CHAPTER III
JURISDICTION: EUROPEAN UNION
AND EUROPEAN COUNTRIES

3.1. INTRODUCTION

Europe is world’s second smallest continents by surface area, but played a predominant role in global affairs. It is one of the most progressive place in terms of economic growth and technological developments. It comprises of 50 States whereas the European Union (‘EU’) is the political gathering of 27 Member States of Europe. EU is developed as single market through harmonised standard system of laws which apply to all Member States. The present chapter discuss the issue of jurisdiction from EU perspective and the individual State of the Europe. It is not possible to discuss jurisdiction rule of every State of Europe and therefore the study discuss the EU and some Member States.

The first part of the chapter discusses the jurisdiction rules of the European Union and the second part deals with the jurisdiction rules of the individual Member States of Europe in particular United Kingdom (‘UK’), France, Germany, Belgium and Switzerland.

3.2. EUROPEAN JURISDICTION RULES

In the history of Private International Law, the Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters¹ (‘Brussels I Regulation’) is one of the most important community instrument. This was adopted on 22nd December 2000, and entered into force on 1st March 2002². It replaces the Brussels Convention of 27th September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters


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The Brussels I Regulation is supplemented by the Lugano Convention of 16th September 1988 on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters (‘Lugano Convention’). This was designed in substance to extend the Brussels Convention to European Foreign Trade Association (‘EFTA’) countries. Other States which are not members of the European Community (EC) or of the EFTA may with the unanimous agreement of all the EC and EFTA Member States be invited to the Lugano Convention. By Article 68(1), as between the Member States bound by the Brussels I Regulation, it supersedes the Brussels Convention. Article 68(2) adds that, insofar as the Brussels I Regulation replaces the provisions of the Brussels Convention between member States, any reference to the Convention must be understood as a reference to the Regulation.

The Brussels I Regulation is only applicable to civil and commercial matters. However, it does not extend to revenue, custom or administrative matters, nor to variety of specifically excluded subject matters. It consists of a Preamble followed by 76 Articles arranged in VIII chapters and VI annexes. Chapter II of the Regulation comprising of Article 2 to 31 deals with the issue of jurisdiction.

3.2.1. General rule of jurisdiction

Brussels Regulation in recitals 11 and 12 maintained that the rules of jurisdiction should be highly predictable and therefore adopted the general rule about jurisdiction in Article 2, which establishes that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State and

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4 id., Article 60(c) and Article 62-63.
5 Supra note 1, Article 68(1).
6 id.
7 Brussels I Regulation, Article 1 defines the material scope of the Regulation.
9 Brussels I Regulation, Article 2(1) “Subject to this regulation, persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state”. (2) Persons who are nationals of the Member state in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that state.”
Article 3 deprives the courts of the other Member State of jurisdiction.\(^{10}\) Where the defendant is not domiciled in any Member State, Article 4 remits the jurisdiction of the courts of each Member State to the law of the State whose court is seized.\(^{11}\) The rationale of the jurisdiction based on the domicile of defendant was expressed by the European court in the various cases as it is in the court of his domicile that a defendant can most easily conduct his defence.\(^{12}\) However, the Regulation provides some exception to this general rule.

(a) **Exception to General rule of Jurisdiction**

Following are the five exceptions specified by the Regulation:

1\(^{st}\) exception:- Article 5(1)(a)\(^{13}\) establishes the first exception to the general rule relating to the contractual matters. In this case the jurisdiction will be the courts for the place of performance of obligation in question. To specify the nature of obligation and the issue arising out of it the Article categories the contractual matter in relating to sale of goods and provision relating to services.

2\(^{nd}\) exception:- Article 5(5) states that a defendant domiciled in one country State may be sued in another Contracting State as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.

3\(^{rd}\) exception:- Article 6(1) deals with multi-defendant cases and provides that a person domiciled in a Contracting State may also be sued “where he is one of a member of defendants, in the courts for the where any one of them is domiciled”. Article 6(3) deals with counter-claims and provides for jurisdiction “on a counter-
claim arising from the same contract or facts on which the original claim are based, in
the court in which the original claim is pending”.

4th exception:- if the disputes fall within the Article 22, which confers exclusive
jurisdiction on the courts of another Member State.

5th exception:- domicile aspect is excluded under Article 23 by an agreement between
parties, conferring exclusive jurisdiction on a designated court or courts of another
Member State.

3.2.2. Creation and validity of Copyright- issue of Jurisdiction

The creation of certain intellectual property rights requires the successful
completion of a registered procedure, while the creation of other intellectual rights
does not. Once a right is created the issue of validity arises. Article 22(4) of the
Regulation deals with the proceedings concerned with the registration or validity of
patents, trademarks, designs or other similar rights required to be deposited or
registered. It is a form of exclusive jurisdiction. Jurisdiction is exclusive in the sense
that a Contracting State other than the one that has jurisdiction under it is deprived of
jurisdiction, even though it has jurisdiction under some other basis such as
defendant’s domicile in that contracting State. The first justification for this provision
is that this provision is based on the sovereign power of the forum, as the grant of a
nation intellectual property rights is an exercise of national sovereignty. Secondly, the
court having jurisdiction should be particularly familiar with the relevant national law.
So strong is the desire to allocate jurisdiction under Article 22(4) that it applies
regardless of domicile of the defendant which is the general rule of jurisdiction.

However, copyright does not require any formalities as it comes into existence
when a work is fixed or recorded in any permanent way.¹⁴ No application,
examination or registration system exists for original literary, artistic, musical and
dramatic works, films, sound recording, broadcast, cable programmes and the

¹⁴ The Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as
revised at Paris on July 24, 1971 (‘Berne Convention’), Article 5(2). Information about
membership of European Countries are available at <http://www.wipo.int/treaties/en/Show
Results.jsp?lang=en&treaty_id=15> [accessed on 01.01.2012].
typographical arrangements of published editions. Therefore exclusive jurisdiction under Article 22 is not applicable in case of copyright related issues.

3.2.3. Jurisdiction under Contract

The owner of the copyright has every right to exploit the copyright right himself. A contract of exploitation of copyright can take various forms. The most common forms of exploitation are licences and assignments. Other forms of exploitation such as distribution, agreement, joint venture, and franchising agreements fall in the category of broad concept of licence and assignment.\(^{15}\)

In case of Assignment as a contractual matter, the general rule of Brussels I Regulation allows plaintiff to bring the case where the defendant is domiciled.\(^{16}\) However, apart from that Article 5(1) of Regulation also confers jurisdiction ‘in matters relating to a contract’ on ‘the courts of the place of performance of the obligation in question’. This applies to contracts in general, but certain types of contract (contracts of insurance,\(^{17}\) certain consumer contracts,\(^{18}\) contracts of employment,\(^{19}\) tenancies of land,\(^{20}\) and contract relating to matrimonial property or succession on death)\(^{21}\) are excluded.

Article 5(1) (a) of the Regulation resembles Article 5(1) of the Convention in providing that ‘a person domiciled in a Member State may, in another Member State, be sued: in matters relating to a contract, in the courts for the place of performance of the obligation in question’. But Article 5(1) (b), a new provision, adds that ‘for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be: in 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 and in the case of

\(^{15}\) Licence contract is essentially a contract that grants the licensee the right to do something that would normally amount to an infringement of intellectual property rights. Whereas, Assignment is similar to sale of the Intellectual Property Rights. It involves transfer of ownership of the intellectual property right. Assignment can be partial when the whole rights are not transferred. It can be time/period specific or/and confine to any specific territory. Mostly in the case of copyright Assignment is the concept mostly in use.

\(^{16}\) Brussels I Regulation, Article 2.

\(^{17}\) id., Article 8.

\(^{18}\) id., Article 15.

\(^{19}\) id., Article 18.

\(^{20}\) id., Article 22(1).

\(^{21}\) id., Article 1(2)(a).
provision of services, the place in a Member State where, under the contract the service were provided or should have been provided. Finally Article 5(1) (c) specifies that, if Article 5(1) (b) does not apply, then Article 5(1) (a) applies.

The effect of Article 5(1) (a) and (c) is to preserve the residual approach, referring to the place of performance of the obligation on which the plaintiff’s sole or principal claim is based in all cases where the new approach specified by Article 5(1) (b), referring to the place of delivery or service provision, does not apply.

After recognition of obligation it is important to determine the place of performance. Under Brussels Convention the European court has ruled in *Tessili v. Dunlop*\(^{22}\) and *Groupe Concorde v. The Suhadiwarno Panjan*\(^{23}\) that this concept unlike most other concept of the convention does not have an independent meaning. Rather the place of performance must be determined in accordance with the substantive law which is applicable to the obligation under the conflict rules of the country whose court is seized. Same test for deciding the place of performance is used in the Brussels I Regulation.\(^{24}\)

The obligation to pay for a licence arose in the English commercial court in *Rank film distributors v. Lanterna Editrice Srl*\(^{25}\), the plaintiff granted the first defendants an exclusive licence to exploit certain films in Italy and elsewhere. Payment was to be by instalments, the third of which was by way of a bank guarantee which was not paid. The plaintiff brought an action for payment against an Italian company, which took over the rights and obligations of the original licensee, and an Italian bank. After some argument at the trial, it was held by Saville J that, as a matter of contractual interpretation, the third instalment was payable in London. Accordingly, the English court had jurisdiction under article 5(1).\(^{26}\)

Article 5(1) contemplates a single place at which it enables an action to be brought. Thus where the place of performance of the relevant obligation is multiple or indeterminable, no court will be competent under the article 5(1). This was recognised

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24 Stone, *Supra note 8*, page 82.


by the European court in *Besix v. WABAG*\(^{27}\), which involved a negative obligation not to participate in a competing bid for a concession offered by a Cameroon authority. It ruled that article 5(1) does not apply in case where the place of performance of the relevant contractual obligation is in determinative, because it consists of a negative undertaking without any geographical limitation and therefore has multiple places of performance. On the other hand in the case of *Kenburn Waste Management v. Bergmann*,\(^ {28}\) the Court of Appeal held in the case of a negative obligation to produce a result in particular country, the place of performance will be in the country where the result is to be achieved.

### 3.2.4. Choice of forum

Article 23 of Regulation authorises parties to existing or potential disputes to enter into agreements designating the court or courts which will be competent to determine such disputes\(^ {29}\). It is a complex provision which regulates both the formal and essential validity of jurisdiction clause and their effects.


\(^{29}\) Article 23 of Brussels I Regulation replaces Article 17 of the Brussels Convention. Article 23(1) provides an amended version of Article 17(1).

