CHAPTER - IV

JURISDICTIONAL CHALLENGES IN ONLINE AND TRADITIONAL CONTRACTS
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“The rise of an electronic medium that disregards geographical boundaries throws the law into disarray by creating new phenomena that need to become the subject of clear legal rules but that cannot be governed, satisfactorily by any current territorially based sovereign.”

4. Introduction:

Having adverted to in the previous chapter with respect to the concept of communication when a contract is formed, the next stage comprises namely, the fulfilment of the object of the parties which they had in mind when the contract came into existence. After this object is fulfilled the liability of either party under the contract comes to an end. The contract is then said to be discharged. Apart from performance, a contract may be discharged by impossibility of performance, by an agreement and by breach. When a promise has to be performed within a certain time, it must be performed on any day before the lapse of that time. Sec 48 of Indian Contract Act emphasises for performance on “certain day” to be at a proper time and place. The explanation to the section says that what is a proper time and place is a question of fact in each case. Thus the place of contract can be identified if there is territorial border. The effectiveness of a judicial system rests on bedrock of regulations which define every aspect of a system’s functioning and its jurisdiction. A court must have jurisdiction and appropriate power of services of process in order to hear a case and render an effective judgment. While transacting on the internet, there are neither political barriers nor any territorial

2 Performance of Contract- Sec: 31-67 ICA 1872
3 Frustration of Contract- Sec:56, ICA 1872
4 Discharge by Agreement - Sec: 62 of ICA 1872
5 Christian M.Rieder “U.S. Subject matter Jurisdiction for Copyright Infringements on the Internet” http://cyber.law.harvard.edu/property00/jurisdiction/rieder.html (Last accessed on November 13, 2013)
demarcations. The global medium has been transformed into a single community.\(^6\) Cyber transactions know no national or international boundaries and are not analogous to three dimensional worlds in which common law principles are evolved.\(^7\) Web access is possible from any part of the globe and parties may not be aware about the jurisdictions which their transactions may traverse.

The common law principles relating to jurisdiction are not readily adaptable to the transactions in cyberspace\(^8\). The users have only a virtual nexus with each other. So, if any dispute arises, then the parties find it very difficult to get the issue resolved as in internet jurisdictions. It is very tough to establish both the traditional requirements for determination of jurisdiction which are mainly the place where party resides and place where cause of action arose. Today most of the transactions are carried by electronic means and hence the legal frameworks supporting these activities need to be consistent and predictable irrespective of the jurisdiction where the parties reside. The major issues that arise are as to which court has the jurisdiction in case of dispute, whether the laws of the country in which the customer resides or the law pertaining to the supplier’s residence has to be applied and also as to how the judgment should be enforced.

In this ensuing chapter a detailed discussion with respect to key principles to determine jurisdiction in cross border, online dispute between parties has been undertaken because this is one of the main fundamental issues in case of internet contracts. Besides, the conventional principles of determining jurisdiction, incidence of the same when online transactions are resorted to have also been delved into. The legal frameworks in the international scenario and in the Indian perspective have all been analysed.

### 4.1 Concept of Jurisdiction:

The word ‘Jurisdiction’ means the power or authority of a court to adjudge a case in India. The jurisdiction of civil courts is laid in Section 9 of the Civil Procedure Code of 1908 which states “The Courts shall have jurisdiction to try all suits of civil nature

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\(^7\) Anna Wells Branscomb, Anonimity, Autonomy and Accountability: “*Challenges to the First Amendment to Cyber space*” 103, Yale L.J.1639 (1995)

\(^8\) David Thatch “*Personnel Jurisdiction and the WorldWide Web., Bits(and Bytes) of Minimum Contacts*” 1997 (23) Rutgers computer and Technology Law journal @ p.152
excepting suits of which their cognizance is either expressly or impliedly barred”. If the court lacks in its jurisdiction, then its judgment has no force. It follows that for disobedience of the judgement no Court proceedings can be initiated. Jurisdiction can be classified under four heads Pecuniary, Territorial, Subject Matter and Personal. Only if all the concepts pertaining to jurisdiction are properly satisfied then the judgment delivered by the court will be valid and enforceable. ‘Subject matter jurisdiction’ means power of the courts to hear and decide cases of those specific areas only like labour matters should go before a labour Court judge; deficiency in services to consumers will go to the consumer forum. In the like manner a Civil Court cannot hear criminal matters and vice versa. ‘Personal jurisdiction’ means the authority of a Court to hear and decide a case against particular set of persons belonging to that particular territory. Say, if the cause of action arises in Mumbai, the courts in Mumbai have the jurisdiction to entertain the matter, or otherwise when the parties are entering into a contract they would have subjected themselves to the jurisdiction of the Court to which they can be tried in case of dispute. ‘Pecuniary jurisdiction’ refers to the quantum of money or claim. The pecuniary jurisdiction is divided into a hierarchical order for example in Tamil Nadu District Munsif can try cases up to 1lakh, Sub judge up to 10lakhs and any amount above 10 lakhs goes to the District Judge. So if the claim amount is 10lakhs District Munsif Court has no pecuniary jurisdiction to entertain the same. The three important pre-requisites of jurisdiction for a judgement to be valid and enforceable are:

1. The jurisdiction to prescribe
2. The jurisdiction to adjudicate
3. The jurisdiction to enforce

Jurisdiction to prescribe is the first and foremost requirement only in the event of existence of this jurisdiction, it is possible to ascertain and analyse whether there is jurisdiction to adjudicate followed by jurisdiction to enforce. The three types of jurisdiction are interdependent and are based on common parameters.

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4.1.1 Jurisdiction to Prescribe

It means that the Laws and Regulations of a Country apply to a particular category of persons. The jurisdiction to prescribe is the power of a State and its privileges to apply its laws to persons, their activities or belongings or interests, status of persons and their interpersonal relationships and business or other entitlements in that State.\(^\text{11}\)

4.1.2 Jurisdiction to Adjudicate

It means that a forum of adjudication has the power to decide a dispute concerning a person or a thing. To adjudicate a matter the respective Country must have the competent jurisdiction to prescribe law that it seeks to apply to decide the subject matter of dispute.\(^\text{12}\)

4.1.3 Jurisdiction to Enforce

It refers to the power of a State to direct a person to mandate compliance of its rules and regulations by various means including administrative or police action or judicial or non-judicial action. It also means that State’s power to punish an offender of law for violation of laws of the State.

4.2 Jurisdiction Concept under the Civil Procedure Code 1908:

The Sections 15-25 of Civil Procedure Code deals with place of suing. ‘Place’ means place in India and the heading indicates that the Courts referred to in these sections are in India and the immovable property referred to is within India.\(^\text{13}\). These sections regulate the venue within India and apply to those places where the code is in force. They deal with matters of domestic concern and prescribe rules for the assumption of territorial jurisdiction by Indian Courts in matters within their cognisance and do not govern claims against persons or things wholly outside their jurisdiction.\(^\text{14}\). Section 16 relates to the territorial jurisdiction of a civil Court and refers to the area over which the Court enjoys influence. Section 20 refers to the personal actions such as an action to the Personal actions such as an action in tort or

\(^{11}\) Ibid
\(^{13}\) Vinay Kumar Gupta, Mulla- “Code of Civil Procedure” (Abridged) LexisNexis Butterworth Wadhwa Nagpur. (14th edn.)
\(^{14}\) Bhamboo v. Ram Narain (1928) ILR 9 Lah 355
contract where jurisdiction depends upon the residence of the defendant or the accused of the cause of action. The object of section 20 is designed mainly to secure that justice might be brought as near as possible to everyman and that the defendant should not be put to the trouble and expense of travelling long distances in order to defend himself in cases in which he may be involved. This is a general section embracing all personal actions. At common law, actions are either ‘personal’ or ‘real’. Personal actions are also called ‘transitory’ because they may occur anywhere, such as actions for tort to persons or to movable property or suits on contract. The principle underlying section 20(a) and section 20(b) is that the suit is to be instituted at the place where the defendant can defend the suit without undue trouble. The expression defendant in section 20 includes corporation or a company registered under the Companies Act 1956. (Companies Act 1956 is repealed and replaced by the Companies Act 2013). When the court finds it has no jurisdiction to try and entertain the suit on the ground that the defendants are staying outside its territorial jurisdiction, the court should reject the plaint or return it to the plaintiff for presentation before the proper court in accordance with the provisions contained in CPC. Residence for the purpose of clause (a) seems to cover permanent residence as well as temporary residence, but not a casual visit. The expression carries on business is the widest of all and applies to natural as well as juristic persons, carrying on business with or without profits. It does not necessarily require the actual presence of a person to carry out the business and it may be carried on by a person through others, provided control is retained by him. The word business is used in a restricted sense and is limited to commercial business.

In a suit for damages for breach of contract, the cause of action consists of the making of the contract and of its breach, so that the suit may be filed either at the place where contract was made or at the place where it should have been performed and the breach occurred. If a contract is made in Pune to be performed in Pune, the whole cause

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15 Union of India v. Ladulal Jain AIR 1963, SC 1681
16 Ibid
18 Neela Productions Sreekumar Theatre, Trivandrum v. S.Kumaraswami, AIR 1996 Ker 239
20 M.Venkatasamy v. Marudapursham (1992) 2 Mad L.J. 235
21 Arthur Butler v. District Board ILR 15 pat. 292
of action arises in Pune and the suit for breach can only be filed in Pune court, but if the contract is made in Pune to be performed in Delhi, the suit for its breach can be filed either in Pune or Delhi Court. The Supreme Court has held that a suit in a contract can be filed at the place where the contract was made or where it was to be performed. The making of the contract is part of the cause of action and suit on a contract therefore can be filed at the place where it was made. The determination of the place where the contract was made is part of the law of contract. But making of an offer in a particular place does not form cause of action in a suit for damages for breach of contract. Ordinarily acceptance of an offer and its intimation result in a contract and hence a suit can be filed in a court within whose jurisdiction the acceptance was communicated. The performance of a contract is part of cause of action and a suit in respect of the breach can always be filed at the place where the contract should have been performed or its performance is completed. If the contract is to be performed at the place where it is made, the suit on the contract is to be filed there and nowhere else. In a suit for agency actions, the cause of actions arises at the place where the contract of agency was made or the place where actions are to be rendered and payment is to be made by the agent. Part of the cause of action arises where money is expressly or impliedly payable under a contract. In cases of repudiation, the place where it is received the place where the suit would lie. If a contract is pleaded as part of the cause of action giving jurisdiction to the court where the suit is filed and that contract is found to be invalid, such part of cause of action disappears.22 There are few of the factors which has been elucidated by the Supreme Court in the landmark case ABC Laminart Pvt Ltd. v. Ap Agencies, Salem23. The High Court of Andhra Pradesh has held that if the jurisdiction of Civil Court and section 20 of CPC is to be excluded, that must be done by clear and specific language in the agreement. A condition in a purchase order - subject to the jurisdiction of Bangalore court cannot be taken as excluding jurisdiction. The clause or condition did not use the word ‘only’ or ‘alone’ as held in Sponge Iron India v. Andhra Steel Corporation24.

