit should not be put to undue hardship in defending such a suit when the suit may not be maintainable at all. There is, however, another aspect to this section that may warrant study - the jurisdiction of the court where the whole or part of the cause of action arises as this could have some bearing on the jurisdiction of the Indian courts over internet disputes.

In essence, this section is the equivalent of the US long arm jurisdiction provisions. It is a section that enables a court to assume jurisdiction over a dispute regardless of where the principals are resident or carrying on business so long as a portion of the ‘cause of action’ took place within the local jurisdiction. Naturally, the definition of the term ‘cause of action’ is critical to a complete study of this section. ‘Cause of action’ has been variously defined as follows:

- The cause of action is the whole bundle of material facts which a plaintiff must prove in order to succeed. These are all those essential facts without the proof of which the plaintiff must fail in his suit;

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

- cause of action means and includes every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment and has no relation whatever to the defense that may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the media upon which the plaintiff asks the court to arrive at a conclusion in his favor.

The test for determining whether an allegation forms part of the cause of action is whether the plaintiff has to prove the same in order to support his right to judgment of the court. However, matters that are not necessary to be proved by the plaintiff in order for the plaintiff to succeed in his claim will not form a part of the cause of action and therefore cannot confer jurisdiction on the court within whose territorial jurisdiction it occurred. So also, the cause of action should be antecedent to the suit and an expectation of the performance of a contract within a particular jurisdiction cannot constitute a part of the cause of action.\footnote{102}{Fertilizer Corporation of India v. Sanjit Kumar AIR 1965 Punj 107.}

Having said this, there is no requirement that the whole, or substantially the whole of the cause of action must arise within the jurisdiction of a court, in order to confer jurisdiction. It cannot be contended that because a very small fraction of the cause of action accrued within the jurisdiction of a court, the plaintiff would not be entitled to institute the suit in that court. Even a fraction of the cause of action is a ‘part’ of it, its percentage to the whole cause of action is immaterial.\footnote{103}{Munirangappa v. Venkatappa AIR 1965 Mys 316.} However, where no portion of the cause of action arises, a suit cannot be filed under s 20(c) of the Code of Civil Procedure.\footnote{104}{Burmath Oil Co. v. K Tea Co., AIR 1973 Gau 34.}

Let us now examine the applicability of the Indian case law discussed above in the context of transactions on the internet. It has been held that ‘a court in this country has jurisdiction over a non-resident foreigner, although he
has not submitted to its jurisdiction, provided the cause of action had arisen wholly or in part within its jurisdiction. It is thus clear that the Indian courts will assume jurisdiction over a matter, if, even a part of the cause of action of the dispute arose within the jurisdiction of the specified court. What remains to be determined is what, in the context of internet transactions, would constitute a part of the cause of action. In this, we can take a cue from the cases decided by the courts of USA where similar ingredients (‘long-arm jurisdiction) had to be proved in order to determine the jurisdiction of the courts.

We have seen that the US Courts have, on occasion, held that the mere fact that an individual can access a given site on the internet from within the jurisdiction of the court, before which the suit was preferred, is justification enough for the court to assume jurisdiction over the dispute. Translated into terms applicable to a trial before an Indian judge, this principle could be interpreted to state that the fact that that a site is capable of being viewed or read from within the jurisdiction of court within which the suit is filed, is an indication that a part of the cause of action arose in that jurisdiction and therefore a suit can be maintained in that court. There are similarities between the long-arm principles used by the US courts and ‘cause of action’ test used by the Indian courts. It remains to be seen whether these similarities would allow the Indian courts to analyze the development of Internet laws in the US and to use this development of case law in their own judgments on matters involving Internet transactions.

There has also been considerable discussion as to what constitutes the cause of action in respect of a contract. It has been held that the cause of action arises in each of the following places:

- where the contract was made;
- where the contract was to be performed;
- where the consideration under the contract was to be paid.