Article 23(1) “If the parties, one or more of whom is domiciled in a Member state, have agreed that the court or the courts of a member state are to have jurisdiction to settle any disputes which have risen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties agreed otherwise. Such an agreement conferring jurisdiction shall be either:

1. In writing or evidenced in writing; or
2. In a form which accords with practice which the parties have established between themselves; or
3. In international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’.

3. Where such an agreement is concluded by parties, none of whom is domiciled in a member state, the courts of other member state shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The courts or courts of a member on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settler, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Article 13, 17 or 17 or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.”
Formal validity: As regards formal validity, Article 23(1) of Regulation makes it sufficient for a jurisdiction clause to satisfy any of four alternative requirements. The agreement may be concluded in writing; or evidenced in writing; or concluded in a form which accords with bilaterally established practices (practices which the parties have established between themselves); or concluded in international trade or commerce, in form which accords with a general commercial usage (a usage of which the parties are or ought to have been aware and which, in the relevant branch of international trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned).

Essential validity: Even where a jurisdiction clause satisfies the formal requirements specified in Article 23(1), it may lack essential validity because of its excessive scope, or its subject matter, or because of defective consent. In regard to permissible scope of a jurisdictional clause Article 23(1) authorises an agreement relating to ‘any dispute which have arisen or which may arise in connection with a particular legal relationship’. Thus it is clear that a jurisdiction clause may cover potential as well as existing disputes, and that the disputes need not relate to contractual claims.

As regards the subject matter, an agreement on jurisdiction is invalidated by Article 23(5), if it contravenes the restrictions imposed by Article 13, 17 or 21 of Regulation. Further in Castelletti v. Trumpy, the European court made clear that 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. On the contrary Article 23 permits parties to choose a ‘neutral’ forum. Thus in that case it was acceptable to choose an English court by a jurisdiction clause contained in a bill of lading for the Carriage of goods by a Danish ship-owner from Argentina to Italy. The court also emphasised that it is not open to a court excluded by the clause to disregard it on the ground that the chosen court would apply different substantive rules in determining the merits of the dispute from which would have been applied by the court excluded.

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Any agreement, including a jurisdictional clause, may be invalid by reason of lack of consent, owing to such factors as fraud, mistake or improper pressure. The effect under Article 23 of a valid agreement on jurisdiction is to confer exclusive jurisdiction on the chosen court or courts. For Article 23 (1) specifies that if the parties, one or more of whom is domiciled in a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that such jurisdiction shall be exclusive unless the parties have agreed otherwise. Article 23(2) adds that where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

In the case of Skype Technologies SA v. Joltid Ltd, 31 Skype Technologies, an internet telephony company domiciled in Luxembourg, entered into Software Licence Agreement with Joltid Ltd., a company incorporated in the Virgin Islands. On the basis of the agreement, Skype Technologies offered Joltid’s software for free download from the internet to allow users free telephonic communication. The agreement granted Skype technologies worldwide use of a compiled object code form, but reserved sole control of the source code to Joltid. Clause 19 of the Licence Agreement stated that any “claim” arising under or in relation to the said agreement fell under the exclusive jurisdiction of the English courts. J claimed that S had breached the Licence Agreement as a result of its dealings with Joltid’s source code and purported to terminate the agreement. Skype Technologies brought proceedings claiming that there was no breach and no valid termination of the Licence Agreement, as Joltid had supplied Skype tech. Ltd. with the source code rather than the object code. Skype Technologies Ltd. also asserted that it would continue to use the software as the Licence Agreement had not been validly terminated. Joltid Ltd. sought declarations that the termination was valid as well as injunctions which would have worldwide effect and financial remedies. After Skype tech.ltd. had brought proceedings, its owner agreed to sell a large part of it to investors who would operate Skype tech. Ltd.

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on much the same basis. Joltid claimed that, consequently, there would be continued infringement of Joltid’s copyright on a global basis. J registered its copyright in the source code in the United States, and brought proceedings there against S, S’s owner, the investors and other parties. Skype Tech. Ltd. alleged that such proceedings were in breach of cl.19 of the Licence Agreement between itself and Joltid Ltd. and sought an anti-suit injunction to restrain any further steps being taken against it in the United States.

The Court held that applying Article 23 of Regulation the English proceeding will continue. Skype technologies are entitled to bring them here because of the exclusive jurisdiction clause. Equally the court has no jurisdiction to prevent Joltid Ltd. from bringing proceeding in California against parties who do not have the benefit of the exclusive jurisdiction clause.

3.2.5. Jurisdiction in case of infringement

Infringement of an intellectual property right is characterised as tortious act in common law jurisdiction and as delictual in civil law systems. Article 5(3) incorporates the language to adjust two different legal systems. In the cases of infringement of copyright Article 2 of the Brussels I Regulation may be applied to fix the jurisdiction of the court where the defendant residents. Supplementing this rule, Article 5(3)\textsuperscript{32} allows the plaintiff to sue in case of tort at the place where the harmful event occurred or may occur. This Article covers all actions which seek to establish the liability of a defendant and which are not related to a contract within the meaning of Article 5(1).

The European Court of Justice in Handelskwekerij Bier BV v. Mines de Potasse d’Alsace SA\textsuperscript{33} held that the expression “place where the harmful event occurred “ must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, if the place is different. Thus the defendant may be sued under Article 5(3) at the option of the claimant,

\textsuperscript{32} Brussels I Regulation., Article 5(3) “in matters relating to tort, delict or quasi delict, in the courts for the place where the harmful event occurred or may occur”.

either in the courts of the State where the damage occurred or in the courts of the
contracting State where the origin of the damage is situated.

Subsequently, European Court of Justice held in the case of *Dumez France SA and Tracoba SARL v. Hessische Landesbank*\(^{34}\) that “it follows from the foregoing
considerations that although, by virtue of a previous judgment of the court [Bier,
referred to], the expression “place where the harmful event occurred” contained in
Article 5(3) of the convention may refer to the place where the damage occurred, the
latter concept may be understood only as indicating the place where the event giving
rise to damage, and entailing tortuous, delictual or quasi delictual liability, directly
produced its harmful effects upon the person who is the immediate victim of that
event.”

In the case of *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International ltd. v. Presse Alliance SA*\(^ {35}\), the Court of Justice considered
the application of article 5(3) to an action for libel brought against the publisher of a
newspaper in respect of a defamatory article contained therein. The case involved an
English libel action brought by an English woman against the publisher of a French
newspaper of which a few copies (230 copies out of about 2,50,000) were distributes in
England. The defamatory statements related to alleged money laundering for drug
traffickers by a bureau de change in Paris at which plaintiff was temporarily employed.
The European court ruled that, in the context of defamatory statement by newspaper
article, the place of the wrongful conduct is that of the publisher’s establishment form
which the libel was issued and put into circulation. Thus Article 5(3) enables the plaintiff
to sue in the courts for that place, and those courts have jurisdiction to award damages for
all the harm caused anywhere by the defamation. In addition, in enabling the plaintiff to
sue at the place of injury, Article 5(3) confers jurisdiction on the courts of any Member
State in which the newspaper was distributed and victim claims to have suffered injury to
his reputation, but such jurisdiction is limited to the harm caused in the forum State. The


claimant might recover the whole amount in the former case, and in the latter only the amount suffered for the loss of reputation in the place concerned. In any event the criteria for assessing whether any event is harmful, and the evidence required of the existence and extend of the harm alleged by the victim of the defamation, are governed by the substantive law determined by the forums conflict rules, provided that the effectiveness of the Convention is not thereby impaired.

In a recent case of Football Data Co Ltd. v. Sportradar GmbH, the Claimants (together "FDC") exploited certain data relating to English and Scottish football matches. This data was compiled in a database known as "Football Live". The data included goals scored, goal scorers, penalties, yellow and red cards and substitutions. The data is both updated and provided to third parties while matches are taking place.

The Defendants (together "Sportradar") were a German company and its Swiss parent who assembled data relating to live English and Scottish football matches from public sources. This data is called "Sports Live Data". The data was stored on web servers in Germany and Austria but could be accessed via links from elsewhere, including from the United Kingdom. FDC issued proceedings in the High Court on 23 April 2010. They alleged infringement of UK copyright and database right in Football Live by Sportradar. Sportradar challenged the jurisdiction of the English Court on the basis that they were committing no acts of infringement in UK and were domiciled in Germany and Switzerland. The First Defendant subsequently issued proceedings against FDC in Germany on 14 July 2010 seeking negative declarations that its activities did not infringe any Intellectual Property rights of FDC. The Court of Appeal on the issue of jurisdiction held that:

"There was clearly identity of parties in the present case. As to cause, the pleadings made it plain that the claimants were suing the defendants in respect of breaches of database right. It was true that the detail about joint tortfeasorship was not spelt out particularly well, but that did not affect the

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cause. The “heart” of the claim was database infringement. The English court was first seized of that cause. Likewise the objet—the end in view—was clear. It was to claim damages from the defendants and an injunction to restrain “the acts complained of”. The defendants’ appeal concerning jurisdiction over the database infringement claims was dismissed.\textsuperscript{37}

\subsection*{3.2.6. Conflict of jurisdictions i.e., Lis pendes}

Forum non convenience is a well known doctrine in common law jurisdictions, such as USA, and UK. However European civil law jurisdiction is often unfamiliar with this doctrine at least in civil and commercial matters\textsuperscript{38}. Brussels Convention/Regulation has resolved this problem by incorporating article 27\textsuperscript{39}, which deals with \textit{lis pendes} and adopts a solution for a situation where proceeding involving the same cause of action and between the same parties are brought in the courts of two different contracting states. The court second seised has to stay the proceeding until the court first seised establishes its jurisdiction. If this is the case, any other court than the court first seised should decline its jurisdiction. This is in line with the purpose of the Brussels convention/regulation i.e.:

“to prevent proceeding before the courts of different contracting states and to avoid conflicts between decisions which might result there from. Those rules are therefore designed to preclude in so far as in possible and from outset, the possibility of a situation arising such as that referred in Article 27(3), that is to say the non recognition of a judgement on account of its irreconcilability with the judgement given in a dispute in which recognition is sought.”\textsuperscript{40}

\begin{itemize}
  \item \textsuperscript{37} \textit{id.}.
  \item \textsuperscript{38} F. Ibilli, Civil Jurisdiction and Enforcement of Judgments in Europe, \textit{Netharland International Law Review} 53 (2006) 127-139.
  \item \textsuperscript{39} Brussels I Regulation, Article 27 (1). “Where proceeding involving the same cause of action and between the same parties are brought in the courts of different member states, any court other than the court first seised shall of its own motion stay its proceedings until such times as the jurisdiction of the court first seised is established.
\end{itemize}
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If related actions are brought in the courts of different contracting states, Article 28\textsuperscript{41} of the Regulation provides that any other court than the court first seised may stay the proceedings until the court first seised establishes its jurisdiction. On an application of one of the parties a court other than the court first seised can decline its jurisdiction if it is permitted to do so by the law of that court. The aim of Article 27 and 28 (previous Article 21 and 22) is to avoid a conflict between decisions. European Court in the case of \textit{Gantner v. Basch}\textsuperscript{42} held that “Article 21 of the Brussels Convention must be construed as meaning that, in order to determine whether two claims brought between the same parties before the courts of different contracting states have the same subject matter, account should be taken only of the claims of the respective applicants, to the exclusion of the defence submissions raised by a defendant”.