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24 AIR 1989 AP 206.
Where there is a contract between an Indian company and a foreign company, the intention of the parties would decide.

Which substantive law would apply to the contract and

Which would be the proper forum for dispute resolution as was laid down in *NTPC v. Singer Co.*

In *Wrutten Bergische Und Badshee Vereinighee Vertiri Sicherung Squeseli Schaften Aktiengeselischaft Hell v. Coromandel Crucibles Industry Sumalkota* the plaintiff purchased some materials from a foreign company situated in West Germany. The bill of lading was executed in Germany. The consignment was shipped from Germany under a marine insurance policy. The insurance company was also situated in Germany. The contract of insurance covered the risk of transit up to the place of residence of the plaintiff. The consignment was short of 779 kg. The plaintiff filed a suit in court at ‘K’ having jurisdiction over ‘S’. It was contended that as per Art.12 of insurance conditions read with Article 48 of VVG (relating to German law insurance matters) the suit could be filed only in Germany. It was held that the court at ‘K’ had the jurisdiction to try the suit. Section 3 of the Code provides that a foreign judgment in conclusive as to a matter directly adjudicated between same parties except where it was not delivered by a competent court, or was not judged on merits or adopts an incorrect international law view or does not recognise the Indian law also. It can be seen that if the foreign judgment has been obtained out of force or fraud or if there is gross violation of the principles of natural justice or if there is breach of any Indian law then the Indian courts will not recognise foreign judgement. Further section 44A of Civil Procedure Code provides for execution of decrees passed by courts in foreign countries but the enforcement of foreign decree is limited to those countries which are notified by the government of India as ‘reciprocating countries’.

25 AIR 1993 SC 998
26 AIR 1990 AP 97 (DB)
4.3 Jurisdiction under the Indian Contract Act 1872

The formation of a contract is part of the cause of action and a suit on a contract can always be filed at the place where it was made\(^\text{28}\). The determination of the place where it was made is part of the law of contract. A contract by correspondence is made at the place where the letter of acceptance is posted\(^\text{29}\) as it is the place where an offer of one party is being accepted by the other party\(^\text{30}\) and it is repudiated at the place where the letter is received\(^\text{31}\) and if acceptance is by performance of a condition the suit may be instituted at the place where the condition is performed\(^\text{32}\). In decided case Baroda Oil Cakes v. Parshottam\(^\text{33}\) it has been held that mere despatch of an offer is not sufficient to give jurisdiction. Acceptance by phone is part of cause of action\(^\text{34}\); the place of delivery of acceptance is irrelevant and does not provide any cause of action\(^\text{35}\). A suit on a contract made by telex between places B&D can be filed at D, if acceptance is conveyed at D\(^\text{36}\). In MMTC of India Ltd v. Indian metals and Ferro Alloy Ltd.,\(^\text{37}\) preliminary negotiations was in New Delhi, after which the defendant sent the agreement to the plaintiff and the latter signed it at Bhubaneswar, thus the acceptance of the offer was made at Bhubaneswar and therefore the cause of action was held to arise in part at Bhubaneswar. Besides this payment under the agreement was to be made at Bhubaneswar. Hence the court at Bhubaneswar had jurisdiction.

The performance of a contract is part of the cause of action and a suit in respect of breach can always be filed at the place where the contract should have been performed or


\(^{30}\) Union of India v. Shiboomal AIR 1989 P&H 205


\(^{32}\) Sitaram v. Thompson (1905) ILR 32 Cal 883.

\(^{33}\) KR 1953 Bom 1137, AIR 1953 K Bom 391

\(^{34}\) Bhagwandas v. Giridharilal AIR1966 SC 533

\(^{35}\) Progressive Constructive Ltd., v. Bharat Hydro Power Corporation Ltd., AIR 1996 Del.92

\(^{36}\) Ravnaq International v. Alfred C Tapier AIR 1983 NOC 83 Delhi

\(^{37}\) AIR 1981 on 76
its performance is completed\(^{38}\). In *Ram lal v. Bholonath*\(^{39}\) a buyer at Kasganj ordered dyes from a seller in Delhi, but after paying for and on opening the parcel found it to contain only clay, he was entitled to sue for damages at Kasganj. The place of performance is generally expressed in the contract and if not so expressed, it may be inferred from the nature of the act. Where the place of performance is neither expressed in the contract nor implied from the necessities of the case, it will be determined according to the intention of the parties\(^{40}\) or according to the provisions of sections 48-49 of the Indian Contract Act 1872. Sections 46-50 of the Act emphasises time and place of performance of contract. The first principle as laid down in S.46 is that where the promiser is to perform without any application by the promisee and no time for performance is specified the engagement must be performed within a reasonable time. “What is a reasonable time” is in each particular case, a question of fact. The second general principle is stated in Sec.47 where the promisor has undertaken to perform without any application from the promisee, but the day of performance is fixed, the promisor may perform the promise during the usual business hours of the day and at the place where such promise ought to be performed. Since only the day of performance is stated but not the place, the promise should be performed at the place where its nature demands. Sec:48 of the Act elucidates the third principle, where the day of performance is fixed but the promisor has not undertaken to perform without application by the promisee it is the duty of the promise to apply for performance at a proper place and within the usual business hours. What is a proper time and place is in each particular case, a question of fact. To give an illustration if ‘A’ undertakes to deliver thousand mounds of jute to ‘B’ on a fixed day ‘A’ must apply to B to appoint a reasonable place for the purpose of receiving it and must deliver it to him at such place.

The discussion from the above lines it is clear that as far as Indian Contract Act 1872 is concerned it has settled principles with respect to traditional form of contracts. Section 28 of the Indian Contract Act states that agreements in restraint of legal proceedings are void. In quite a good number of cases it has been held that where two

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\(^{38}\) *Gopikrishna v. Nikkomal* (1873) 13 Beng LR 36

\(^{39}\) (1920) 32 All 629: 59 ICC 359

\(^{40}\) *Dhunjisha v. Forde* (1887) ILR II Bom 638
courts or more have jurisdiction under the Civil Procedure Code to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in any one of the courts is not contrary to public policy and it is not contravening section 28 of the Act. Therefore if on the facts of a given case more than one court has jurisdiction, parties by their consent may limit the jurisdiction to one of the two courts. But by an agreement parties cannot confer jurisdiction on a court which otherwise does not have jurisdiction to deal with a matter. In 1977 the Indian Contract Act was amended stating that all clauses which reduced normal period of limitation would be void to that extent.

4.4 Jurisdictional Concept in Electronic Commerce:

The transaction over the net has become so common and ‘e-commerce’ has become the buzz word in view of global operations. In the empirical study made by this researcher it is understood that nearly 70 percent of the general public feel that transacting online is very essential and the greatest advantage is overcoming the geographical barriers. Little do they know about the various legal intricacies involved? The whole world is heading towards fast technological advanced state of life where every house is transacting online for some reason or other. It can be either be invoked for availing services, or for disposing of goods or for buying goods, be it clothing to fit from head to toe, electronic gadgets or anything and everything. As far as there are no issues law does not play a role. Only when issues start arising legal provisions come into play. For instance a person in India downloads music from a paid website and the payment is made through either a credit card or debit card. Unfortunately there is a failure in the download and the person is unable to download the music. Now he decides to initiate the law in force. The legal intricacies involved are whom should he sue, where he will be residing since the transaction has occurred on the net, how to fix the jurisdiction say if the site itself is based in a server in France and the owner happens to reside in Singapore, how should the legal actions be initiated. Such critical issues are unanswered to a great extent. Such issues have created complete chaos and confusion that plague judicial decisions in this area of internet jurisdiction. Practically the effectiveness of a legal system is determined by its political and geographical boundaries. There are basically two issues that arise while determining the jurisdictional aspect of a contract. One is the jurisdiction under which the contract was formed and the other issue is whether there is
any superseding legislation that annuls or hampers such a contract clause. Jurisdiction is the geographical boundary within which a court hears and decides a case. Without a proper jurisdiction, the judgement pronounced by the court would be ineffective. In traditional form of contracts there are settled principles and legal provisions. It is therefore easy to fix the jurisdiction of the parties. But in this emerging concept of internet jurisdiction, multiple parties from various parts of the world are present and the parties have only virtual access with each other. For determining the traditional jurisdiction generally the residence of the defendant and the place where the cause of action arises play a pivotal role. It is impossible to apply the conventional principles for determining jurisdiction aspects in cyberspace. Imposing the traditional common law principles of jurisdiction to the borderless world of Internet transactions has proved to be extremely challenging for the Courts and has resulted in the application of a myriad of different tests and principles. It has been subject to much of scholarly debate. As long as the laws of each jurisdiction differ in material ways from that of others, questions will continue to arise in interpretation and enforcement where there is any cross border element of electronic transaction. The researcher has made an attempt to study the jurisdictional laws and principles applicable to United States because in India it is in a very nascent stage, that apart Indian laws have been framed borrowing the key principles to determine jurisdiction in cyberspace contracts. Though the binding nature may not be there yet these have a persuasive value and the Indian Courts may consider the same. The US Restatement of Conflict of Laws, first promulgated in 1934, created a series of simple mechanical rules for choosing as to which law could be applied in inter jurisdictional litigation. For contracts, the First Restatement applied a similarly formal rule; the law of the place where the contract was made would govern the validity of a contract. The place of making was defined as the place where the principal event necessary to make a contract has occurred. In the First Restatement real property was

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41 Ruth Orpwood, Legal Counsel Dell Canada, “Electronic Contracts: Where we have come from, where we are, and where we should be going” — International In House Counsel Journal, Vol. 1, No.3, Spring 2008, 355 – 366


governed by the lex-situs-the law-of its physical location. These rules were being modified by the Second Restatement. In 1971 a rule was laid down that “when faced with a choice between jurisdictions, courts should apply the law of the jurisdiction with the most significant relationship to the litigation. This approach provides much less guidance to a court than the formal First Restatement. The Second Restatement added flexibility but of course it lost in certainty and consistency. To assist Courts in weighing the importance of the contacts between various jurisdictions and the dispute, the Restatement provided seven criteria: (1) The needs of the interstate and international system, (2) the relevant policies of the forum, (3) the relevant policies of the interested States, (4) the protection of justified expectations, (5) the basic policies underlying the particular field of law, (6) certainty and uniformity of result, and (7) ease determining and applying the law.