In most well-drafted commercial contracts, the parties specify the jurisdiction of courts in the event of a dispute and agree to submit to the jurisdiction of a particular court. Where such a decision has been made,

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conferring jurisdiction on one of two courts that could have assumed jurisdiction over the dispute, the courts will normally accept the agreement between the parties to submit to the jurisdiction of the other court. However, the compulsive jurisdiction of a given court should be clear, unambiguous and explicit and unless the jurisdiction of the courts is expressly excluded by the use of words such as ‘alone’, ‘only’ or ‘exclusive’ the mere declaration that a particular court has jurisdiction over a contract would not suffice. Furthermore, where the court chosen by the parties under the contract would not, under the provisions of the Code of Civil Procedure, have had jurisdiction over the subject matter of the dispute, in such cases, the choice of such a court by the parties in accordance with the terms of the contract would not be enough to grant the court jurisdiction over the matter. Thus, the parties cannot by contract award jurisdiction where no such jurisdiction is statutorily available but may, by express declaration, choose a given jurisdiction in preference of another, provided both jurisdictions could validly adjudicate over the subject-matter of the dispute.

It may not be as easy to draw parallels between the US laws relating to the development of contract related disputes, as it is in respect of the other jurisdictional aspects. The US law, as is reflected, in the statements contained in the Draft UCC indicates that in the event the transaction has a multi-jurisdictional flavor, the following courts could assume jurisdiction:

- the court within whose jurisdiction the licensor in an online transaction is situated at the time of the completion of the transaction; or
- the court within whose jurisdiction the licensee receives physical possession of the physical media on which the subject matter of the contract is stored; or
- the jurisdiction which has the most significant nexus with the contract.

In India, the development of the law has not reached anywhere close to this level of specificity. Where the law governing the contract has not been specified in the contract, the Indian courts would try to determine the proper law of the contract that governs the contract. In order to do this, the courts

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would have to impute an intention by applying an 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. 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 to the courts having jurisdiction and other such links are examined by the courts to determine the system of law with which the transaction has its closest and most real connection.

No specific rules have been drafted in respect of the interpretation of the proper law of the contract (as is the case in the US and UK). Instead, the proper law is inferred from the facts of the case. It would therefore not be acceptable within the framework of the Indian judicial system to adopt the rules adopted in the United States and UK. In Indian courts, therefore, the jurisdiction is to be determined through an examination of the case law as relates to the facts and circumstances of that particular case, rather than any rigid rules lay down. Thus, for disputes relating to contracts concluded over the Internet, the governing principles that will guide the Indian courts are the three aspects of the contract relating to formation, performance and consideration. However, determining where exactly these essential features of the contract did, or are to, take place in the context of a geographically undifferentiated entity like the Internet, would require a jurisprudence far more developed than that which is currently available in India. While the courts may not adopt the specific rules, it would not be too great a leap of faith for the Indian courts to adopt the principles that have been used by the courts of the US and UK.

While the discussion above relates to the jurisdiction of the courts in respect of examining the case on merits, there is more to judgment than the mere examination of the evidence and the passing of the decree. The decree, in order to provide effective relief to the plaintiff requires to be executed. Thus, the next step after obtaining judgment, is getting the decree enforced in the appropriate court which is normally, either the court which passed it or the court to which it is sent for execution.

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However, in the context of the discussions above as to the extra-territorial nature of most Internet related activities, the execution of decrees is rarely as simple as approaching the first court in the chain of appeal. Very often, the decrees in Internet related disputes would be enforceable against citizens of a foreign country, and consequently in a foreign court. Furthermore, as has been seen in the discussion relating to the case of *Playboy v. Chucklebenyg* the courts of a foreign country may assume jurisdiction over Indian citizens or residents and such decrees would also require to be enforced.

Let us examine the provisions of the Code of Civil Procedure in this regard. Section 45 of the Code of Civil Procedure relates to the execution of decrees of the Indian courts in jurisdictions outside India.

5.4.1.4 Execution of Decrees outside India (s. 45)

So much of the foregoing sections of this Part as empowers a court to send a decree for execution to another Court shall be construed as empowering a Court in any State to send a decree for execution to any Court established by authority of the Central Government outside India to which the State Government has, by notification, in the Official Gazette declared this Section to apply.

In explanation, it must be clarified that the term ‘foregoing sections’ relates to the sections of the Code of Civil Procedure that deal with the execution of decrees generally and apply to those places or courts to which the Code of Civil Procedure applies. It is under this section that the decrees of the Indian courts are enforced in countries which the Central Government has declared by notification under this section. In addition, there are certain countries which have entered into reciprocal agreements with the Government of India, in respect of the enforcement of their decrees in Indian courts.