However, the Regulation does not make clear about the situation where the more appropriate forum is not in another but in a non member state. This controversial question was settled by the court of justice of European communities in the case of \textit{Owusu v. Jackson}\textsuperscript{43}. In this case one Andrew Owusu, a British domiciled in the United Kingdom suffered a very serious accident during his holiday in Jamaica. In the late afternoon when no lifeguards were present, Owusu decided to dive into the sea. Sadly he hit his head against a submerged sandbank. This resulted the fracture in his fifth cervical vertebra, which rendered him tetraplegic. Only after that accident a sign “no driving shallow water” was put. In 2000, Owusu brought an action in United Kingdom for breach of contract against Nugent B. Jackson, who is domiciled in the UK, from whom he rented a two bed roomed holiday villa at Mammee Bay in Jamaica. The contract provided that Owusu would have access to a private breach. He

\textsuperscript{41} Brussels I Regulation, Article 28 (1). “Where related actions are pending in the courts of different member states, any court other than the court first seised may stay its proceeding.

\textsuperscript{2} Where these actions are pending at first instance, any court other than the court seised may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.

\textsuperscript{3} For the purpose s of this article, action are deemed to be related where they 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.”


alleged that it also included an implied term that the breach would be safe and free from hidden dangers. They in the capacity of owner, occupier or manager of the relevant beach failed to alert swimmers to the danger. This dispute had only connecting factors with the UK and Jamaica.

Defendant challenged the jurisdiction of the English court. He argued that the action had the most real and substantial connection with Jamaica, so that is the most appropriate forum for the dispute. English Court in first instance held that Article 2 of the Brussels Convention provides for jurisdiction to the courts of the member state in which the defendants has its domicile or seat. Since Jackson was domicile of UK he was not entitled for *forum non convenient*. Defendant appeal against this judgement in the Court of Appeal. On appeal the main issue was whether the court of a member state which relied its jurisdiction on the Brussels Convention, is entitled to declare itself *forum non convenient* in favour of the court of a non Member State, when the defendants is domiciled in a Member State and the case has no connecting factors but only to one Member State and a non Member State.

Court held that nothing in the wording of Article 2 of the Convention suggests that the application of this article is subject to the condition that there should be a legal relationship in evolving at least two Member States. The involvement of a member state and a non member state either because of the subject matter of the proceedings or the domicile of the parties also makes the case international. It follows that Article 2 applies to circumstances such as in the main proceedings, involving relationship between the court of single Member State (the domicile of the plaintiff and one of the defendants) and those of the non Member State (the occurrence of the accident).

The court based its judgement on the rational of the following points.

1. First of all the general jurisdiction rules in Article 2 Brussels convention is mandatory in nature. Once the court has jurisdiction by virtue of this article, it is not only entitle but also obliged to accept and excursive this jurisdiction. According to the terms of Article 2 there can be no derogation from these basic jurisdiction rules, except in the cases expressly envisaged by the
convention. It is obvious that the Brussels convention does not provide for an exception on the basis of forum non convenience, by which could be derogated from Article 2.

2. The principle of legal certainty is one of the important objectives of the Brussels conventions. This principle would not be fully guaranteed if the courts having jurisdiction under the convention wryer to be allowed to apply the doctrine of forum non convenience. The Brussels convention is intended to strengthen the legal protection of the person established in the European community, by providing uniform rules on jurisdiction to guarantee certainty as to the allocation of jurisdiction among the national courts of the member state.

3. Allowing a forum non convenient exception would disable the defendant to reasonably foresee before which other courts that those of the state in which he is domiciled, he would be sued. Also it would thwart the plaintiff in his proceedings, as it is up to him to demonstrate that he will possible not obtain justice in the alternative forum, or that the foreign court has no jurisdiction, or he does not have access to effective justice before that court. Shortly the legal protection of persons establish in the European community would be undermined by applying the doctrine of forum non convenience.

4. If the appeal for a stay of proceeding on the ground of forum non convenience is successful, the possibility left for the plaintiff is to commence a new suit in the alternative forum abroad. Bringing the case before the alternative forum results in extra expenses and in the extension of the period of procedure.

5. Finally the use of the forum non convenience doctrine is undesirable because allowing it would affect the uniform application of the jurisdiction rules of the Brussels Convention. Forum non convenience is only recognised in the limited number of Member States (actually only in the UK and Ireland). The possibility should be excluded that the by the use of forum non convenient
different result appears in different Member State depending on whether or not the national rules of each Member State include a forum non convenience.

3.3. JURISDICTION IN UK

United Kingdom (‘UK’) is an important part of the European Union. Therefore, on the matter of jurisdiction it follows the Brussels I Regulations where the defendant is from Member State. To incorporate the Brussels Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgment in Civil and Commercial Matters (now Brussels I Regulation), it has enacted the Civil Jurisdiction and Judgment Act, 1982 (‘CJJA’). Where the CJJA is not applicable the UK decide the issue of jurisdiction on the basis of the either specific principles contained in statutes, statutory instruments of the UK or from the Common law principles. One of the important principle of common law regarding jurisdiction 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 fleeting his presence might be. However, such subject matter limitation is not applicable to the dispute relates to European Union or EFTA rules.

3.3.1. Subject matter of Jurisdiction

United Kingdom has a history of promoting concept of copyright. First legislation in UK relating to Copyright dates back to 1709. From then onwards they have adopted many changes in their copyright legislation as per the international and technological developments. Currently the Copyright, Designs and Patents Act, 1988 (‘CDPA’) is applicable in UK. The Act incorporates the principles of Berne Convention, World Trade Organisation and WIPO Copyright

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44 Common law principle is an unwritten body of law that is derived from precedent and the case law as established in the English Courts.
47 Copyright was first regulated in UK by statute of the Copyright Act of 1709.
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The Treaty\textsuperscript{48} Convention also. The Act requires that a work has to be sufficiently connected to the UK in order to be protected by CDPA\textsuperscript{49}. Chapter IX of CDPA contains the provisions for subsistence of copyright. A work qualifies for protection via authorship (Section 154) if the author was a qualifying person (e.g. British citizen, resident, domicile, company incorporated in the UK). A work can qualify for protection if it was first published in the UK (via ‘first publication’ Sec. 152). Apart from that the traditional English rules i.e., the subject matter limitation on jurisdiction relating to foreign intellectual property rights is that the Courts will not adjudicate on the validity of the foreign intellectual rights. In Tyburn Production s Ltd. v. Conan Doyle\textsuperscript{50}, the UK Court extended the limitation to foreign intellectual property rights.

In this case the plaintiff was a UK company which produced and wished to distribute in US television film. The defendant claimed as the sole heir of the late author who created the famous character for the serial asserted his copyright. The plaintiff therefore sought to the English Court for a declaration that the defendant had no right under copyright laws of US to entitle her to prevent the distribution and an injunction to prevent her from so asserting. The Court refused these grounds and held that an English court lacks jurisdiction to adjudicate in actions arising question as to the validity or infringement of patents rights, copyrights, rights of trademark, and other foreign intellectual property rights.


\textsuperscript{49} Copyright Design and Patent Act, 1988, Section 154 - Qualification by reference to author :

1. A work qualifies for copyright protection if the author was at the material time a qualifying person that is, (a) a British Citizen, a British Dependent Territories citizen, a British National (Overseas), a British Overseas Citizen, a British subject or a British protected person within the meaning of the British nationality act 1981, or (b) an individual domiciled or resident in the UK or another country to which the relevant provisions of this part extend, or (c ) a body incorporate under the law of a part of the UK or of another country to which the relevant provision of this Act extends.

2. Where, or so far as, provision is made by Order under section 159 (application of this Part to countries to which it does not extend), a work also qualifies for copyright protection if at the material time the author was a citizen or subject of, an individual domiciled or resident in, or a body incorporated under the law of, a country to which the Order relates.

3. A work of joint authorship qualifies for copyright protection if at the material time any of the authors satisfies the requirements of subsection (1) or (2); but where a work qualifies for copyright protection only under this section, only those authors who satisfy those requirements shall be taken into account for the purpose of section 11(1) and (2), section 12 and section 9(4).

\textsuperscript{50} [1991] Ch 75.
3.3.2. Outside EC and EFA Contracting states

If a defendant is domiciled elsewhere but not in the Member State of European Union, then the regime of Brussels I Regulation does not apply and the domestic court hearing the case is left to determine the jurisdiction based on the traditional rules otherwise governing such question in their legal system. Therefore in these kinds of cases traditional rules of jurisdiction will apply. Article 4(1)\(^{51}\), of the Regulation also preserves the traditional rules for the defendants who are not domiciled in a Member State.

3.3.2.1. Traditional jurisdiction: Action in personam

The jurisdictional rules have been largely been codified in the Civil Procedural Rules (‘CPR’). Part 6.20 of the CPR establishes the provision for service of a claim form out of jurisdiction.

(a) **Where the Defendant is not domiciled in the European Countries.**

An English Court has jurisdiction to hear and determine a case, (i) if the defendant is present in England; or (ii) the defendant submits to the jurisdiction of the court; or (iii) the court exercises its discretion under the Part 6 IV Civil Procedure Rules to grant leave to serve a writ on the defendant who is neither present in England nor has he submitted to the jurisdiction of the courts.\(^{52}\)

(i) **Where the defendant is present within the jurisdiction of the court**

The law is very clear in these kinds of cases as it follow the established principle that “whoever is served with the king’s writ and can be compelled consequently to submit to the decree made is a person over which the courts have jurisdiction.”\(^{53}\) This general rule is applied even in cases if the defendant is in

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\(^{51}\) Brussels I Regulation, Article 4 (1) If the defendant is not domiciled in a member state, the jurisdiction of the courts of each member state shall, subject to article 22and 23, be determined by the law of that member state.