4.4.1 Pre Long Arm Statute Period

Any sovereign state has the exclusive jurisdiction, power and authority over the persons and property only within its territorial jurisdiction and not on outsiders or persons who do not fall within their territorial jurisdiction. In Pennoyer v. Neff it was held that only in case a person was served process when he was physically present within the territory of the state, the court would have personal jurisdiction over a person. The court would attain “in rem jurisdiction” over a non resident who owned a property situated within the State’s territory. The State in this case would be required to satisfy that the plaintiff had duly served the process and then it would attach the property before entry of judgement. On enactment of the 13th amendment, the non-resident defendant could claim that asserting such jurisdiction ‘the in rem jurisdiction’ by a foreign State clearly violated the due process rights.

4.4.2 Long Arm Statutes:

The enactment of long arm statute allowed the local courts to exercise personal jurisdiction over non-residents as long as it complies with the principles of due process elucidated in the 14th amendment of the Constitution of United States. In Hers v. Pawloski

44 1995 US 713 (1877)
45 Burke, Prof Dr. John Ia, Lex 2K, “Conflict of laws” @ http://www.lex.2k.org/site/Introduction.html (Last accessed on June 18, 2013)
the Supreme Court of United States upheld a Massachusetts Statute that provided that the non residents who use the roads in Massachusetts would be deemed to submit to jurisdiction in Massachusetts as legally valid.

### 4.4.3 Minimum Contacts Test

In the year 1945, the United States Supreme Court in *International Shoe Company v. Washington*[^48] created a “Minimum Contacts” test for States to use as a basis for exercising jurisdiction over an out of State defendant. The Court stated that to the extent that a corporation enjoys the privilege of conducting activities within a State, it also enjoys the protections and benefits of that State. Since these privileges may also give rise to obligations which arise out of or connected to the activities within the State requiring a corporation to answer to a suit in that State, is not an undue burden. This test has been modified to include individuals also[^49]. To conclude it can be stated that according to this Minimum Contact Test, a State can sue a non-resident foreign corporation if the corporate satisfies the “Minimum Contacts” with the Foreign State and principles of justice and fair play have been duly considered; minimum contacts means physical contacts or presence within Forum State[^50].

### 4.4.4 General Jurisdiction and Specific Personal Jurisdiction

General jurisdiction is attracted in case a non-resident defendant has such substantial contacts with the State, so that personal jurisdiction will be invoked despite the cause of action not being related to the defendant’s contacts with forum State as held in *Perkins v. Benguet Consolidated Mining Company*[^51]. In order to establish specific jurisdiction the cause of action should be related to the defendant’s contacts and a three prong criteria needs to be satisfied they being

[^47]: 273 US 352 (1927)
[^48]: 326 US 310 (1935)
[^51]: 332 US 337 (1952) 337
a) The defendant ought to have purposefully availed himself of the privilege of transacting business within the Forum State.

b) The cause of action should have arisen from the defendants activities within the Forum State.

c) Exercise of jurisdiction should be fair and reasonable in the facts, circumstances of the case.

In *Cyber shell Inc v. Cyber shell Inc,* this case is worth examining as a typical example of a fact situation, which involves a conflict over jurisdiction. The problem involved in this case is with respect to a service mark dispute between two corporations, one at Orlando and another at Arizona. The Court had to address the issue of whether the mere use of a website by the Florida Corporation was sufficient to grant the Orlando Court Jurisdiction. The decision of the Court was negative. The US Supreme Court categorically stated that it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the Forum State, thus invoking the benefits and protection of its laws. Here the Court did not accept the argument of the plaintiff that by employing a web page, without a web publisher was subject to jurisdiction in the plaintiff’s forum. The Court also rejected the plaintiff’s reliance on the “Effects Test” holding that the test does not apply with the same force to a corporation as it does to an individual, because a corporation does not suffer harm in a particular geographic location in the same sense, which an individual does.

In *Burger King Corp v. Rudzewicz,* the Supreme Court held that a Court of a Forum State could exercise general jurisdiction over a person or property of the non-resident, if the defendant has “Systematic and continuous contacts” with the Forum State. The Court has explained the phenomenon in case of targeted contacts with the Forum State. In such a case of purposeful availment, the defendant would be subject to any

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53 1997 US App Lexis 3387
55 Targeted contacts means where the defendant has had financial gains or intentionally initiated contacts within the Forum State.
litigation in which the Forum State assumes specific jurisdiction. The Court held that it is necessary to consider various factors to determine the reasonableness, inter alia assessing the burden on the defendant, plaintiff and Forum State’s Interest and the interest of inter state judicial system in resolving the matter. In *Hanson v. Denckla*\(^{56}\), the Court held that a non-resident defendant should reasonably expect that he may be subjected to legal proceeding in a foreign Court if he “purposefully avails the benefits of conducting business in the foreign State and enjoys the legal protections granted by that State for conducting its business. The application of “Minimum Contacts Test” was further clarified in *Worldwide Volkswagen Corporation v. Woodson*\(^{57}\), by the Supreme Court in the 1980’s. In this case a resident of New York purchased a car from a Newyork based dealer. After sometime the Newyork buyer shifted to Oklahoma where he met with a motor accident. A legal action was filed in Oklahoma by the buyer alleging that the vehicle was defective. The Supreme Court held that defendant did not maintain “Minimum Contacts” with the State of Oklahoma as he has neither advertised nor transacted any business in Oklahoma. The Court established that the purposeful availment criteria will be fulfilled if the non-resident defendant has delivered its product into the stream of commerce and the same is done with expectation that the product shall be purchased by consumers within the Forum State. Subsequently in 1987 the Supreme Court of US clarified that if a defendant is aware that through his business his product may be transferred into Forum State, it will not satisfy purposeful availment unless he has advertised or solicited business or otherwise purposefully availed within Forum State\(^{58}\). The Courts have assumed specific jurisdiction over non-resident defendants even when a slightest contact with a Forum State was made by a non-resident, for instance sending of couple of cease and desist letter was held to be sufficient contact to attract specific personal jurisdiction\(^{59}\). Thus the Courts have expanded and contracted the contacts text over time, in order to keep pace with simultaneous changes in science and technological advancements. The law Courts should definitely permit this development in the Court

\(^{56}\) 357 US 235 (1958), 253

\(^{57}\) 333 US 286 (1980)

\(^{58}\) *Asahi Metal Industry Company Ltd., v. Superior Court of California* – 380 US 102 (1987)

\(^{59}\) *Meade Instruments Corporation v. Reddwarf Starware LLC* – 37 US Pq 2d 1157 (Dc Cal 1998)
proceeding failing which it would be lagging behind compared to other sectors. The applicability of “Minimum Contacts Test” to the offline and conventional disputes involving citizens and corporate who do not belong to the Forum State have been analysed. In the foregoing lines the applicability of this test for Internet or online transactions will be discussed.

4.4.5 Jurisdiction Concept in Internet Transactions:

In the traditional contracts, borders can be clearly marked and the range of culture, law and the geographical boundaries can be demarcated visibly and accurately. But in cyberspace it is difficult to earmark the boundaries as it has no specific borders. The relationship between geographical boundaries and culture is constant but the same geographical boundaries and legal boundaries vary. As a result conflicts arise when this research is conducted by correlating the geographical and legal boundaries and the main elements are categorised into four heads as power, legitimacy, effects and notice. To have effective laws government should be sovereign and should possess power to exercise control over physical space and also should be capable of enforcing these laws. A law in the physical world applies only to those people and assets who reside within its geographical area and exclude others. Further the government acquires legitimacy to enforce laws only if the majority of the residents recognise the law. Law in the physical world do not solely depend on the physical border but also their relationship with the property of any resident, both for persons as well as corporates. The researcher understands that the elements discussed above are operative in physical world but these may not exactly fit in the virtual world. But the extent of jurisdiction based on contracts concluded or performed in electronic commerce needs to be taken care and it ought to be interpreted differently than the traditional form. Only concept that has to be borne in mind is that when laws are framed for internet jurisdiction, it should be in harmony with the laws of other countries. An attempt has been made through legislation to bring about a rational basis for determining proper law to handle certain types of contacts. The draft of the Uniform Commercial Code (March 1997) attempts to address the law relating to multi jurisdictional transactions. It reiterates that a choice of a law term in an agreement

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60 Amitabh Bagchi v. Ena Bagchi, AIR 2005 Cal 11
is enforceable. If an agreement does not have an enforceable choice of law terms then the law of the land where the licensor is located or where the right has occurred or where rights to have occur or the law of jurisdiction where the corporate is located or where the licensee receives physical possession of the copy or where receipt was to have occurred will be applied in the event of non delivery. Though efforts have being taken into consideration to apply the same for internet paradigm, no special law exists to address jurisdiction issues on the internet; hence Courts have to apply traditional analyses of jurisdiction of cases in this new scenario. Territorial border generally speaking delineate areas within which different sets of legal rules apply. Jurisdiction in such a world is the reflection of the sovereignty and political power of a State. The political entity has full jurisdiction over its subjects and over acts committed within such jurisdiction\(^{61}\).

Territorial notions of jurisdiction have made a relatively smooth transition into the online internet transactions also. The conventional notions of jurisdiction have adapted well to this new cyber environment. Cyber space has expanded the arena for interactions of all sorts and enables the parties to reach out from different geographical locations and thus possibly creating “Minimum Contacts” necessary for personal jurisdiction. It can also be stated that the traditional principles of jurisdiction are adaptable to cyber space because they consider the physical location of the parties and the conduct which direct at the Forum State. The customary component like location and other conventional methods of identifying the jurisdiction can be adopted.

### 4.4.6 Applicability of Minimum Contacts Test for Internet Transactions:

Applicability of Minimum Contacts Test to offline and conventional form of contracts has been discussed earlier. In the ensuing lines applicability of the same in online transactions has to be studied by taking into consideration the decided case laws.