5.4.1.5 Execution of Decrees passed by Courts in Reciprocating Territories (s. 44A)

(1) Where a certified copy of a decree of any of the superior Courts of any reciprocating territory has been filed in a District Court, the decree may be executed in India as if it had been passed by the District Court.
(2) Together with the certified copy of the decree shall be filed a certificate from such superior Court stating the extent, if any, to which the decree has been satisfied or adjusted and such certificate shall, for the purposes of proceedings under this section, be conclusive proof of the extent of such satisfaction or adjustment.

(3) The provisions of s 47 shall as from the filing of the certified copy of the decree apply to the proceedings of a District Court executing a decree under this section, and the District Court shall refuse execution of any such decree, if it is shown to the satisfaction of the Court that the decree falls within any of the exceptions specified in clauses (a) to (f) of s 13.

**Explanation 1.** - Reciprocating Territory’ means any country or territory outside India which the Central Government may, by notification in the Official Gazette, declare to be a reciprocating territory for the purposes of this section; and ‘Superior Courts’, with reference to any such territory, means such courts as may be specified in the said notification.

**Explanation 2.** - ‘Decree’ with reference to a superior Court means any decree or judgment of such Court under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, but shall in no case include an arbitration award, even if such an award is enforceable as a decree or judgment.

The Government of India has notified several countries under both these sections, an iteration of which would perhaps be inappropriate here.

Finally, the execution of foreign arbitral awards is also the subject matter of jurisdictional concern. Happily, there has been considerable consensus in the world on this and the New York Convention, 1958 specifies the manner in which participating countries will deal with the recognition of foreign arbitral awards. The Government of India has notified several of the New York Convention countries and passed the Foreign Awards (Recognition and Enforcement) Act 1961, in respect of the recognition of foreign awards. The newly enacted Arbitration and Conciliation Act 1996, at Chapter I of Part II, lays down the current law relating to the enforcement of foreign arbitral awards.
In general, courts applying the rules of personal jurisdiction to cyberspace have required “something more” than mere electronic contacts to support an exercise of jurisdiction. In addition to electronic contacts, there must be some act purposefully directed toward the forum state. Thus, courts have focused on the purposeful availment prong of the due process, minimum contacts test.\textsuperscript{110} Though, in exceptional cases, courts have conferred jurisdiction in the absence of any connection beyond a web site, this is unlikely to be sustained in the long run. It is, firstly, impossible to enforce decisions of this nature in every case, considering that often the web site owner may be in a hostile country, or in a jurisdiction that simply refuses to recognize the jurisdiction of the court issuing the original decree. Secondly, such an approach would cause considerable inconvenience to any large-scale form of e-business, and could contribute to stagnation of the Internet—something that must be avoided at all costs.\textsuperscript{111}

As demonstrated by the cases discussed above, the existing body of law on in personam jurisdiction based on Internet contacts is inconsistent and incoherent at several levels. Fundamentally, the method of analysis of the significance of contacts via the internet is still unclear. The court in \textit{Zippo} analyzed the defendant’s contacts by looking at the number of Pennsylvania residents using the defendant’s Internet service. In \textit{Granite Gate}, the court looked at the number of Minnesota residents accessing defendant’s Web site and the frequency of use by several Minnesota-based Web gamblers. Other courts have referred to the number of times the defendant’s web site was “accessed” by the forum state’s residents, or the number of Internet users in the state.\textsuperscript{112}

It is submitted that the issue cannot be solved by any objective standard as to contact, but rather requires an analysis of both the quantity and quality of Internet contacts. This would involve the examination of several


\textsuperscript{111} Supra n. 62, p. 46.

components, for example, the number of “hits” a Web site receives, and the number of forumState citizens accessing the site. However, an evaluation cannot stop at this. All hits are not of equal weight for jurisdictional purposes, so courts and commentators need to develop a hierarchy of different types of Internet contacts in order to evaluate the totality of a defendant’s contacts with a forum.

5.4.2 Jurisdiction under the IT Act, 2000

The IT Act 2000, passed in India, is illustrative of the prevailing confusion in the area of jurisdiction in the context of the Internet. The Act begins by saying, in clause (2) to section, that it shall extend to the whole of India and, save as otherwise provided in the Act, it applies also to any offence or contravention there under committed outside India by any person. Clause (2) of Section 75 of the Act also simply states that “.... 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”. Provisions of this nature are unlikely to be effective for a number of reasons.