\(^{53}\) *John Russell & co. Ltd. V. Cayzer, Irvine 7 Co. Ltd.* [1916] 2 AC 298 at 302
England for a very short period of time. The case in hand is of *H.R.H Maharanee Seethadevi Gaekwar of Baroda v. Wildenstein*. In this case a French defendant arrived in the UK to attend the Ascot races and while he was at the races, the claim form was served on him. It was held that the claim form had been properly served on him and only if he could prove that the case being held in the English courts could be oppressive on him could the action be stayed. This above judgment gets support from the case of *Colt Industries Inc. v. Sarlie*. In this case an American defendant arrived in the UK for a few days. The claimant, an American firm, served the defendant with proceedings on the basis of a judgment that had previously been granted in New York. It was held that the Courts had jurisdiction and that it was immaterial that the cause of action arose outside of the jurisdiction or that the defendant was only in the jurisdiction for a short period of time.

Once the court has established its power by service of process on defendant it is not rendered incompetent by his subsequent departure from the country. Since writ plays an important role in the decision of court’s jurisdiction, the Code Procedure Rules are specifically framed to describe the way writ has to be served. Rule 6.3 of CPR illustrate the various methods of serving a claim form on the defendant. It allows the personal services, first class post, fax or electronic communication or any method authorised by the court. In case the issue is related to a company, the writ may be served according to Rule 6.3(2). The Rule recognise the methods of service provided in the Companies Act 2006. Further Rule 6.11 contains provision relating to service of the claim form by contractually agreed method. In this case claim form will be serve by a method or at the place specified in the contract. In case the place of serving the form is outside the jurisdiction of the court, it may be done with the permission of the court.

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56. Chesire and North, *Supra* note 52.
57. *id.*, at p. 287-288
59. *id.*
60. *id.* Rule 6.11 (2)

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(ii) Submission of defendant to the court

Submission by the defendant to the jurisdiction of the court is one ground of jurisdiction. A defendant who is not present in England may, nevertheless, confer jurisdiction on the English court by way of submitting to it. Following are various methods of submission by defendant recognise by the English court.

a. Where the defendant accepts service of an English writ: This may occur where the defendant instructing a solicitor in England to go on the court record and accept service on his behalf as provided in Rule 6.8.\(^61\) If the solicitor endorses the claim form with a statement that he has done so, then the claim form is deemed to have been duly served upon the defendant.\(^62\) Alternatively, the defendant may submit by way of unconditionally acknowledging the service of the claim form upon himself.

b. Where the defendant pleads to the merits of the case: If, for example, defendant pleads to the merits of the case by way of disputing liability for breach of contract then he will be taken to have submitted to the jurisdiction of the court.\(^63\) He will also be taken to have submitted if he asks the court to stay its proceedings since, implicit in such a stay, is acknowledgement that the court has jurisdiction.\(^64\) However, if defendant merely argues that the court has no jurisdiction over him, this does not constitute submission.\(^65\) Furthermore, if defendant combines his challenge to the jurisdiction of the court with a request that the court should stay its proceedings pending the outcome of proceedings abroad, then this does not constitute submission.\(^66\) Finally, a defendant who challenges the issue of an interlocutory injunction to restrain him from removing his assets out of England (a Mereva injunction) does not submit to the court’s jurisdiction.\(^67\)

c. Where the Defendant contracts to Submit: Where defendant has contracted with plaintiff to submit any dispute arising from the principal transaction

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\(^{61}\) *id.*, Rule 6.8 subject to Rule 6.5(1) and 6.7.

\(^{62}\) CPR Rule 6.7(b).

\(^{63}\) *Boyle v. Sacker* (1988). 39 Ch D 249


\(^{65}\) *Re Dulles’ settlement* (No. 2) (1951) ch. 842 C.A. 29

\(^{66}\) *Williams & Glyn’s Bank v. Astro Dinamico* (1984) 1 WLR 438

\(^{67}\) *Obikoya v. Silvernorth* (1983)
between them to the jurisdiction of the English court and he has agreed that a writ may be served on him or upon someone else on his behalf within the jurisdiction, he thereby submits to the jurisdiction of the English court. If no place for service of the writ within the jurisdiction is identified, service out of the jurisdiction is at the Court’s discretion.68

(iii) Service of a claim form outside the jurisdiction

As noted, at common law the Court does not have jurisdiction over a defendant who is resident abroad unless either a claim form is served on him when he is present in England69 or when he submits to the Court’s jurisdiction. Thus, the obvious lacunae are the inability to sue a defendant who is not present in England who has not submitted to the jurisdiction of the Court. This lacunae remained even if England was the appropriate forum in which to hear and determine the dispute. The first attempt at eliminating this unsatisfactory situation was provided for by the enactment of the Common Law Procedure Act 1852 (‘CLPR’). This Act introduced the concept of an extended or exorbitant or assumed jurisdiction i.e. it gave the court a discretionary power to summon before it a defendant (irrespective of domicile/country of residence/nationality) who was not present in England, by having him served with the writ or notice of the writ. The courts developed the factors to be taken into consideration before exercising their discretion to grant leave.70 The factors had been frequently refined over the years by the courts e.g. by the House of Lords in Seaconsar Far East v Bank Markazi Jomhouri Islami Iran,71 which stated that:

1) The plaintiff must have a serious issue to be tried. This may be a substantial question of fact or law;

2) The plaintiff’s claim falls within one of the paragraphs of O.11 r.1(1); and

3) The plaintiff satisfies the court that England is the forum convenience in that it is the forum in which the case “may be tried more suitably for the interests of the parties and the ends of justice”.72

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68 RSC O.11 r.1(1)(d)(iv)
69 Maharance of Baroda v. Wildenstein [1972] 2 QB 283 (1972) 2 All ER 689
70 Initially under O. 11, r.1(1) of the Rule of Supreme Court: RSC O.11, r.1(1)
71 [1994] 1 AC 438
72 id., at 460
These Rules are now contained in CPR Rule 6 and supplemental Practice direction. Rule 6.36 provides service of the claim form where the permission of the court\textsuperscript{73} is required. In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction B supplementing this Part apply. Paragraph 3.1 of Practice Direction B deals with Service out of the jurisdiction where permission is required. The grounds on which Rule 6.36 can be served with the permission of the court are as follows:

1) A claim is made for a remedy against a person domiciled within the jurisdiction.

2) A claim is made for an injunction ordering the defendant to do or refrain from doing an act within the jurisdiction.

3) A claim is made against a person (‘the defendant’) on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and –
   (a) There is between the claimant and the defendant a real issue which it is reasonable for the court to try; and
   (b) The claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim.

4) A claim is an additional claim under Part 20 and the person to be served is a necessary or proper party to the claim or additional claim.

5) A claim is made for an interim remedy under section 25(1) of the Civil Jurisdiction and Judgments Act 1982.\textsuperscript{74}

The Practice direction 3.1 further lays down the important rules of jurisdiction relating to contract and torts. In case of contract it allows the claim to be served where

\textsuperscript{73} The important difference between service of the writ within the jurisdiction and service outside the jurisdiction is that in the later case the plaintiff must first obtain permission from a judge to serve the writ. This has to be done ex parte. The plaintiff must show that the case comes within one of the provisions of the rules and the requirements of forum non convenience are satisfied. So if permission is given the writ can be served on the defendant in the foreign country and then he has the opportunity to argue that the permission should not have been given. The writ must not be served in a way that is against the law of the foreign country.

the contract was made within the jurisdiction. The traditional rule of contract decides the jurisdiction where the contract is made or complete. Further requirement of the claim to be served is where the contract was made by the agent trading or residing within the jurisdiction. This clause requires the close connection of the defendant with the court through agent of defendant. The domicile of the agent is not the primary requirement in this case. His residing or trading within the jurisdiction of the court is prove of sufficient contact. The Court can also apply its discretion if the contract is to be governed by English law. In this case irrespective of place of the formation of the contract, the Court can have the jurisdiction. Last part of the direction contains the choice of forum clause. If the contract contains the choice of forum clause then the court has jurisdiction to serve the claims.

When the parties have expressed their intention as to the governing the contract in general it is determined that this is the proper law of the contact. Where there is no express selection then it is inferred from the terms and the nature of the contract and the general circumstances of the case i.e. the systems to which the contract had the closest and most real connection.

3.3.2.2. Infringement in UK cases

British rule on jurisdiction seemed to preclude action based on infringement of the intellectual property laws of the other countries. The reasons were firstly the very technical rule, according to which such action were considered to be local actions which the British Court would not hear, and secondly because they were unsustainable by the virtue of British choice of law rule concerning “double actionably” requires that acts abroad where actionable in the UK if they were actionable both according to British (tort law) and the law of the foreign country where they were committed.

Since the decision of the court of appeal in *Gareth Pearce v. Ove Arup Partnership ltd.* it has become permissible to bring action in the UK in respect of

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75 *id.*
76 *id.*
77 [1999] FSR 525
the infringement abroad of the foreign copyright outside the EU / EFTA. For this, leave of the British court to serve out of the jurisdiction will be required. However, under the British Civil Procedure Rule, the court can refuse to grant leave if it does not consider the UK to be the proper place to bring the claim (forum non convenience).

Jurisdiction usually focuses on the place of the wrong, meaning where the tort was committed. The question is where the wrongs are committed when done on the internet. In the UK, a claim founded on the tort can be made if the damage was sustained, or resulted from an act committed, within the UK (CPR, RSC rules 11(1)(f)). As the general principle the focus will be in the defendant’s act that caused the damage. The place will usually be the place where for example the defendant uploaded the material on to the website (transmitting and placing a webpage in the storage area of the server), or from which he/she sent the email. Therefore if a person places infringing material online and sends an infringing email British court are likely to have the jurisdiction if the defendant did so in the UK. Furthermore British court also have the jurisdiction if the damage was sustained in the UK, this is why a claim in respect of damage suffered in UK resulting out of a breach of copyright be also be brought before British court.

In the recent English court of appeal case King v. Lewis78, the claimant Don king, a well known boxing promoter who was a USA citizen and resident sued boxer Lennox Lewis and his attorney both of whom were resident in USA. Lewis’ attorney had posted two defamatory article, representing king as an anti-Semite on two website based in California which had been downloaded in the instant jurisdiction. The court of appeal held that there was an initial presumption that the appropriate forum for the trial was the courts of the country where the tort was committed. However, this presumption only the starting point for consideration of what was clearly the most appropriate forum. In the case of publication via Internet where each publication constituted a separate tort, the publisher might find himself vulnerable to several actions in the different jurisdiction. When placing material on the Internet the defendant has targeted every jurisdiction where the information might be downloaded.