The landmark decision was given in CompuServe Inc v. Patterson\(^{62}\); the plaintiff in this case was resident in Ohio rendering internet access to online services and distributed share ware, computer software created by CompuServe. The defendant was a

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\(^{62}\) 89 F 3d 1257 (6th cir 1996)
resident of Texas and a provider of shareware. The software was placed on the plaintiff’s system for downloading. Patterson signed a ‘Shareware Registration Agreement’ (SRA) with CompuServe through an electronic contract. According to the terms and conditions, the governing law of the contract was chosen as Ohio law. Patterson transmitted his shareware to CompuServe in Ohio for almost three years. Subsequently CompuServe began marketing its own software for web navigation which was quite similar to the Patterson’s shareware. Patterson alleged CompuServe’s acts were infringing his trademarks and alleged that CompuServe was carrying on deceptive trade practice. When Patterson demanded at least $100,000 to settle the claim, CompuServe filed a suit for declaration in Ohio seeking a declaratory order to prove its innocence. Patterson challenged the personal jurisdiction of the Court. The main issue centred on the question as to whether Patterson’s ‘electronic contacts’ with Ohio would entitle the District Court of Ohio to exercise specific personal jurisdiction over him. The 6th Circuit Court of appeals considered the following important tests laid down in Burger King case in order to test the Minimum Contacts Test. Patterson could reasonably anticipate being hauled into an Ohio Court as he consistently transferred his software from Texas to CompuServe system based in Ohio which marketed his software and was accessed by Ohio subscribers. Patterson knowingly reached out to CompuServe’s Ohio home and he has benefitted from the company is handling of his software and fees also generated from the same place. These facts fulfilled a substantial connection with Ohio and the “Purposeful availment” prong of specific personal jurisdiction test is also complied with. The Court further held that Patterson satisfied the “arise from” prong of the specific personal jurisdiction test. It was further added that any cause of action for infringement of trademark would lie in Ohio because Patterson marketed his software exclusively through CompuServe’s system located in Ohio. The legal notices through electronic mail were served on CompuServe by Patterson in Ohio and therefore the “arise from” was satisfied. The criteria of “fairness and reasonableness” were also satisfied as Patterson gained financial benefits from his contacts with Ohio. He also had given consent in the contract (Shareware Registration Agreement) to submit to Ohio law. Taking into consideration the aforesaid reasoning the Court rejected Patterson’s motion to dismiss the case for lack of
personal jurisdiction. The Court also broadened the application of Minimum Contact Test to cover the contacts that occurred in cyberspace.

In another landmark case *Maritz Inc v. Cyber gold Inc* the Court had discussed about the “active contact standard”. The plaintiff in this case is a Missouri based corporation that had registered a trademark named “Cyber gold”. The defendant Cybergold.com was a California based corporation that had a domain name registration for “Cyber gold.com”. The defendant did not have any physical presence in Missouri. The defendant planned to launch an internet mailing service wherein a user would subscribe to the defendant’s mailing list and the defendant could sort out the user’s profiles and deliver appropriate advertisements. The plaintiff Maritz sued the defendant for trademark infringement and the defendant objected to the matter on the ground of lack of personal jurisdiction. Cyber gold had consciously decided to transmit advertising information to internet users, knowing that such information would be transmitted globally. The Court held that the defendant purposefully availed itself of doing business in Missouri. Thus the Court took the view that it had personal jurisdiction to decide the case in Missouri. The clear evidence of 131 Missouri residents subscribing to the defendants mailing list and the website of the defendant with an automated component email reply system, further strengthened the case. The ‘automated component’ solicited internet users with no restriction of access to any user of any particular geographical area, adding another dimension to the “active contact standards” whether personal jurisdiction may be asserted over a non-resident defendant.

In *Panavision International LP v. Toe pen*, Panavision had registered trademarks ‘Panavision’ and ‘Panaflex’ in motion pictures and T.V., camera and geographical equipment. The defendant, Toeppen in bad faith registered the domain names panavision.com and panaflex.com. The defendant did not use the domain name for any promotion or sale of any goods nor offered any services through these websites. When the defendant was asked to transfer the domain names to the plaintiff, he demanded $13,000 from the plaintiff. The Court held that Toeppen’s illegal act was purposefully directed towards California and was related to the cause of action. The Court

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63 937 F supp 1327 (ED. Mo.1996)
64 935 F supp 1296 (CD Cal 1996)
hold that exercise of personal jurisdiction is justified in a case where non-residents acts are aimed at causing intentional damage to a resident in a Forum State. Hence any act over the internet involving tortuous activities can also attract the ‘active contact standard’ and fulfil the parameters required for the personal jurisdiction analysis.\(^{65}\)

### 4.4.7 Jurisdictional Concept of Active and Passive Websites

The websites have been divided into two categories on the nature of their format for the purpose of fixing the jurisdiction. Passive websites provide information in a “read only” format. Active websites are interactive sites that encourage the browser to enter information identifying the browser and providing background information on the browsers internet or buying habits.

In a recent case\(^{66}\) the plaintiffs were carrying on their business communication and were providing services through the internet. Amongst the services provided by the plaintiffs, they were publishing advertisements of their clients by setting up web pages. The plaintiffs also provided services such as sales of cinema tickets of selected theatres in Bombay and used to make booking of hotel rooms, selling of books and other goods. The services of the plaintiff were under trademark “REDIFF” which was very widely published. The turnover of the plaintiff group of companies was over Rs.250 crores and the individual turnover of the plaintiff’s company was also substantial. In this case both the parties, the plaintiff and the defendant had common field of activity and both were operating on websites and were providing information of similar nature. Both the plaintiffs and the defendant offered facility of sale of books, music, cassettes and compact discs. They had offered a chat line and offered a cricket opinion poll. There could be no doubt that the two market or domain names “REDIFF” of the plaintiffs and “RADIFF” of the defendants were almost similar. When both domain names were considered it was clearly seen that two names being almost similar in nature, there was every possibility of internet user being confused and deceived in believing that both domain names belonged to one common source and connection although the two belonged to two different persons. The defendant’s explanation regarding coining of the

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\(^{66}\) Rediff Communication Ltd., v. Cyber booth, AIR 2000 Bom 27
identical domain name was completely fake and unbelievable. The only object in adopting the domain name “RADIFF” was to trade upon the reputation of plaintiff’s domain name. The plea that the users of the internet are persons skilled in the use of computer and that they can differentiate the two domain names was not accepted by the Court. There was a clear intention of deception. Hence the Court granted interlocutory injunction restraining the defendant from using the domain name “RADIFF”. In Indian company law, the Act specifically states that identical names should not be registered.\textsuperscript{67}

In \textit{Zippo Manufacturing Co. v. Zippo.com Inc.},\textsuperscript{68} A California based Company named Zippo rendered Internet news service. The users in Pennsylvania constituted 2 percent of Zippo Dot’s clients. The defendants used the word ‘Zippo’ to render its online news service in Pennsylvania. The plaintiff company produced tobacco lighters and registered its Trade mark as “Zippo”. The plaintiff Zippo manufacturer contended that the defendant by transacting business in Pennsylvania had caused infringement of its trade mark “Zippo”. They further alleged that the defendant had diluted their registered Trade mark. Out of the 1,40,000 paid subscribers of the defendant worldwide nearly 3000 were residents of Pennsylvania. Those subscribers contracted to receive the defendant’s service by visiting the website and filling out an online application. The defendant also entered into agreements with seven Internet access providers in Pennsylvania to allow subscribers to access its news service. The Court concluded that because of the 3000 Pennsylvania subscribers and agreements with Internet service providers the defendants had purposefully availed of Pennsylvania’s jurisdiction. The defendant had minimum contacts with the Forum State. When a case was filed in the United States District Court of Pennsylvania; the Court held that it had specific jurisdiction over the defendant. The “theory of specific personal jurisdiction” was satisfied as there were active purposeful contacts with the Forum State as Zippo Dot contracted with local service providers and with residents of Pennsylvania who were its customers. The litigation also arose out of the defendant’s activities in Pennsylvania and it was observed that there would be no hardships on the defendants to defend themselves in Pennsylvania. In this case mere use of its name in Pennsylvania fulfilled requirement that the litigation arose out of its contacts with the

\textsuperscript{67} Sec:16 – Indian Companies Act 2013.
\textsuperscript{68} 952 F Supp 1119 (DCWD Pa 1997).
Forum State. The Court for the first time laid down the Zippo Sliding Scale Approach on the nature and quality of commercial activity conducted over the Internet.

4.4.8 Interpretation of Zippo Sliding Scale Test

According to the Test on one extreme end are “Passive websites” that disseminate mainly information to internet users and would not attract exercise of personal jurisdiction. It means a defendant who has simply posted information on a website accessible by residents of foreign jurisdiction would clearly not be appropriate. In the middle of the spectrum are the “interactive websites” where internet users may input some information on the website. The middle ground thus consists of websites where a user can exchange information and a Court must determine whether to assert jurisdiction by “examining the level of interactivity and commercial nature of the exchange on the website”. On the extreme other end of the spectrum are the active websites wherein the defendants undertake activities over the internet and constantly interact with the website. That meant that at this end of the spectrum a defendant who enters into continuing contracts with residents of foreign jurisdictions, where an assertion of jurisdiction would be appropriate. No matter where the parties may fall on the spectrum they should recognise that engaging in commercial activity over the Internet may spawn liability in foreign jurisdictions, if that activity consists of something more than a simple posting of information as held in Maritz Inc v. Cybergold Inc.⁶⁹

In the Zippo case the Court took the view that the defendant would fall in the category of active websites and held that the exercise of personal jurisdiction over the defendant was fair and justified. In American Network Ins v. Access America/ Connect Atlanta Inc⁷⁰, a Georgia defendant was hauled into a New York Court. A New York plaintiff sued the Georgia defendant for Trademark infringement and unfair competition in the U.S. District Court for the Southern District of New York. The plaintiff, a provider of similar consulting services to those provided by the defendant, claimed the mark used by the defendant, “<America.Net>”, infringed the plaintiff’s mark <American.Net>. New York’s long arm statute includes a provision for jurisdiction over an out of State tort

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⁶⁹ 937 F Supp 1328 (1332 – 33) ED Mo 1996
⁷⁰ 975 F Supp 393 (S.D.N.Y. 1997)
feaser when harm is felt within the State if the defendant has reason to expect in State consequences and the defendant derived substantial revenue from interstate or International commerce. Since the plaintiff’s business was located in New York, and the defendant was aware of the same, it was reasonable for the defendant to expect that the publication of the offending mark on the Internet would result in harm suffered in New York. The web page alone would not have been enough but that additional contacts with six New York subscribers to the advertised services established purposeful availment. Those subscribers evidenced the defendant’s efforts to market his services in New York whereby making a New York as a reasonable expected Court jurisdiction. Additionally the Court held that these subscribers evidenced the defendant’s effort to market his services in New York, making a New York Court appearance a reasonable expectation. Since marketing was the basis for the cause of action, the defendant’s online actions were found to be directly related to the complaint.71

In Resucitation Technology Inc v. Continental Health Care Corporation72

The plaintiff is an Indiana based company contacted by the defendants, through its website. The parties were discussing a joint venture deal whereby the plaintiff’s creditor would be paid and initially public offering will be made in exchange for acquiring certain patent rights. The parties had signed a confidentiality agreement but the discussion did not materialise as intendend, hence the plaintiff sued the defendants for breach of confidentiality conversion and declaratory order for absence of contractual relationship. While accessing whether the defendants transacted any business activities in Indiana, the Court considered the “level of interactivity and the commercial nature of the exchange of information”. The Court held that the ‘quality of those electronic contacts is measured with reference to the intended object of that activity’. The Court analysed the level of internet activity that prevailed between the parties during the transactions. One or two inquiries about some Indiana goods or services would not support the local jurisdiction. In this case the parties had been interacting through email messages over a long period of time and there were approximately 80 email messages exchanged between the parties.