Firstly, it is unfair to suggest that the moment an Indian computer system is used, an action defined by Indian laws as an “offence” would be subject to the jurisdiction of Indian Courts. To illustrate, let us consider a web site located in a foreign country. The site may host content that would be perfectly legal in its home country, but may be considered offensive or illegal in India. If an Indian chooses to view this site on a computer situated in India, does that mean that the site can be prosecuted in an Indian Court? This would appear to violate principles of justice. As explained earlier, the judicial trend of examining the amount of activity that a site undertakes in a particular jurisdiction is a far more equitable method to determine jurisdiction.113

Further, even if Indian Courts are to claim jurisdiction and pass judgments on the basis of the principle expostulated by the IT Act, it is unlikely that Foreign Courts will enforce these judgments since they would not accept the principles utilized by the Act as adequate to grant Indian Courts jurisdiction.

113 Supra n. 62, p. 53.
This would also render the Act ineffective in this context, it is necessary that Indian courts take a leaf out of the books of their counterparts and develop justifiable grounds on which extra-territorial jurisdiction may be validly exercised. The times ahead promise to be very interesting.

It is desirable to provide a mechanism for online dispute resolution in the case of e-contracts, e-receipts and e-payments. There is a need to introduce accountability online in relation to the transactions on the internet. Even though e-records and digital signatures together with a secure system of payments provide a sufficiently safe mechanism for authenticity of the transaction, still the transaction may be marred by non-delivery of goods/services or defective/deficient goods or services. There might be a delay or the goods simply may not match with the expectations. In this situation, it is suggested to set up e-consumer courts.

5.5 REVIEW

In comparison to the UK special jurisdiction approach, the US specific jurisdiction approach is different. Whilst the US employs “Zippo”, “effects” and “targeting” tests, the UK adopted classical general and special jurisdiction approaches concerning special jurisdiction in the Brussels Regulation, in an effort to bolster confidence in E-commerce. The Indian Code of Civil Procedure, 1908, bases territorial jurisdiction on two principles - first, the place of residence of the defendant, and second, the place where the cause of action arises. However, there are no clear guidelines as to how these are to be determined. In the context of the Internet, residence of the defendant may well include either his place of physical residence or the place where the web-site server is located. Similarly, the cause of action may be said to arise at a variety of places where the site is accessed or where its server is located. But in the absence of any statutory clarification, courts will be forced to rely upon precedents, such as those described above.  

The review of the decisions seems to indicate that any active attempt to utilize the World Wide Web to reach its vast audience will likely subject the publisher to a lawsuit in a distant forum. The growing popularity of interactive sites enabling the browsers to do business with the publisher from their

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114 See sections 15-20 of the Code of Civil Procedure, 1908.
115 Supra n. 62, p. 50.
desktops alone will almost certainly provide a basis for jurisdiction in the plaintiff's chosen court. Furthermore, a website coupled with a toll-free number will almost certainly indicate an intention to reach the widest possible market, also permitting a court to exercise jurisdiction over the defendant. The effect of this could be to force website owners to attempt to restrict access to their sites to local persons, thus affecting the global reach of the Internet—one of its primary aims.

Parties to a contract may select a preferred forum, or a preferred choice of law, as a part of their agreements with each other. Similarly, parties to a lawsuit, or a potential lawsuit, may select a forum or applicable law after the fact, in order to smoothen matters at trial. In the absence of clear choice-of-law rules, courts could benefit by abiding by the wishes of the parties and enforcing valid forum selection clauses. Thus, if one is concerned about jurisdiction in connection with commercial transactions, it may be advisable to create on-line agreements that govern those transactions and to specify the jurisdiction in which any disputes will be litigated and the law that will be applied. It is also probably advisable to require users to manifest their assent to such agreement before they enter into any transactions.

Generally, a forum is safe in applying its own law to a controversy being tried in its courts. After all, if the suit is proceeding in a forum, it must have a sufficient relationship to the transaction to have jurisdiction over the parties. Thus, often, a forum that is torn between two conflicting laws often chooses to apply its own law. Although this reaction is certainly understandable—a forum will always be most familiar with the nuances of its own laws—such a rule, on the whole, would be unwise. This could give rise to forum shopping by plaintiffs. If forum shopping is allowed on a global scale, it could lead to situations which are not entirely equitable—for example, plaintiffs would sue in nations where the defendants are unable to respond, either due to absence of resources, or due to unfavorable legal conditions in that particular forum. The author submits that parties should have freedom to decide upon the forum which will have jurisdiction in case dispute arises.