The subjective intention of the publisher as to where the information was intended to target was held to be irrelevant in accessing forum convenience and would increase uncertainty. Therefore, placing material on website which can be read anywhere in the world and so in the UK, authorise downloading and so publication in UK, irrespective of whether the publisher intended to do so or not. The Court further held that England was the appropriate forum for resolving the issue since the defendant has a substantial reputation in England, that he has a considerable financial and business connection in the UK and further has friends and acquaintance within the Jewish community in England.

In sum, a person who infringes copyright may face action in the place where he or she uploaded the material since this is the place where the wrong was committed. In this case, the infringer can be sued for all damages suffered. Furthermore a person who puts infringing material s on the website makes it available worldwide and will be responsible when someone download information from his website. Therefore the infringer may also face action in the jurisdiction where the material was downloaded from the Internet since this is the place where damage is suffered. Since downloading therefore basically furnishes the basis for all jurisdiction worldwide, British courts will decide upon the principle of forum non convenience whether the British courts are appropriate forum for the case.

3.3.2.3. Limitation to jurisdiction rule

British courts can decline jurisdiction on three grounds. Firstly if there is foreign choice of jurisdiction clause, secondly if there is an agreement on arbitration (in case of licensing agreement), and thirdly if the court hearing is not convenient under the principle of forum non convenience. The principle of doctrine of forum non convenience applies “where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial; of the action, i.e., in which the case may be tried more suitably for the interest of all parties and the ends of justice”. It is likely that the British court refuse jurisdiction if another country is available to provide a more convenient forum.
3.3.2.3.1. Forum non convenience

In the case of *St. Pierre v. South American stores Ltd.*\(^{79}\), the court held that

(1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English court if it is otherwise properly brought. The right of access to the king’s court must not be lightly refused.

(2) In order to justify a stay two conditions must be satisfied, one positive and other negative; (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the court in some other way; and (b) the stay must not cause an injustice to the plaintiff. In both, the burden of proof is on the defendant.”

In the case of *Spiliada Maritime Corp. v. Cansulex Ltd*\(^{80}\) the court stated that

(a) The basic principle is that a stay will only be granted on the ground of forum non convenience where the court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action, i.e. in which the case may be tried more suitably for the interests of all the parties and the end of the justice.

(b) Once it has been shown that there is a more appropriate forum for trail abroad, the burden of proof shift to the defendant to show not only that England is not the natural or appropriate forum, but also that there is another available forum which is clearly or distinctly more appropriate then the /English forum.

(c) In deciding whether there is another forum clearly more appropriate, the court will seek to identify the “natural forum”, meaning “that with which the action has the most real and substantial connection”, and will examine not only factors affecting convenience or expense, but also such matters as the law governing the transaction, and the places where the parties reside or carry on business.

\(^{79}\) [1936] 1 KB 362

\(^{80}\) [1986] 3 WLR 972.
(d) If there is another forum which prima facie is clearly more appropriate the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should not be granted.

(e) The mere fact that the plaintiff has a legitimate personal or juridical advantage in proceeding in England cannot be decisive.

The appropriate forum will be the country with which the action has the most real and substantial connection. The court will look for connecting factors “and these will include not only factors affecting convenience or expense, but also other factors such as the law governing the relevant transaction and the place where the parties respectively reside or carry on business.

In determining whether justice requires that a stay should not be granted, all 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 the trial; (iv) the 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.\(^8\)

**Contract**

Electronic contracts are formed and recognised under the UK legal system because of the implementation of various directives of EU like Directives 1997/7/EC on the protection of consumers in respect of distance selling implemented through the Consumer protection (distance selling) regulation act 2000. Under UK law the rules applying to contract formation online are generally the same as the “traditional rules” applied to contract law. Electronic communications are facilitated under the Electronic Communications act 2000. Section 8 of the act states regulation may be issued to amend existing legislation for the purposes of authorising or facilitating the use of electronic communications or storage. There are no special rules for forming a contract over the internet under UK law. In case of online contract a seller’s standard terms will only be incorporated into a contract if the terms are brought to the other

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parties’ intention before the contract is made. In case of click wrap contract such a method of drawing standard terms to a customer’s attention is important for the validity of the online contract. In case where a hyperlink to separate page contain the terms and conditions is displayed and consumers are required to click on an icon accepting they have read and understood the terms and conditions there is less certainty as to whether the terms and conditions will be validity incorporated into a contract between the buyer and seller, as it is more difficult to demonstrate the terms and conditions were brought to the customer’s attention the contract was concluded. In the case of the Parker v. SE Railway [1877] 2 CPD , the court held that the better view is that terms and conditions will be effectively incorporated into a contract as long as reasonable steps have been taken to bring the existence of the terms and conditions to the notice of the buyer before the contract is concluded.

The CPR standard direction of the court allow the choice of forum to be created in the case of the contractual issue. Therefore a click wrap or shrink wrap online contract if valid due to maintaining the standard form, then the choice of forum is also valid in case of copyright licensing.

3.4. JURISDICTION IN FRANCE

The main source of French rules on jurisdiction is based on legal provisions, case laws and international treaties. The rules on domestic jurisdiction provided under the New Code of Civil Procedure (‘NCCP’), mainly Article 42 to 46 dealing with jurisdiction are applicable to international disputes. Apart from that Article 14 and 15 of the Civil Code provide jurisdictional privilege to the benefit of the French nationals. France is also party to various bilateral conventions which decide the issue of jurisdiction. In case the defendant is domiciled in an EU Member State the jurisdiction issue of the court will be governed by the Brussels I Regulation. In otherwise cases the national rules of jurisdiction will applicable to the international cases.82

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3.4.1. General rule of jurisdiction

The most basic rule of jurisdiction under the French law is the *actor sequitor forum rei* principle provided under Article 42 of the NCCP. As per it the competent court is one of the defendant’s domicile. In case where more than one defendant is involved, plaintiff may choose and bring the case before the court of the place where one of them lives. If defendant has neither a known domicile nor residence, then the case can be brought before the court of the place where he lives or before the court of his choice if he lives abroad. French Court may also have jurisdiction if the defendant “appears” to have a domicile in France and if he led plaintiff to belief that this was his actual domicile. For natural person, the place “where he lives” means the place where he has his domicile or, in default his residence. In case of the corporate entity the place where it is established.

In case of contractual matters the plaintiff may choose to either seise the court of the defendant’s domicile, or the court of the place where actual delivery is to be made or where service is to be provided, depending upon the subject matter of the said contract. In case of tort NCCP provides that the plaintiff may choose between the courts of the domicile of defendant, those where the event causing the damage occurred and those where the said damage was suffered. Therefore, French court has the jurisdiction to hear a claim against a non EU domiciled defendant if either the harmful event or the damage occurred in France. In case only a part of the damage is suffered in France, the Court is divided as to whether the French courts have the entire

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83 NCCP, Article 42.“The territorially competent court is, unless otherwise provided, that of the place where the defendant lives.”
- If there are several defendants, the plaintiff may, at his choosing, bring his case before the court of the place where one of them lives.
- If the defendant has neither a known domicile nor residence, the plaintiff may bring his case before the court of the place where he lives or before the court of his choice if he lives abroad.”
84 *id.*, Article 43
85 *id.*
86 *id.*, Article 46(1) “The plaintiff may bring his case, at his choosing, besides the court of the place where the defendant lives, before:- in contractual matters, the court of the place of the actual delivery of the chattel or the place of performance of the agreed service;
87 Ibid., Article 46(2) - in tort matters, the court of the place of the event causing liability or the one in whose district the damage was suffered.”
jurisdiction or only part of it. Though the general trend seems to favour that only part of the issue which has suffered in France has the jurisdiction.\textsuperscript{88}

3.4.2. Co defendant

Due to Article 42(2) of NCCP which allows a plaintiff to sue several defendants before the courts of the domicile of one of them, a defendant domiciled in a non EU state can be sued before French courts as a co defendant in a proceeding brought against a defendant domiciled in France. However for that purpose the following criteria have to be met:

(i) The claims against co-defendants have to bear “close connected links”

(ii) Jurisdiction has to be based upon one of the defendants having his domicile in France. French courts therefore lacks jurisdiction if the only basis thereof lies in a choice of court clause

(iii) Defendant upon whom jurisdiction is based has to be an actual, serious defendant, in order to avoid any fraudulent choice of jurisdiction by initiating a fictitious claim against a French resident

(iv) Where disputes between a co-defendant and plaintiff are to be submitted to a foreign court pursuant to a choice of court clause, French courts only retain jurisdiction where claims against defendants are indivisible, in order to ensure good administration of justice.

3.4.3. Special jurisdiction

However France in its Civil Code provides exorbitant jurisdiction to French courts. Article 14 of the France Civil Code\textsuperscript{89} provides that;

“An alien, even if not residing in France, may be cited before French courts for the performance of an obligations contracted by him in France with the


French person; he may be called before the courts of France for obligations controlled by him in a foreign country towards French person.”

Article 15 further provides that;

“French persons may be called before a court of France for obligations contracted by them in a foreign country, even with an alien.”

France has reflected their parochial attitude in Article 14. This Article authorise the courts territorial jurisdiction over virtually any action brought by plaintiff of French nationality. Thus, a French person can sue at home on any cause of action, whether or not the events in suit related to France and regardless of the defendant's connections and interests. This provision creates a potential threat of forum-shopping.

Historically, Article 14 is a product of Bonaparte's Civil Code of 1804. The Code attempted to unify the array of ordinances and customs in force in different parts of France, including those relating to international jurisdiction. One basis of jurisdiction that existed in some parts of France at that time was jurisdiction to attach the assets of foreign debtors and even to secure a judgment against those assets in some cases. The impulse underlying this old basis of forum arresti jurisdiction - the desire to let one's own people sue at home when enforcement is possible there appears to have provided at least part of the inspiration driving Article 14. The other part of the inspiration behind Article 14 appears to have been the fear that French nationals would be unable to receive fair treatment in foreign courts. This was a time when all of Europe not under French domination was at war with France. Beyond Europe lay barbarism. For the French, suing at home before French judges seemed far preferable to seeking justice abroad, indeed it seemed naturally just.

3.4.4. Jurisdiction in case of contract

In case of contract Article 46(1) of the NCCP, in contractual matters the plaintiff may choose to either seise the court of the defendant’s domicile, or the court

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91 Id.
of the place where actual delivery is to be made or where service is to be provided, depending upon the subject matter of the said contract. Therefore a plaintiff may bring court proceedings in France against defendant domiciled in a non EU State if delivery or provision of service is to occur in France.