71 Jeffrey R Kuester & Zenifer M.Graver, “Personal Jurisdiction on the Internet; Where is Cyberspace?” @ http://www.tkhr.com/articles/personal.html/ (Last accessed on January 11, 2014)
Hence the Court could conclude that the defendants intended objects of the contacts were to transact business and develop the business in Indiana. There were also duly signed agreements between the parties, meetings, exchange of mails and fax, further strongly indicating that the defendants intended to create a long term relationship and aimed to develop business in Indiana.

In another decided case *Bensusan Restaurant Corporation v. King*\(^73\) since 1980 the plaintiff in this case Bensusan was running a New York based ‘Blue Note Jazz Club’ and owned a federal Trademark registration for the mark ‘Blue Note’ and used this mark locally. The defendant a Missouri club had been using the mark prior to the New York based club and had continued the use of the name for its business activities. In the year 1996, the Missouri club created a website that provided general information about the defendant’s club, new events and procedure to buy tickets. The plaintiff sued the defendant complaining of infringement of trademark, dilution and unfair competition by filing the case in Federal Court in New York. Missouri club’s websites included a hyperlink to the website for the New York Blue Note club. It also had a disclaimer that “Blue Note” should not be confused with one of the world’s finest Jazz clubs, the Blue Note located in the heart of New York Greenwhich village. The Court considered New York’s Long Arm Statute and observed that a New York club’s user could visit the Missouri club’s website to book tickets for an event but, to in fact purchase the tickets; a user was required to call the Missouri club to a telephone number shown on its website and collect tickets at Colombia. The District Court took the view that an action for trademark infringement would lie in Missouri and not New York as only general information was shown on defendant’s website which cannot be equated with active marketing or promotion or sale or effectively targeting the customer in New York. The website was purely information based and also contained a disclaimer to inform the viewers that it had no association with the New York based Blue Note club. Therefore, the Court was of the opinion that no tort was committed by the defendant outside the Forum State that caused an injury to the plaintiff. The Court held that the defendant’s creation of the website did not alone satisfy the requirement of New York Long Arms Statute and excise of personal jurisdiction would violate the constitutional Due process principles.

\(^73\) 937 F Supp 295 (1996) affirmed 126 F 3d 25 (2\(^{nd}\) cir 1997)
In *EDIAS Software International, LLC v. BASIS International Limited*\(^74\) the parties had signed an agreement wherein EDIAS became a distributor of software manufactured by BASIS in European Region. New Mexico was the governing law of the contract and the contract was also signed in New Mexico. BASIS terminated this agreement due to a dispute with EDIAS and accordingly informed its customers and staff members. It also displayed on its web page that EDIAS had not granted written consent to sell its products at a fair market price and to provide adequate technical assistance. The plaintiff filed the suit in Arizona alleging that the defendant by terminating the agreement, had breached the contract by placing the alleged reasons for termination posted different defamatory and libellous statements causing tortious interference with the contract. The defendant challenged the suit for lack of personal jurisdiction as it was based in New Mexico and had no office or employee in Arizona. The Court in this case found that the defendant had sufficient purposeful availment with Arizona to justify the exercise of personal jurisdiction over it. The defendant had made several telephone calls, faxes, emails with the plaintiff in Arizona for the contract in question and conducted meetings within the Forum State. They had also sold to the plaintiff its software and to Arizona customer’s software worth $50,000. As regards the posting of defamatory statements, the Court took the view that the defendants could foresee that its activities shall have a direct impact in Arizona and fulfils the ‘effect test’. The Court concluded that BASIS had purposefully availed the benefits of doing business in Arizona and the exercise of jurisdiction over the defendants satisfied the constitutional Due process requirements\(^75\).

In *Hall v. LaRonde Hall*\(^76\) the plaintiff rendered sales and technical services to a New York based company selling computer software. The contract authorised LaRonde to sell license for use of computer software to the public. The defendants compensated the plaintiff by paying $1 for every license sold. Although initial payments were made to the plaintiff, subsequently the defendant did not remit further payment although he continued to sell the license. The plaintiff rendered all their services in California and had

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\(^74\) EDIAS Software International, 937 F Supp 313 (D. Ariz 1966)

\(^75\) Karnika Seth – “*Computer Internet & New Technology Law.*” Lexis Nexis Butterworths Wadhwa Nagpur (1\(^{st}\) edn. 2012) P.30

\(^76\) Hall, 66 cal Rptr2D 3999 (Cal Ct App.1997)
transacted with the defendants only through email and telephone calls. The Court held that such electronic contacts would satisfy the Minimum Contacts Test and further expressly held there is no reason as to why requisite Minimum Contacts cannot be electronic.\textsuperscript{77} Another Internet advertising case with a bit of twist is \textit{Minnesota v. Granite Gate Resorts Inc}\textsuperscript{78} which involved a suit brought by Minnesota Attorney General alleging deceptive trade practices, false advertising and consumer fraud against the defendant, a Nevada corporation advertising an online gambling service. The advertisement was not active and visitors to the site were directed as to where and how to sign up for the service. The site also contained a bold notice to users to check with their State and local authorities regarding this type of wagering before registering with the defendant. Despite the language the defendant employed and the passive nature of its website, the Court found that defendant had established a sufficient number of contacts with the State and could reasonably anticipate being hauled into Court in Minnesota. Regarding the quantity of advertising acts and contacts with the Forum and supporting \textit{Inset}\textsuperscript{79} the Court stated that “once the defendant places an advertisement on the Internet, that advertisement is available 23 hours a day, seven days a week and 365 days a year, to any internet user until the defendants take it off the Internet”. Looking into the number of times a resident of the Forum contacted the defendant’s page, the Court noted that at least 238 computers located in Minnesota accessed the defendant’s website\textsuperscript{80}. The parties in \textit{Heroes Inc v. Heroes Foundation}\textsuperscript{81} were charitable organisations located in Washington D.C. and New York respectively. The plaintiff brought a trademark infringement action in D.C against the defendant. The New York defendant maintained a website providing information about its organisation and its members. The site encouraged readers to send emails to the defendants and to make donations. The website also provided a tollfree number for that purpose. Due to these internet contacts, and because the defendant placed advertisements in a D.C newspaper the Court held that the defendant had a substantial contact which is

\textsuperscript{77} King, David D., University of Louis Ville cases, http://Louisville.edu/faculty/ddking/cec311/cases hall v. La ROnde.doc/view (Last accessed on July 30, 2013)
\textsuperscript{79} \textit{Inset Systems Ins v. Instruction set 937 F Supp.161 (D.Conn.1996)}
\textsuperscript{81} 958 F. Supp. 1 (D.D.C 1996)
necessary to confer jurisdiction to a D.C Court. Although the Court stated that since the web page is not the only contact, it need not decide whether the web page alone would confer jurisdiction. The Court added that since the home page is a sustained contact with the District; it has been possible for a District resident to gain access to it at any time since it was first posted.

Passive activity is considered a ‘Posting’ of information, lacking interaction is typically an advertisement on the web. The first Federal case to decide whether an advertisement posted on a web site is sufficient to confer jurisdiction over an out of State defendant was laid down in *Inset Systems, Inc v. Instruction Set Inc.*\(^{82}\) Here the case was related to an alleged infringement involved by the Massachusetts defendant’s use of the word “Inset” in its internet domain name and in a toll free telephone number. The only contacts the defendant had with Connecticut were its website and a toll free number both of which advertised, the services of the defendant. The Court stated that the defendant directed its advertising activities on the internet and its toll free number to all States. It held that the defendant was subject to jurisdiction in Connecticut because its advertising activities were purposefully directed to Connecticut. This goes to suggest that advertising over the internet confers jurisdiction in any State or Country where it could be accessed. The Court came to a conclusion that since the defendant “purposefully directed its advertising activities towards this State on a continuing basis, it could reasonably anticipate the possibility of being hauled into Court here. The researcher is of the opinion that mere posting of advertisement on a website should not be considered as sufficient enough to confer jurisdiction. The Court could have insisted on the presence of some other factors in addition to those it had relied upon for the purpose of fixing the jurisdiction.

In *Maritz, Inc v. Cyber gold, Inc*\(^{83}\) Jurisdiction was found where browsers were encouraged to add their address to a mailing list that basically subscribed the user to the service. The Court found as many as 131 Missouri residents had visited the interactive web page which was itself considered as a sufficient ground to fill the jurisdiction. The Court ruling can be distinguished from “Inset” because in Maritz the site is

\(^{82}\) 937 F. Supp. 161 (D. Conn. 1996)  
\(^{83}\) 937 Supp. 1328 1332 – 33 (E.D Mo. 1996)
interactive and that it responded automatically to all internet users requesting to the placed on the mailing list. The Court observed that even though the defendants characterised their website as “Passive” its intent was to reach all internet users, anyway that does not necessarily make it active.