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however, forum must have some reasonable nexus with the transaction to get legal sanctity.

Until the law in this area becomes clearer, there are at least some lessons we can learn from the cases that have been decided so far. For instance, there may be some jurisdictions in which you will not want to do business at all. If the nature of your business requires that users be a certain age or if your business is banned or regulated in certain areas (for example, gambling), then it may be necessary to identify all users before they can be permitted to engage in transactions, and to prohibit transactions with certain users and in certain jurisdictions.

**Evolution of a New System**

One of the suggestions that have been made towards the resolution of this rather troublesome problem is the evolution of new and entirely independent rules to govern jurisdiction on the Internet. These regulatory structures should treat cyberspace as a distinct place for purposes of legal analysis. This suggestion originates from the conception that cyberspace has its own sovereign jurisdiction. By developing uniform law governing cyberspace transactions, it will be much easier to determine which rules regulate one’s online activities, rather than deciding which territory’s laws apply. The next question that arises from this suggested approach is who is to develop and enforce these rules. The proponents of such a system suggest that since the Internet was implemented through a system of self-governance, those persons can establish a system to govern them. Yet, they concede that determination of those who would have the “ultimate” right to control the policies remains uncertain.

Another criticism of this suggestion is its sheer impracticality. Ultimately, courts must decide jurisdiction if only to regulate their sphere of influence and decision-making power. An independent set of rules, ignoring geographical factors, is unlikely to be workable in this context.

Another suggestion has been the creation of some mechanism for alternative dispute resolution. In this regard, there has emerged the Virtual

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118 Supra n. 62, p. 48.
Magistrate Project. Like other arbitration schemes, the Virtual Magistrate must obtain jurisdiction over parties by consent. This consent can be obtained in at least two ways, consent by explicit agreement and implied in fact consent. Under this first method, parties may manifest consent entirely through electronic means. The implied in fact agreements would involve consenting to jurisdiction through a term of the contract between the service providers and subscribers. As a result, once an event had been noticed for Virtual Magistrate resolution, the service provider could compel participation. If successful, the Virtual Magistrate would be a big step toward the establishment of a cyberspace jurisdiction.

Other strategies\textsuperscript{119} to minimize risk include:

1. Limit the Degree of Interaction, because the provision of “goods” in the form of transmitted data or information requested by a user, or the acceptance of purchase orders through the Web site, may suffice to establish specific jurisdiction relating to that transmission or transaction.

2. Limit the Amount of Non-Internet Promotion and Solicitation, so that the courts will be able to identify the vital “other contact” that they mostly rely upon to obtain jurisdiction.

3. Decline Business from Remote Locales, by making it clear that the site is only directed at persons from a particular region or locality. This would do away with the “purposeful availment” requirement of the minimum contacts test.

Further, site owners can limit the site’s interactivity. Inviting consumers to sign on for services, post messages and order products from a Web site may increase the chances that a court will find purposeful availment\textsuperscript{120} and in case of disputes, either choice of law will come to aid or the Arbitrated dispute resolution (ADR).

The use of the Internet challenges how parties to an electronic consumer contract can be adequately identified so that they, and their


activities, may be sufficiently connected with a particular jurisdiction.\textsuperscript{121} If the parties’ presence or their commercial activities are sufficiently connected with a particular jurisdiction, then it can be foreseen by both parties in which jurisdiction(s) their dispute is likely to be heard. Regardless of the method of communication used, the ability of the parties to foresee where each other is geographically located and consequently where business activities are directed are “decisive”\textsuperscript{122} factors in determining which jurisdiction will hear their dispute.

In response, traditional connecting factors have been modified and used to establish jurisdiction, to a greater or lesser extent, of an online contract. However, despite recent modification, the application of traditional connecting factors may not always lead to the desired outcomes of certainty and predictability in establishing jurisdiction of a cross-border dispute. The emergence of electronic commerce as a global form of business activity has questioned the relevance of state sovereignty in asserting jurisdiction and, by implication, the application of connecting factors to establish jurisdiction. However, the ‘minimum contact test’ (US), real and substantial connection (UK) and cause of action (India) bear some similarity and the author submits that all these terms should be read in coherence with each other to provide practically possible jurisdiction and thereby to achieve the rule of reasonableness and natural justice.

\textsuperscript{121} http://ijlit.oxfordjournals.org/content/16/3/242.full#xref-fn-23-1 (last visited on 15th May, 2014).