3.4.5. Jurisdiction in case of Internet

With respect to internet related cases, the French courts generally consider that they have jurisdiction whenever the service available on the internet can be received on the French territory and the damage occurred in France. In a famous case of Yahoo!\(^2\) (UJEF et. LICRA v Yahoo! Inc et Yahoo France Tribunal de Grande Instance de Paris No.RG:00/0538, May 22, 2000 and November 22, 2000), the court applied the ‘effect test’. As per fact, a French Jew while surfing on the net came across Nazi memorabilia being offered for sale on a web page hosted by Yahoo!. Offering Nazi memorabilia for sale was an offence under the French Penal law. Although the website of Yahoo! France did not host a similar web page, it could be viewed on Yahoo! Website hosted from the United States by anyone in France. LICRA, an organization fighting racism and anti-semitism, and the Union of Jewish students in France (UJEF) sued Yahoo! and Yahoo! France in the court in France. The French court ordered the US internet portal to block access to its US website from France, in order to prevent internet users in France from accessing the objectionable items offered for auction sale on that site. It found that this was technologically feasible through a series of devices for which it examined experts. It thus rejected Yahoo!'s argument that the French court's order was not capable of being implemented beyond the borders of France. The French court essentially applied the “effects” test to assert jurisdiction. It held that by “permitting visualization in France of Nazi objects and eventual participation of a surfer established in France in the exposition/sale of such objects” Yahoo! had committed a wrong within the territory of France. Although the website was capable of being viewed from anywhere in the world, the French court concluded that it had caused harm to the two claimants located in France. The mere download ability of the objectionable

\(^2\) (UJEF et LICRA v Yahoo! Inc et Yahoo France Tribunal de Grande Instance de Paris No.RG:00/0538, May 22, 2000 and November 22, 2000)
information/material did not alone determine the question of jurisdiction. The French court also considered the effect it would have on the public at large in France who could access Yahoo!'s website and who were targeted. This the court concluded from the fact that Yahoo! Inc USA displayed advertisements in French to visitors at the US-based server and Yahoo! France provided a link to the US-based Yahoo! server that Yahoo! Inc did intend its services to reach persons in France and intended to profit for the visitors from France to its US-based website.

3.5. GERMAN JURISDICTIONAL RULES

The main legal source of the rules of jurisdiction in Germany in civil and commercial matters, apart from the Brussels I Regulation and Brussels/Lugano Conventions, is the German Code of Civil Procedure [Zivilprozeßrecht, ZPO]. The governing provisions on local jurisdiction are set out in Section 12 to Section 40 of ZPO. There are no international jurisdictional rules for cross border disputes. Rather, international jurisdiction of German courts is based generally on the provisions of the domestic law of the country i.e., ZivilprozeßBordnung (abbreviated ‘ZPO’) on local jurisdiction so that on principle a German court which has local jurisdiction will also have international jurisdiction. Only in exceptional cases is international jurisdiction explicitly regulated, e.g. in family law (Section 606a, 640a of ZPO). German procedural law does not distinguish between national and foreign plaintiffs. 93 Consequently, a plaintiff with his/her domicile outside the EU is able to avail him/herself of the extensive jurisdiction options under the ZPO. The German courts have general as well as specific jurisdictional rules. Once a German court has general jurisdiction over a party, it may adjudicate any kind of action brought against that party. In contrast where the German court merely has special jurisdiction, it may only deal with actions so called ‘pecuniary claims’. 94

3.5.1. General rule of jurisdiction

According to ZPO Section 13, the court where the defendant has his/her domicile (‘Wohnsitz’) has jurisdiction. The German Civil Code Section 7 defined domicile as the place where one settles down permanently with the intention of making that place the centre of one’s economical and social actions. However, ZPO also outlines exceptions in relation to jurisdiction over persons employed in public service and in relation to jurisdiction over persons without domiciles. As far as legal persons are concerned, ZPO section 17(1) makes clear that one is to focus on the place of their seat (sitz), and that absent special circumstance, the seat is the place where the administration is conducted.

If a person has no domicile in Germany or abroad, the general venue under Section 16 ZPO, is determined by the most recent place of residence or by the most recent domicile, in each case in Germany. ZPO Section 21(1) allows special jurisdiction to be exercised over a legal person at the location of its branch. For such jurisdiction to be proper, however, the claim must stem from the branch’s activity. The Bundesgerichtshof, the highest court in Germany has made clear that ‘a branch that independently and directly enters into any contract thereby establishes a jurisdictional bases for all future causes of action, including tort claims, provided the claim is related to the activates conducted at the branch’.

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95 German Civil Code, Section 13 “The general jurisdiction of a person is determined by the residence.”
96 id., Section 7: “(1) A person who settles permanently in a place establishes his residence in that place. (2) There may be a residence in more than one place at the same time. (3) Residence is terminated if the person abandons the place of residence with the intention of giving it up.”
97 id., Section 17 “(1) The general jurisdiction of municipalities, corporations and those companies, cooperatives or other associations and those foundations, institutions and funds that can be sued as such, is determined by their situation. As the seat is, if nothing else arises, the place where the management is conducted. (3) In addition to the specific requirements of this section by the court of jurisdiction is a permissible by statute or otherwise specially regulated jurisdiction.”
98 id., Section 16: “The general jurisdiction of a person who has no residence is determined by the location within the country and, if such is not known, determined by the last place of residence.”
3.5.2. Contractual matters

According to Section 29 ZPO, in disputes arising from contractual relations the court at the place where the disputed obligation has to be fulfilled will have jurisdiction. The meaning of “disputes arising from contractual relations” is broad. It includes all contracts for the performance of an obligation, the rescission of void agreements and complaints concerning a breach of pre-contractual duties to provide information. Under German jurisdictional rules focus on the place of performance (Section 29 of ZPO) rather than the place of contract formation. This approach is limited by contractually nominating the particular place as the place of performance. However where there is no agreement as to the place of performance, the German courts must ascertain the applicable law before identifying the place of performance.

In contract law the parties to a dispute may – as distinct from tort law – choose a particular jurisdiction. Section 38 (1) of the German Civil Procedure Act (ZPO) allows choice of court agreements as long as the parties are merchants (in the meaning of the German Trade Act) and/or legal persons of public law. Further on, Section 38 (2) ZPO allows choice of court agreements in the case where one of the parties has no general jurisdiction within its country. Agreements with consumers on the jurisdiction of a court are not valid. These national rules of the ZPO apply simultaneously to issues of international jurisdiction.

German law always uphold the parties’ forum selection provided it is valid and that the parties are merchant. A German court will uphold the choice made by such parties even where the selected forum has no connection to the parties or the

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100 German Civil Code, Section 29 “(1) For disputes under the contract and the existence of which the court has jurisdiction of the place to meet where the disputed obligation.
(2) An agreement on the place which confers jurisdiction only if the parties are merchants, legal persons under public law or public law special funds.”

101 id., Section 38(1): “An incompetent at the court of first instance is responsible under the express or tacit agreement of the parties if the parties are merchants, legal persons under public law or public law special funds.”

102 id., Section 32(2): “The jurisdiction of a court of first instance may also be arranged if at least one of the parties has no general jurisdiction in Germany. The agreement must be concluded in writing or, if it is taken orally, confirmed in writing. If one of the parties to a domestic place of general jurisdiction, then the domestic court can only be chosen in which this party has its general jurisdiction or specific jurisdiction is justified.”
contract.\textsuperscript{103} Party selection of a foreign forum prevents German jurisdiction only where the forum selection is exclusive.\textsuperscript{104}

3.5.3. Tort

As regards lawsuits based on a tort, according to Section 32 ZPO,\textsuperscript{105} the court in the place where the tort took place has jurisdiction. This includes both the place of the harmful act/event and the place where that act/event results in damage.\textsuperscript{106} ZPO Section 32 is the relevant ground for jurisdiction regardless of the remedy sought, and can consequently be relied upon in injunction proceedings. Thus, ZPO Section 32 must be read to include reference both to the place where the tort was in fact committed and the place the tort would be committed if the harmful act was allowed to be executed. This section is very relevant for the cases related to copyright infringement on the internet. Since Article 5(3) of the Brussels convention also has similar jurisdiction rules in case of internet defamation, it will be the guiding force to interpret the provision under Section 32.

3.6. BELGIUM JURISDICTION RULES

Apart from the European instruments (Brussels/Lugano Conventions, Brussels I Regulation) the main source for the rule of jurisdiction in civil and commercial matters is the Belgian Code of Private International Law (‘BCPIL.’). This Code has been introduced by the Belgian Act of 16 July 2004 and came into effect on 1st October 2004.\textsuperscript{107}

The jurisdiction rules set forth in the BCPIL are specific to transnational disputes. Together with the other rules included in specific statutes and international instruments these rules are deemed to determine exhaustively the claims that may be


\textsuperscript{104} \textit{id} at p. 200.

\textsuperscript{105} German Civil Code, Section 32 “For claims in tort, the court has jurisdiction, is committed in the district where the offense.”

\textsuperscript{106} Dryander, \textit{Supra} note 99, at p. 690.

\textsuperscript{107} Prior to this Code, International jurisdiction of Belgian Court was subject to specific rules included in the Code of Civil Procedure (Code Judiciaire) and in some limited cases to the application by extension to the international context of internal rules of jurisdiction.
brought before the Belgian courts. From the entry into force the BCPIL, the internal territorial rules allocating venue between Belgian courts can no longer be relied upon to establish the international jurisdiction.

The most specific feature of the Belgian jurisdictional rules is that these rules are strictly organized. The courts have jurisdiction either under Article 5 to 11 of the BCPIL (General jurisdiction) or when the case falls within the specific basis of jurisdiction that govern the particular subject matter of the dispute.

3.6.1. General Jurisdiction

The general basis of jurisdiction for cross border cases is the domicile\textsuperscript{108} or the habitual residence of the defendant in Belgian.\textsuperscript{109} In case of co-defendants Article 5(1) provides that Belgian Courts have jurisdiction to hear against all of them provided that at least one of the defendants be domiciled or have his habitual residence in Belgium. However, the application of Article 5(1) of the BCPIL is subject to a statutory restriction that jurisdiction will not be entertained by the Belgian Courts if the claim has been instituted “solely with the object of removing a defendant from the jurisdiction of his home court”.

In case of counter claims, under Article 8(2) when Belgian courts have jurisdiction to hear a claim, they also have jurisdiction to entertain any counter-claim, provided that such counter-claim “arises from the same fact or act on which the original claim are based”. This Article is inspired by Article 6 of the Regulation.\textsuperscript{110}

The Code provides the concept of “forum necessitates” under Article 11 as it provides jurisdiction to the Belgian Courts if these courts have close contacts with Belgium, when bringing proceedings abroad proves to be impossible or when it

\textsuperscript{108} Belgium Code of Private International Law, Article 4 define domicile as being, for an individual, the place where he /she is registered, and for a legal person, the place of its registered office. The usual residence is defined as being the place where an individual is principally established (notably, according to person and professional circumstances revealing long lasting connection with this place), even without registration and notwithstanding any authorization, or for legal person, the place where they have their principle establishment (according to the center of decision and activities).