The most recent case following the “Inset” rationale is Telco Communication v. An Apple A Day\textsuperscript{84} where the US District Court for the Eastern District of Virginia held jurisdiction as proper. The Virginia plaintiff sued the Missouri defendant for inter alia, defamation in internet press releases from which the price of the stocks of the plaintiff suffered. The Virginia long arm reaches tortfeasors whose extraterritorial actions result in injury within Virginia when that tortfeasor regularly conducts or solicits business. Here the Court held that the defendant admitted that the press releases were advertisements and therefore, a solicitation of business over the internet. The Court also stated that the acts amounted to torts committed in Common wealth because the internet service providers and users in Virginia, the alleged tort would not have occurred in Virginia. The defendant could have reasonably expected to be hauled into a Virginia Court. The Court supported its decision stating that the defendant’s activity is within the reach of the states long arm statute, which allows personal jurisdiction over a defendant who caused a tortious injury in the State by an act outside the State. If the defendant “regularly does or solicits business or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services that are rendered in Virginia.

On analysing the various decided cases, it is understood that Courts find it extremely difficult to fix the jurisdiction because it is difficult to understand if the web has been used solely or primarily as an advertising medium rather than a medium of consummation of commerce\textsuperscript{85}. In Hearst Corp v. Gold Berger\textsuperscript{86}, the US Federal Court holding that New York long arm statute did not permit a federal Court to exercise personal jurisdiction over an out of State defendant solely because the defendant’s website is accessible to and has been electronically visited by computer users in

\textsuperscript{84} Civ. Act No. 97 – 532 – A (E.D. Va 1997)


New York. The plaintiff in this case was the owner and publisher of Esquire Magazine brought a trademark infringement action against defendant Ari Goldberger, who has established an internet Domain name and website, “ESQWIRE.Com”. This site offered law office infrastructure network services and legal information services. Defendant lived in Cherry Hill, New Jersy and worked in Philadelphia. The Court first held that Defendant did not transact business within the meaning of NY CPLR Sec. 301(a)(1)\textsuperscript{87} because Goldberger’s website is most analogous to an advertisement in a national magazine and New York law is clear that advertisements in national publications are not sufficient to provide personal jurisdiction under section 302(a)(1)\textsuperscript{88} nor was it a proper jurisdiction under CPLR section 302(a)(2)\textsuperscript{89} (committing of Tortious Act in New York). The Court noted that the Tort of trademark infringement occurs within New York. But the Court held that even if Goldberger’s internet website could be considered on offer for sale, whereas here gold bergers has no produce or service yet available for sale, jurisdiction does not exist in New York based merely on his placing the offer on the internet outside New York nor finally could the Court exercise jurisdiction under CPLR section 302(a)(3). (“Tortious Act outside New York causing injury in New York”). For CPLR Sec. 302(a)(3) to be applicable the defendant must be one who either (i) regularly transacts business or derives substantial revenue from goods used or consumed or services rendered in the State or (ii) expects his act “to have consequences in the State and derives substantial revenue from interstate or international commerce”. Regular solicitation in New York, plus a tortious injury in New York, will suffice for personal jurisdiction under section 302(a)(3)(i)\textsuperscript{90} even if there is no casual relationship between the

\textsuperscript{87}Sec.302 (1) United States District Court for the Southern District of New York holds that bank account may be sufficient to satisfy “doing business” test for a general basis of personal jurisdiction.

\textsuperscript{88}Sec.302. Personal jurisdiction by acts of non-domiciliaries. (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:

\( (1) \) transacts any business within the state or contracts anywhere to supply goods or services in the state;

\textsuperscript{89}Sec. 302(a)(2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act.

\textsuperscript{90}Sec. 302. Personal jurisdiction by acts of non-domiciliaries. (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, who in person or through an agent:
advertisement and the injury. But here even if Goldberger’s present internet website was considered a solicitation (since he does not yet have any product or service to sell it did not occur in New York this rendering section 302(a)(3)(i) is inapplicable and under Section 302(a)(3)(ii) Goldberger does not derive “substantial revenue or international commerce.” Indeed as the Court noted, it is undisputed that Goldberger’s business has not derived any revenue at this point.\(^91\) Again in *CD solutions, Inc v. Tooker*\(^92\), when the plaintiff the user of <cdss.com> domain name sought a declaratory judgement finding defendant’s CDS Trade mark invalid, the plaintiff asserted that the defendant’s use of the mark CDS in Texas permitted a finding of specific jurisdiction. The Court would not find specific jurisdiction because whether the defendant used the mark in Texas was irrelevant to the specific jurisdiction determination since the action before the Court did not arise out of or relate to defendant’s contacts with Texas. Further in *Weber v. Jolly Hotels*\(^93\) where the plaintiff Weber, a New Jersey resident brought suit as a result of injuries sustained while staying at defendant’s hotel in Jolly, the plaintiff asserted that New Jersey may exercise general jurisdiction over the defendant, an Italian corporation as a result of the defendant’s internet advertisements. Analogising the present case to instances that involve advertisements placed in “national publications” the Court concluded that internet advertising, by itself was not sufficient to confer personal jurisdiction upon a defendant. A finding of general jurisdiction, the Court noted, requires the defendant’s activity with the Forum State to be continuous and substantial a threshold requirement not established in this case. Indeed the Court observed that advertising on the internet is not tantamount to directing activity at or to purposefully availing oneself of a particular forum.

The sliding scale method laid down in Zippo case plays a pivotal role in jurisdiction matters. In Cyberspace passive website should not be the basis for fixing the jurisdiction of the Court in transactions happening over the net. The United States District

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\(^{91}\) David G post & Davis C Nunziato “*Personnal Jurisdiction, The Internet*”, Cyberspace Law Institute.

\(^{92}\) 965 F. Supp. 17 (N.D. Tex. 1997)

\(^{93}\) 977 F. Supp 327 (D.N.J. Sep 12 1997)
Court for the Southern District Court of Texas Houston Division expressly held in *Agar Corporation, Inc v. Multi Fluid Inc*\(^94\) that there were no grounds present for specific or general jurisdiction. In the subsequent cases which came related to cyberspace jurisdiction, the Courts adopted a contrary view stating that mere accessibility of a website alone would be insufficient to establish jurisdiction of a Forum State over a non resident. In the year 2000, a very interesting and a land mark case came up. *UEJF and LICRA v. Yahoo! Inc and Yahoo France*(*Yahoo Case*),\(^95\) French Court assumed jurisdiction over Yahoo! Inc, a company based in Santaclara country which had no physical presence in France. Certain France residents filed a complaint alleging that on Yahoo’s auction site third parties were offering Nazi Memorabilia for sale. Yahoo France was also made a party in the complaint which targeted the French audience. On May 22\(^{rd}\) 2000 the French Court gave its ruling holding yahoo is required to block access to its sites in France wherein Nazi Memorabilia were being sold as it comprised illegal activity in France. Two months time was given to yahoo to disable its access from France. Yahoo took the plea that selective technical blocking access cannot be undertaken, which was rejected by the Federal Court. As a result, website links to the Yahoo’s auction site were removed from Yahoo France site. However, Yahoo did not block access to French residents to its USA website and also did not post any warning message thereon. The French Court directed Yahoo to create a blocking system within 3 months time to prevent the netizens in France from accessing its websites; simultaneously it declared a fine of 100,000 Francs each day that Yahoo exceeds the stipulated time period. Paris Court relied on the criteria of mere accessibility of the website to determine and exercise jurisdiction in this case. This essentially negates the importance of effects test which requires a fulfilment of a foreseeable harm requirement. In fact the French Court observed that the harm caused by Yahoo’s displaying of Nazi material was unintentional character. Yahoo did not appeal on French Trial Court’s judgment and challenged the enforcement before the United States District Court. The Court held that the decision of the Paris Court is inconsistent with the first amendment to the Constitution of USA that guarantees freedom of expression and therefore it is not applicable in US. The LICRA & UEJF appeal decision


\(^{95}\) The Yahoo case Tribunal De Grande Instance De paris decided on 22\(^{nd}\) May 2000.
before the US Court of Appeal for 9th circuit. In 2004, the Court found that the District Court did not have personal jurisdiction over the appellant namely, LICRA & UEJF. The Court held that Yahoo had made no allegation of wrongful conduct by the organisation and concluded that the District Court was unjustified in exercising personal jurisdiction over LICRA & UEJF. According to Denis T Rice96, the site in question being an auction site, ‘the intent to target’ a given jurisdiction with certain products should not be imputed to sellers of the products using an auction site. Even stronger in the argument that no intent to target should be imputed to the auction operates who only provide ‘space’ where buyers & sellers convene.

The US Court of Appeal before deciding the above said Yahoo case had relied on Bancroft and Masters, Inc v. Augusta National Inc97 where the Courts observed that the exercise of jurisdiction is inconsistent with the requirement of minimum contacts and “fair play” and substantial justice where the non resident defendant has purposefully directed his activities in the Forum State including advertising and selling products or services to customers or performed an act by which he purposefully availed privileges of carrying on business in the Forum State and availed the protection of its laws also. If the claim of plaintiff is based on defendant’s business activities in the Forum State or if exercise of jurisdiction is considered to be reasonable, the exercise of jurisdiction over a non resident defendant would be justified.