\textsuperscript{109} id., Article 5

\textsuperscript{110} Brussels I Regulation, Supra note 1.
cannot be reasonably requested that the claim be brought abroad. This provision allows the Belgian Court to have jurisdiction when there is no other basis of jurisdiction is applicable. To apply this provision requires two basic conditions. First, it must be evidenced that bringing proceedings abroad would be impossible or unreasonable. Reasons may be related to the cost of proceedings before the foreign competent court, when it is “out of proportion” with the financial interests involved in the case. The plaintiff must have to prove that such disproportion has the effect, in practice, to deprive him from effective access to the foreign court. Second, the case must have “close contacts” with Belgium. So if the plaintiff is resident, national or domicile of Belgium, the connection is set. This provision can be best suit to the cyberspace related suit as the parties may in a remote state which may be unreachable for the plaintiff or cost huge expenses.

3.6.2. Specific jurisdiction

The Code has also specific jurisdiction rules according to the subject matter of the case. In case of contract Article 96(1) of the Code provides that the Belgian Courts have jurisdiction to hear such claim either when the obligation “arose in Belgium” or when it “is or should be performed in Belgium”. The connecting factor under Article 96(1) (b), the place where the contractual obligation arose refers to the place where the contract was formed, meaning in practice the physical location where it has been concluded. For contract entered into between parties which are not located at the same place, reference is made to the place where the contract is “deemed to have been concluded”, which would seem to designate the place where the contract is deemed to have been formed under the relevant governing law.112

In case of Tort, the Code provides that when the claim relates to “an obligation arising from a harmful event”, Belgian courts have jurisdiction either “when the event giving rise to the obligation has arisen or threaten to arise, in all or in part, in Belgium”113 or if and to the extent that prejudice occurred or is about to occur in Belgium (Article 96.2).


112 id. at p.6.

113 BCPIL, Article 96(2).
The second option reflects the jurisprudence of the European Court of Justice in the *Shevill*\textsuperscript{114} case which concerned a compensation claim for defamation through the press. This provision is inspired by the case law of the Court of Justice under Article 5(3) of the Brussels Convention. When the event giving rise to the damage is or is to be located on the Belgian territory, the victim can bring proceedings in Belgium to claim compensation for the entire harm that has been suffered (in Belgium or abroad). It is important for this that one of the constituting elements of the event giving rise to damage is located in Belgium. When the event giving rise to the damage is entirely located abroad, the victim can still bring proceeding in Belgium provided the harm was or is to be suffered, in all or in parts, in Belgium. In such cases however the jurisdiction of the Belgian court is only restricted to the claim for the compensation of the harm that is located in Belgium.\textsuperscript{115}

### 3.6.3. Consumer contracts

In this case the Code provides protective jurisdictional rules for the consumers who have their habitual residence in Belgium. Consumers can bring proceedings in Belgium against defendants in third states not only on the basis of general or specific jurisdictional rules identified above but also on the basis of their habitual residence in Belgium. However some connection is required to exist with Belgium. Article 97(1) of the Code set up the connecting factor for this case by the fact either that the consumer “has taken in Belgium the steps necessary for the conclusion of the contract”, or that the provision of the thing or service to the consumer “was preceded by an offer or by advertising in Belgium”. The Code also provides that choice of court agreements are valid against consumers only when they are concluded after the dispute has arisen.

### 3.6.4. Intellectual property

In the case for disputes relating to the registration or validity of intellectual property rights which are subject to be deposited or registered (it is required that the rights be deposited or registered in Belgium as per Article 86). In this case, Belgian Courts have no jurisdiction to hear the claim when the relevant connection is with the

\textsuperscript{114} Case 68/93, March 7, 1995, CJCE, I, p. 415.
\textsuperscript{115} National Report Belgium, *Supra* note 112, p. 7.
foreign state. Belgian Courts are required to decline jurisdiction even ex officio when the dispute relates to the validity or registration of an intellectual property registered abroad.

It provides that the Belgium Court will have jurisdiction regarding any claim concerning protection of intellectual property rights besides the general rule of the Code, when the protection claimed is limited to the Belgium territory.\textsuperscript{116}

\subsection*{3.6.5. Lis pendens}

Article 14 of the Code allows Belgian Courts to stay their proceedings when a foreign court is already seized of the same dispute. This is a rule like lis pendens rule of Article 27 of Brussels I Regulation. It is based on the principle that Belgian Court can stay their proceeding only when the other Court has been seized of the dispute before the Belgian Court. So it is only applicable when parallel proceedings involving same parties and has the same object and the same cause. However, it is not mandatory and the Court may decide to stay or not the proceedings must take into account the requirement of “good administration of justice”. Belgian Courts have therefore certain discretion in this regard.

\subsection*{3.6.6. Internet infringement case}

In a recent case of Copiepresse SCRL v. Google Inc.\textsuperscript{117} the court of Brussels find opportunity to discuss online copyright infringement. The plaintiff, Copiepresse represents some of Belgium’s largest newspapers. Google offers a service called Google News Belgium. The website (\url{http://news.google.be}) was a computer generated daily press review sorted between different main topics such as business, sport, and entertainment. Any press article is announced by its title, a thumbnail of its illustrating picture when applicable, a brief summary or the first lines of the article and an underlying hyperlink redirecting to the page where the article is posted, when the latter is still online. On 3\textsuperscript{rd} August 2006, a writ of summons to appear in court,

\textsuperscript{116} Article 86 does consequently not grant jurisdiction for an extraterritorial protection. If such a protection is needed, the jurisdiction will have to be based on the general rules of the BCPIL.

\textsuperscript{117} Abstract of the case is available at <\url{http://www.crid.be/pdf/public/5476.pdf}> [accessed on 10/07/2011].
issued by Copiepresse was served upon Google. Copiepresse claimed that by including headlines and links to online stories from the Belgium press without its prior permission, Google news infringed the copyright and sui generis database rights of its newspaper members. Furthermore, Copiepresse reproached Google that when an article was no longer freely available on the site of the Belgium paper, one could obtain its content through ‘cached’ hyperlink that directs the user to content of the article, which Google registered in the cache memory of its server.

Google Inc. failed to appear at the hearing of 29 August 2006. The order of 5th September 2006 was handed down by the President of the Court solely taking into account Copiepresse’s point of view and documents produced. In this default order the President of the Court noticed that the information was extracted from the press web servers without permission, and held that Google could not exercise any exception provided in the laws relating to copyright and neighbouring Google to be in breach of the newspaper’s right. The default order obliged Google to withdraw from all sites under whatever denominations, all article, photograph and graphic representations of the Belgium newspapers represented by Copiepresse as of the notification of the order under the daily penalty of 1000000 Euro or every day of delay. It also ordered to publish a visible and clear manner without comments on the home page of ‘google.be’ and ‘news.google.be’ the entire order for 20 days.

3.7. SWITZERLAND JURISDICTION RULES

Switzerland is not part of the European Union, therefore the jurisdictional rules differs comparatively from other European Countries. The fundamental principles for determining jurisdiction of Switzerland Courts are regulated by law. For domestic matters the Code of Civil Procedures (‘CCP’) defines the jurisdiction of courts. With respect to the disputes involving residents from European Union or EFTA countries, the jurisdictional rules set forth in the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 (the Lugano Convention) apply. For other international disputes where one of the parties is not domiciled or resident of Switzerland or European Union, the
jurisdictional rules are determined by the Federal Act on Private International law, *La loi fédérale sur le droit international privé* (‘LDIP’).\(^{118}\) This Code deals with various issues apart from the main issues of jurisdiction, Choice of law, Recognition and Enforcement of foreign judgement.

3.7.1. **Jurisdiction rules**

On the issue of jurisdiction Article 2\(^{119}\) highlights the central presumption or residual rule on jurisdiction that is the courts of defendant’s domicile have jurisdiction over him. This means that a foreign party can bring an action in Switzerland if the defendant has a Swiss domicile. A natural person has his domicile in the State he resides with the intention to remain permanently.\(^{120}\) The Act further clarifies that in case the domicile of a person is not known than the habitual residence will be an important factor in jurisdiction issue.\(^{121}\) In case of habitual residence, it is deemed to exist in the State where a person lives for an extended period of time, even if this time period is limited from the outset.\(^{122}\) In case of corporation and partnerships, their domicile is decided on the basis of registered office. In the absence of such designation the registered office shall be the place where the administration of the company or partnership is established.\(^{123}\) Further, Article 3\(^{124}\) provides the case for emergency jurisdiction in cases where the Code do not provide for jurisdiction in Switzerland and proceeding abroad is impossible. In this kind of case the Code allow to recognise the new connecting factor with the place with which the facts of the case are sufficiently connected.


\(^{119}\) *id.*, Article 2. “Unless this code provides otherwise, the Swiss judicial or administrative authorities at the domicile of the defendant shall have jurisdiction.”

\(^{120}\) *id.*, Article 20(1)(a)

\(^{121}\) *id.*, Article 20(2)

\(^{122}\) *id.*, Article 20(1)(b)

\(^{123}\) *id.*, Article 21

\(^{124}\) *id.*, Article 3. Emergency jurisdiction. “If this code does not provide for jurisdiction in Switzerland and if proceeding abroad is impossible or can’t reasonably be required to be brought the Swiss judicial or administrative authorities at the place with which the fact of the case are sufficiently connected shall have jurisdiction.”
In case of tort jurisdiction is based on the defendants’ domicile and in the absence of any, his habitual residence or Swiss place of business. Where none of these can be found in Switzerland, the Swiss court, either where the tortuous act was done or where the consequences occurred, have jurisdiction.

3.7.2. Choice of forum

The Code of Obligation 1911 deals with the contractual issues. It is possible to form contract electronically. Though code of obligation does not contain specific rules on the conclusion of contracts electronically. So general provision of the code is applicable. Common intent of the parties are more important. The LDIP ask for the agreement to be in writing by telegram, telecopier or any means of communication which evidence the terms of the agreement by a text. Therefore a contract form by click wrap is valid if it fulfil the above guidelines. The LDIP allows the parties to agree upon a Court for an existing or a future dispute. This choice of court provision must be in writing in some form. Therefore during the dispute the party may decide the forum. Further the Code recognises the arbitration agreement as one exception to the

125 Article 129(1) The Swiss courts at the domicile of the defendant or, in the absence of domicile, those at his place of habitual residence or at his place of business shall have jurisdiction over actions in tort.
2 If the defendant is neither domiciled nor habitually resident in Switzerland and does not have a place of business in Switzerland, an action may be brought before the Swiss court at the place in which the act that caused injury arose or the resultant injury occurred.
3 If several defendants can be sued in Switzerland and if the claims are based essentially on the same facts and grounds, an action may be brought against all of them before any judge having jurisdiction; the judge before whom suit is first brought shall have exclusive jurisdiction.

126 id., Article 5. Choice of court
“1 The parties may agree on a court for an existing or a future dispute concerning pecuniary claims arising from a specified legal relationship. The agreement may be made in writing, by telegram, telex, tele copier, or by any other means of communication which evidences the terms of the agreement by a text. Unless stipulated otherwise, the court agreed upon shall have exclusive jurisdiction.
2 The agreement shall be void if one party is denied in an improper manner a court to which that party is entitled under Swiss law.
3 The court agreed upon may not decline its jurisdiction:
   a. If one party has his domicile, place of habitual residence, or place of business in the canton of the Swiss court agreed upon; or
   b. If, pursuant to this Code, Swiss law is applicable to the dispute.”
general rule.\textsuperscript{127} If the forum has not been decided then as per Article 112(1) of the Code the Swiss Court of the defendant’s domicile (or where he has none, his habitual residence) has jurisdiction over contract claims.\textsuperscript{128} In addition, where the Swiss branch of the defendant makes the contract on the latter’s behalf, Article 112(2) gives jurisdiction to the court where the branch is located. Article 113 also provides for Swiss jurisdiction where the defendant is neither domiciled, habitually resident nor has a place of business in Switzerland, but where the relevant contractual performance is due to take place in Switzerland.\textsuperscript{129}

### 3.7.3. Jurisdiction in Copyright Infringement

In case of intellectual property rights also the code provides rules of jurisdiction\textsuperscript{130}. According to Article 109(1) the Swiss Court have jurisdiction, if one of two alternatives bases of jurisdiction is satisfied. The first base is that the defendant is domiciled in Switzerland and second, in case where defendant is no so domiciled,

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\textsuperscript{127} \textit{id.}, Article 7. Arbitration agreement

If the parties have concluded an arbitration agreement with respect to an arbitrable dispute, the Swiss court before which the action is brought shall decline its jurisdiction unless:

a. The defendant proceeded to the merits without contesting jurisdiction;

b. The court finds that the arbitration agreement is null and void, inoperative or incapable of being performed; or

c. The arbitral tribunal cannot be constituted for reasons for which the defendant in the arbitration Proceeding is manifestly responsible.

\textsuperscript{128} \textit{id.}, Article 112(1) The Swiss courts at the defendant’s domicile or, in the absence of domicile, those at the place of habitual residence of the defendant shall have jurisdiction over actions arising from contracts.

1. In addition, the Swiss courts at the place where the defendant has his place of business shall also have jurisdiction over actions arising out of the activities of that place of business.

\textsuperscript{129} \textit{id.}, Article 113 If an obligation must be performed in Switzerland and if the defendant does not have his domicile, habitual residence, or place of business in Switzerland, the action may be brought before the Swiss court at the place of performance.

\textsuperscript{130} \textit{id.}, Article 109.(1)The Swiss courts at the domicile of the defendant shall have jurisdiction over actions concerning intellectual property rights. In the absence of such domicile, the Swiss courts at the place of where protection is invoked shall have jurisdiction. This provision is inapplicable to actions concerning the validity or the registration of intellectual property rights abroad.

2. If several defendants can be sued in Switzerland and if the claims are based essentially on the same facts and the same grounds, an action may be brought against all of them before any judge having jurisdiction; the judge before whom suit is first brought shall have exclusive jurisdiction.

3. If the defendant is not domiciled in Switzerland, actions concerning the validity or the registration of intellectual property rights in Switzerland shall be brought before the Swiss courts at the place of business of the representative of record or, in the absence of such representative, before the courts at the place where the Swiss registry has its office.
Switzerland is the place where protection is sought. The second basis of jurisdiction is wide open and Switzerland would have jurisdiction in cases where Swiss copyright is involved. Second basis interpretation gets support from Article 110, which deals with applicable law. Paragraph 1 of this Article states that “rights in intellectual property are governed by the law of the country for which protection of those rights is sought”. So in case of copyright, the jurisdiction of Swiss court is contingent upon either the infringing party being domiciled in Switzerland, or the act of infringement taking place in Switzerland.\(^\text{131}\) In case of copyright infringement on the internet, if the websites offers unauthorised downloading than that work can be considered as distributed in Switzerland and jurisdiction action can be initiated by Swiss court.\(^\text{132}\) Article 109 allowed the Swiss court of the domiciled defendant to imitate the validity issue if the copyright protection is according to the domestic legislation. Swiss court is not competent to take the validity issue of the intellectual property of abroad.\(^\text{133}\) Swiss court have jurisdiction on the basis of the defendants’ domicile in Switzerland, even though the lawsuit concern foreign intellectual property rights if the issue is of ownership of such rights.

### 3.7.4. Conflict of forum

In Article 9 the Code recognises the principle of lis pendens\(^\text{134}\). So the Swiss court cannot decline the jurisdiction of the court on the ground of forum non convenience. As an exception the Code allow that if the defendant submits to the jurisdiction of the Swiss court without challenging the merit of the case, the court will be having the jurisdiction over the dispute.\(^\text{135}\)

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\(^{132}\) *id.*, p. 663.

\(^{133}\) Article 109

\(^{134}\) Article 9. If the same parties are engaged in proceedings abroad based on the same causes of action, the Swiss court shall stay the proceeding if it may be expected that the foreign court will, within a reasonable time, render a decision that will be recognizable in Switzerland.

2 To determine when a court in Switzerland is seized, the date of the first act necessary to institute the action shall be decisive. The initiation of conciliation proceedings shall suffice.

3 The Swiss court shall dismiss the action as soon as a foreign decision is submitted to it which can be recognized in Switzerland.

\(^{135}\) Article 6. Appearance by the defendant

In the case of pecuniary claims, the court before which the action is brought shall have jurisdiction if the defendant proceeds to the merits without contesting the court’s jurisdiction unless the court may decline jurisdiction pursuant to Article 5, paragraph 3.
3.8 CONFLICT OF LAW IN INTELLECTUAL PROPERTY (‘CLIP’)

The Draft of CLIP was prepared by European Max Planck Group of Conflict of laws in Intellectual Property (‘CLIP’). It is group of scholars in the field of intellectual Property and Private international law. It was established in 2004. Primary goal is to draft a set of principles of Conflict of Laws in Intellectual Property.

General jurisdiction

In general the Clip follow the model of Brussels I Regulation (Article 2) that the person domiciled in a Member State shall whatever their nationality be sued in the court of that Member State. However, they change the terminology of the term to habitual residence in place of domicile. However similar terminology is also found in the ALI principles (Article 201) where it has been referred the concept of residence. CLIP further (Article 2:102(3)) defines the habitual residence of the legal persons and it follows the model of Brussels Regulations Article 60. In addition the Article 2:102 (2) CLIP defines the principle place of business as the habitual residence of natural persons acting in the course of business activity.

The exclusive jurisdiction is created under the CLIP as meant only in proceedings convened with registration and validity of registered intellectual property rights in particulars patents and registered trademarks. Therefore, these rights are limited as it does not apply to disputes where validity or registration arises in a context other than by principle claim or counterclaim (CLIP 2:401(2)).

Special jurisdiction

In case of infringement of an intellectual property right a person may be sued in the courts of the State where the alleged infringement occurs or may occurs. Further it clarifies in subsection (2) an infringement occurs in a State where the intellectual property rights exists provided the defendant has acted or has taken substantial preparatory action in the State to initiate or further the infringement. The jurisdiction can also be applied in a case where the activity by which the right is claimed to be infringed has substantial effect within or is directed to the territory of that State.\textsuperscript{136} Actions occurring in places where no

\textsuperscript{136} Article 2:202
intellectual property rights exists might constitute an infringement in foreign countries as a result of extra-territoriality application of their intellectual property laws, but do not constitute an infringement in place of action and therefore cannot open jurisdiction based on infringement in the State of action.

In case of contract the CLIP provides the special jurisdiction in Article 2:201(1). It starts with the same rules as Article 5 (1) of the Brussels I Regulation. It allocates jurisdiction to the courts of the State where the obligation in question is to be performed. It further introduce a special rule determining this place for ‘disputes concerned with contracts having as their main object the transfer or license of an intellectual property right’. In such disputes, ‘the state where the obligation in question is to be performed shall be, for the purpose of this provision and unless otherwise agreed, the State for which the license is granted or the right transferred’.

Special jurisdiction rule for infringement case has been maintained in Article 2:202. It provides that a person may be sued in the courts of the State where the alleged infringement occurs or may occur. This provision is different from the Article 5(3) of Regulation. The CLIP provision does not provide option of suing as an alternative in the place where the damage occurred. It points out only one State having special jurisdiction in infringement cases. It is further limited by the Article 2:203 by providing that ‘a court whose jurisdiction is based on Article 2:202 shall have jurisdiction in respect of infringements that occur or may occur within the territory of the State in which the court is situated’. It means that if the infringement occurs in one State, the court of that state has only jurisdiction to decide the issue relating to the infringement in that State. Therefore, the plaintiff has to bring case to every State where the infringement has occurred.

3.9 CONCLUSION

European Union has uniformity in jurisdiction issue for the Member State in the form of Brussels I Regulation. The old convention was revised in 2001 to accommodate the new technologies and its effect. Therefore the regulation has maintained exclusive jurisdiction for registered IPR issues. Though since copyright is not a registered right due to Berne Convention requirement, the other jurisdiction
grounds is applicable. More prominent among them is the general jurisdiction which is related to domicile of defendant as important grounds of jurisdiction. EU considered copyright infringement issue a ‘tort’ issue therefore Article 5(3) assign the jurisdiction to ‘the place where harm is caused’. According to the landmark case of Shevill the place where harm is caused includes both the place of the wrongful act and the place of injury. This rule has been stretched by the ECJ in internet related cases. On the contractual issue the Regulation respect the choice of forum selection by the parties. Both the rules have been almost accepted by the Member states in their dealing with the non Member States. German Section 32 allows the jurisdiction at both places of the harm act and the place where that act results in damages. Belgium in Article 96(2) interprets its obligation arising from a harmful event in same way. The EU and European countries seems to have adapted the rules of jurisdiction for the internet also.