In Resuscitation Technologies Inc v. Continental Health Care Corp98, the New York defendant had extensive communication with the Indiana plaintiff, including 80 – emails the Court in Indiana found the level of activity directed to Indiana was substantial thus giving Indiana personal jurisdiction over the defendant. In Cody v. Ward99 the Court found that the defendant’s telephone calls and emails to the plaintiff were sufficient contacts to satisfy due process. Here the defendant had communicated with the plaintiff

97 223 F.3d 1082,1086 (9th Cir. 2000)
98 1997 WL 138567 (S.D.Ind.1997)
directly through the telephone and email. The Court reasoned that given the nature and number of the defendant’s fraudulent misrepresentations to the plaintiff he could reasonably foresee being sued in Connecticut. The District Court recognised in ACLU v. Reno\textsuperscript{100} an email address provides no authoritative information about the addressee, who may use an email ‘alias’ or an anonymous remailer with the possible exception of an email to a known recipient most content providers cannot determine the identity and age of every user accessing their material. Thus except for email sent to a known recipient, it may be difficult to say that email distribution is a method by which a company purposefully avails itself of the privilege of conducting activities within the recipient’s Forum State.\textsuperscript{101}

In Mc Donough v. Fallon Mc Elligott Inc\textsuperscript{102}, a California Court reiterated the principles that the mere existence of a website that is accessible to California residents would not by itself attract personal specific jurisdiction over a non resident. The plaintiff was a photographer based in California filed an action against the defendant of Missouri alleging copyright infringement wherein the defendant reproduced a photograph of Charles Barkley a famous basketball player and published it in a magazine and also submitted it to a contest of advertising awards. The Court held that the accessibility of a website that may lead to jurisdiction. To the Forum residents alone is not sufficient to sustain personal jurisdiction over a non resident defendant and also where the cause of action arose does not arise from operating the site itself. The defendant’s company had neither an officer nor employees in California. The plaintiff filed a case against the defendant for copyright infringement, unfair competition and breach of plaintiff’s right to privacy and publicity. The Court dismissed the motion for lack of personal jurisdiction on the ground that mere existence of website that is accessible to California residents would not by itself attract personal specific jurisdiction over a non resident. Email may also contribute to a finding of personal jurisdiction. Many websites allows users to contact a business or individual via Email. Although Email alone probably will not confer jurisdiction, its routine use may suffice to find jurisdiction in the same way that

\textsuperscript{100} 929 F Supp 831
\textsuperscript{101} Hanson v. Dencklay (1958) 357 US 235 (203)
\textsuperscript{102} Mc Donough, 30 USPQ 2d (BNA) 1826 (S.D.Cal 1996)
frequently sending or receiving regular mail from a State leads to jurisdiction. In Scher v. Abrahams Court denied even though the defendant’s site allowed users to contact him via E-mail and he sent his publication to them via E-mail. The Courts look at the volume of E-mail or communications exchanged to grow jurisdiction. In many cases Courts often analogue to non internet contacts such as those involving national advertising simply placing an advertisement in the national newspapers is not enough to confer jurisdiction. But if the advertisement results in substantial and or systematic business with a Forum State.

4.4.9 Application of the “Effects Doctrine to Determine the Jurisdiction

The United States District Court had laid down the “Zippo sliding scale” approach, where one extreme is the “Passive website” which would not attract exercise of personal jurisdiction and on the other end of the spectrum are the “active websites” where the defendant constantly interacts with the website. The middle of the spectrum is ‘interactive website’. Most countries came to accept and rely on this test. The time phase around 1999-2000. The Courts started expressing divergent views. This is mainly because of the advancement in the technological arena, where the accessibility of the net by the users changes. After 1999 period the Courts adopted a different test to assert jurisdiction over a non resident whenever a defendant transacted business through internet. Here the Court analysed the actual effect and impact that a website had in the jurisdiction where the plaintiff sued the defendant. In this new approach, the Courts relied upon the ‘effects doctrine’ in Calder v. Jones. According to it the personal jurisdiction over a defendant is justified in case where the defendant commits intentional tortious acts that are expressly aimed at the Forum State and caused harm to the plaintiff in the Forum State and where the defendant knows that such harm is likely to be suffered by the plaintiff as consequence of the tortious acts of the defendant. This approach was followed in Blakey v. Continental Airlines Inc. The plaintiff was an employee of an airline

104 No. 97 C 5353 1998 WL 299678 (ND III May 29 1998)
105 Zippo Manufacturer V Zippo.com – 952 F Supp 1119 (DCWD Pa 1997)
106 365 US 783 (1983)
107 163 NJ 38 (NJ 2000)
company who lodged an action for online defamation in the Court of New Jersey against her colleagues. The alleged defamatory statements were published on the Employees Bulletin Board System. Subsequently the plaintiff also implicated her employer for allowing such statements to be published. The Court accepted the motion challenging lack of personal jurisdiction moved by the co-employees and gave a summary judgement with regard to the hostile work environment claim against the employer. The New Jersey Supreme Court concluded that the defendants were subject to the States Jurisdiction by applying the “effects doctrine”. Though the acts causing the ‘effect’ in New Jersey were not performed in New Jersey they could assume jurisdiction over a cause of action that resulted from the effects of posting defamatory message’s online.

The “Effects Doctrine” was further emphasised in *Euro Market Designs Inc v. Crate and Barrel Limited*\(^{108}\). An Illinois based company sued a retailer from Ireland, who maintained an interactive website through which residents of Illinois could order merchandise for shipping it to a foreign location, in the Illinois Court on the ground of trademark infringement. The Court applying the principles of the “Effect Doctrine” held that the defendants had purposefully availed itself of the Forum State and the defendant can reasonably expect a legal action in the Court of the Forum State. The Court noted that in case the trademark of the plaintiff is infringed the direct effect of such act would lead to an injury to the plaintiff in Illinois. The defendants had also purposefully availed and directed its activity in such a manner that it caused harm to the plaintiff in Illinois which the defendant knew is likely to be suffered by the plaintiff in Illinois. The effects test was further explained in *Nissan Motor Company Ltd. v. Nissan Computer Corporation*\(^{109}\) where an automobile manufacturer filed a case against a Massachusetts based computer seller in the District Court of California alleging that the defendant had caused a trademark infringement by registering the domain name Nissan.com and Nissan.net which directly infringed the trademark ‘Nissan’. The defendant had also used a logo on its website which had a striking resemblance to the plaintiff’s logo. It also provided links to various automobile manufacturer website. In this domain name the defendant challenged the lack of personal jurisdiction. The Court applied the ‘Effects

\(^{108}\) 96F Supp 2d 823 (ND 111 2000)

\(^{109}\) 89 F Supp 2d 1153 (CD Cal 2000)
Doctrine’ to invite the jurisdiction and held that the defendant had intentionally changed the content of its website to cash on the reputation and the goodwill of the plaintiff and in turn derive undue advantage from the consumers at large. The plaintiff was resident of California and maximum damage was suffered in the Forum State. The defendant took the plea that it operated a passive website and that they sold nothing through internet but the Court declined this plea of the defendant. The Court ruled that the defendant obtained advertising revenue through deliberate confusion. The defendant’s conduct was specifically targeted to the Forum State. In the same way the Court adopted the “Targeting Approach Test” and held that it has jurisdiction over out of State defendant as he had specifically targeted New York residents as customers for conducting illegal business of gambling using the Internet in the famous case People v. World Interactive Gambling.\textsuperscript{110}

Professor Michael Geist a critique of Zippo Test adopts a view that the Zippo Test is a barrier to promotion of e-commerce on the internet and advocates either “Effects Test” or target based approach as he feels it is more reliable in determining the jurisdiction.\textsuperscript{111} In the advent of development of technology every website is almost interactive in nature with facilities like chatting, instant messaging voice chat and therefore the proponents of ‘effect test’ are of the view that the effects test overcomes this narrow approach and presents a broader approach that does not restrict or restrain the interactivity level of a website. Therefore static website and middle zone websites referred to in Zippo test are in fact redundant.

The researcher is of the view that when it was propounded in 1996 little did the Courts anticipate the changing developments, dimensions and interactivity of the cyberspace activities. The doctrines or the test propounded by the Courts now may be suitable for the present scenario but as advancement in technology is inevitable, the doctrines test of today might look redundant and suitable theories should be enacted according to the day and age in par with advanced cyber technology. According to

\textsuperscript{110} 1999 NY Misc Lexis 325 (Supp. Ct. N.Y.Co., 23\textsuperscript{rd} July 1999)
Karnika Seth\textsuperscript{112}, target based approach is a clear and practicable test in order to determine jurisdiction. The target based approach overcomes pitfalls of the Zippo and Effects Tests as it imparts legal certainty by being unaffected by evolving technologies and changing definitions of interactivity. It promotes trust and stability in electronic commerce and does not unnecessarily involve other possible jurisdictions as may occur in the effects test.

4.5 Determination of Jurisdiction of Cyberspace in Other Countries

United States Securities and Exchange\textsuperscript{113} also rely on the target based approach. Canadian Authorities\textsuperscript{114} and also the United Kingdom\textsuperscript{115} have adopted target based approach for deciding jurisdiction, particularly in context of financial transactions conducted using the internet. The American Board Association Internet Jurisdiction Project 2000\textsuperscript{116} also emphasised the benefits of targets based approach. The report observed that in order to conduct business in a State physical presence is not necessary anymore. A Forum State may be targeted by a non-resident person that may derive benefits through its online transaction with Forum residents on the internet.

4.5.1 Determination of Jurisdiction of Cyberspace in Indian Scenario

Subject matter jurisdiction is defined as the competence of the Court to hear and determine a particular category of cases. It requires a determination of whether a claim is actionable in the Court where the case is filed; similarly personal jurisdiction is simply the competence of the Court to determine a case against a particular category of persons. It requires a determination of whether the person is subject to the Court in which the case is filed. In a contract the parties to a contract are free to decide the Forum where they agree to decide their disputes. This principle of autonomy of parties is a settled principle

\textsuperscript{112} Karnika Seth – “Computer Internet & New Technology Law”. Lexis Nexis – Butterworths Wadhwa Nagpur (1\textsuperscript{st} edn. 2012) P.35


\textsuperscript{114} British Colombia Securities Communication ‘National policy 37-210 Trading in securities using the internet and the other electronic means’ (Notes NIN # 9 8/ 72)


In Private International Law.\textsuperscript{117} In case more than one Court hold jurisdiction in a transaction the parties are free to choose any one forum to adjudicate their disputes. In case where there is a conflict of jurisdiction, the choice of jurisdiction shall be made by the plaintiff based on convenience unless a law excludes such option of access or it would amount to abuse of process of Court or against ‘public policy’. Public policy means not merely policy of a government but also includes matters which is for public interest and public good\textsuperscript{118}. The concept of public policy varies with changing requirements of society\textsuperscript{119}.

In \textit{Ratan Chand Hirachand v. Askar Nawaz Jung}\textsuperscript{120} the Court highlighted that the legislations drafted by nations may incorporate few laws to meet these requirements and the remaining needs are met by Courts that fill up the lacuna. ‘Forum Selection Clause’ is where the parties expressly select the forum. This is said to be a settled principle of International Law which has gained acceptance on a universal footing. In many jurisdictions a State may assume jurisdictions over a person based on a choice of law clause and the forum of choice clause in a contract.

The Supreme Court pronounced a case dealing with cyberspace jurisdiction in \textit{Oil and Natural Gas Commission v. Utpal Kumar Basu}.\textsuperscript{121} Here the petitioner responded to the advertisement regarding a tender for a particular project in Gujarat, the advertisement being published in the Times of India in circulation in West Bengal. He submitted a tender by Fax message from Calcutta and received reply of it in Calcutta. A Writ petition was filed before the Calcutta High Court on plea of part of the cause of action having arisen in Calcutta. The Court observed merely because it read the advertisements at Calcutta and submitted the offer from Calcutta and made representations from Calcutta it would not in Court’s opinion, constitute facts forming an integral part of the cause of action. So also the mere fact that it sent fax message from Calcutta and received reply at Calcutta would not constitute an integral part of cause of action.

\begin{thebibliography}{11}
\bibitem{117} Dicey & Morris, “\textit{Conflicts of Law}”, (13\textsuperscript{th} edn.), pp.1216 - 1217
\bibitem{118} \textit{Central Island Water Transport Corporation Ltd v. Brojo Nath Ganguly} (1986) 2 SCR 278.
\bibitem{119} \textit{Bhagwant Genuji Girme v. Gangabisan Ramgopal ILR (1931) Bom.71.}
\bibitem{120} (1991) 3 SCC 67
\bibitem{121} (1993) 3 SCC 711
\end{thebibliography}
In Casio India Company Limited v. Ashita Tele Systems Private Limited\textsuperscript{122} the Delhi High Court ruled that if the website is accessed from Delhi it is sufficient enough to attract the territorial jurisdiction of the Court. In the subsequent case\textsuperscript{123} in the year 2007 the Delhi High Court observed that merely because of accessibility of a website from a particular place will not suffice for the Courts to assume personal jurisdiction over foreign website owner or a non-resident entity. In this case Court adopted Zippo Sliding Scale Approach and held that wherever a website is interactive permitting the users not only to accessible information but also subscribe to the services of the website, the jurisdiction can be assumed and will be justified. In the following case Renaissance Hotel Holdings Inc v. B.Vihaya Sai & another\textsuperscript{124} here an USA based hospitality company had sued an Indian Hotel at Bangalore seeking a restraint to retrain defendant from using trademark ‘Sai Renaissance’ on internet as domain name. The Court held that based on online booking made from Delhi for a room located in US or Bangalore, the jurisdiction of its Court cannot be invoked. Prime consideration should be the place where the hospitality business is conducted from which is in Bangalore. The Court declined to assume jurisdiction in this trademark infringement case.

In Banyan Tree Holdings (Pvt) Ltd v. Murali Krishnan Reddy\textsuperscript{125} the Court held that in a passing off or infringement case where defendant is out of State and where there is no long arm statute the plaintiff will be required to prove that the defendant purposefully availed itself of the benefits of conducting business in the Forum State by active advertising and targeting of customers in Forum State and mere hosting of an interactive website without such targeting will not suffice. Further in Nirmaljit Singh Narula v. Indijols at Hubpages.com\textsuperscript{126} the plaintiff filed a suit for permanent injunction against defendant from publishing defamatory articles about plaintiff on its website www.hubpages.com, which was based out of a server in USA and owned by a USA based company. In the application for temporary injunction, the Court granted an exparte ad-interim injunction against the defendant from publishing defamatory articles about the

\textsuperscript{122}(2003) 27 PTC 265 (Del)
\textsuperscript{123}India TV, Independent News Service Pvt Ltd v. India Broadcasting Line, LLC, (2007) 135 DLT 521
\textsuperscript{124}CS(OS) No: 103/ 2009 – decided on 9\textsuperscript{th} Feb.2009
\textsuperscript{125}2008 (38) PTC 288 Del
\textsuperscript{126}CS(OS) 871/2012 order passed on 30\textsuperscript{th} March 2012
plaintiff on its website within 36 hrs from service of the Court order failing which it directed the Registrar of the website to block the website from public access within India.

Analysing the cases discussed above, the Courts have made it clear that merely hosting of a website which can be accessed from any location will not attract jurisdiction of the Court. Mere posting of an advertisement by the defendant that displays its mark on a passive website and which does not result in an advantage to the defendant to enter into any commercial transactions with the users in the Forum State cannot satisfy cause of action requirement in the Forum State. When it is an interactive website, targeting approach is to be seen and also the happening of the commercial transactions should be exercised in cross border internet dispute. Indian Courts have started applying the above said target based approach in fixing the jurisdiction where internet cases involving a foreign non-resident is considered. Section 20 of the Civil Procedure Code 1908, is designed to secure that justice might be brought as near as possible to every man and that the defendant should not be put to the trouble and expense of travelling long distances in order to defend himself in cases in which he may be involved. The Court has no jurisdiction in a suit against a non-resident foreigner on a cause action which arose wholly without the territory of India. The Court has jurisdiction to entertain a suit against a foreigner resident within the limits of its jurisdiction in respect of a cause of action that has accrued abroad. \(^{127}\) A foreigner is not exempted from the jurisdiction of Indian Courts. \(^{128}\) If a foreigner resides or he carries on business, or personally works for gain, in India, it is clear he is amenable to the jurisdiction of Indian Courts.

In the second chapter of this research work, communication aspect of online contracts has been analysed. Online contracts are formed through an of these modes Click wrap\(^ {129}\), Shrink wrap\(^ {130}\) or Browse wrap\(^ {131}\) agreements. The conditions regulations,

\(^{127}\) *Ismailji v. Ismail* 1921 35 1228  
\(^{128}\) *Smith v. Indian Textile Company* 1927 39 All 669  
\(^{129}\) Click wrap agreements terms and conditions are mentioned on a website which a user indicates his acceptance by clicking the ’I agree’ button on the screen.  
\(^{130}\) Shrink wrap agreements comprise of agreements wherein the product purchased bears the terms and conditions displayed on a box in which the product is sold. The moment the box is opened, it is deemed he has given his consent and duly accepted the terms therein.  
\(^{131}\) Browse wrap terms are a part of the website content but does not require a user to specifically grant his assent and mere browsing of website may constitute user’s consent.
various clauses on the rights and obligations of the user namely the choice of the governing law as well as the Forum selection clause are legally valid and enforceable in a Court of law. The moment acceptance is given a valid and a binding contract comes into force. Coming to the traditional form of contract, the place where the contract comes into existence, gets the jurisdiction to deal with the matter.

In _Entores v. Miles Far East Corporation Ltd._,\(^{132}\) where the offeree had sent his acceptance from Amsterdam by telex to the offeror in London. Lord Denning held that telex is virtually instantaneous form of communication which when used makes mail box rule inapplicable. It was further held that in instantaneous means of communication ‘receipt rule’ applies and contract, in such cases comes into existence where acceptance is received. The rationale behind this rule is that the offeree will always know whether his acceptance has been received and can react immediately to any faults or misunderstanding.

In English Law an agreement purporting to oust the jurisdiction of the Courts is illegal and void on the grounds of public policy.\(^{133}\) An arrangement may, however, stipulate that there is no intention to contract or that it is only a gentleman’s agreement. In such a case no action is possible under the agreement.\(^{134}\) An agreement by which a party is restricted absolutely from enforcing his legal rights arising under a contract, by the usual legal proceedings in the ordinary tribunals.\(^{135}\) An agreement which limits the time within which the contract rights may be enforced.\(^{136}\) This section does not render void a contract by which two or more persons agree that any dispute which may arise between them shall be referred to arbitration and that only the amount awarded in the arbitration shall be recoverable. Hence, an agreement between the parties to refer disputes to arbitration is perfectly valid. The right to proceed against the arbitrator’s award for instance to set-aside cannot be excluded by the contract.\(^{137}\) In the same way with respect to electronic transactions, in case of a Click wrap agreement, it can be presumed that the place where the user has clicked on the ‘I agree’ button, a contract is being formed.

\(^{132}\) (1955) 2 QB 327
\(^{133}\) HALSBURY’S LAWS OF ENGLAND Vol.9 352
\(^{134}\) Rose & Frank Co. v. J.R.Crompton Bros, (1925) AC 335.
\(^{135}\) Section 28(1) of Civil Procedure Code 1908
\(^{136}\) Section 28(2) of Civil Procedure Code 1908
\(^{137}\) Ganges Manufacturing Co. v. Indra chand, (1906) 33 Cal. 1169
He cannot take up the plea that he was ignorant about the same because Ignorance of law is no excuse and he is deemed to have consented to the terms and conditions of the agreements to form the Click wrap agreement.

Indian cases in this area have not been reported but few U.S. cases have been reported, the same will be discussed in the ensuing lines as it may have a persuasive value. In United States in *Bremen v. Lapata* the Court examined an issue as to whether the enforcement of a Forum Selection Clause is unreasonable. The Court adopted a nine factor test that is based on parameters such as place of execution of a contract, location of the parties and witnesses, relative bargaining, power, conducts of parties, public policy of the Forum State and concluded that the enforcement of a Forum Selection Clause cannot be unreasonable.

In *Groff v. America Online Inc* the plaintiff was a resident of Rhode Island, the subscriber of America Online filed an action alleging the violation of State Consumer Protection Laws. In the subscription agreement, there was a Forum Selection Clause that provided Virginia Courts as a Forum for dispute resolution. The plaintiff had pressed the ‘I agree’ button. The Court held that the plaintiff in the facts and circumstances of the case had consented to the choice of the Forum and the Click wrap agreement so formed was valid and binding between the parties. The researcher also supports the view of the Honourable Court in appreciating the binding nature of Click wrap agreement.

In *Carnival Cruise Lines Inc v. Shute* the plaintiff booked for seven days cruise on the ship of the defendant. The defendant mailed the tickets to the plaintiff in Washington. The ticket contained a printed declaration to the effect that the acceptance of the ticket would amount to accepting the agreement which included a Forum Selection Clause mentioning Florida as a chosen Forum for dispute resolution. The plaintiff who boarded the ship in California was injured as she slipped and fell on the deck. Though the ship was in Washington, the Forum Selection Clause indicated Florida as the appropriate Forum. When the plaintiff contended that Florida would be an inconvenient Forum to adjudicate the dispute between the parties, the Supreme Court took the view that the Forum Selection Clause was fully valid and enforceable.

138 307 US 1, 9 – 10 (1970)
140 399 US 585 (1991)
Therefore internet users should be very careful while entering into contract. In traditional form fixing of jurisdiction is comparatively easy. While in internet it is just a ‘Click away’ to from a contract. Hence the users should be prudent enough to carefully read the terms and conditions mentioned in the website of the service provider before consenting to avail services.


The issues of Jurisdiction are more intriguing at the international level where not only the Jurisdiction of the Courts but also the applicable law will have to be determined. The problem becomes complicated because of the diversity of the laws. For instance, comparative advertising is prohibited in Germany but not in India or America. Similarly advertising aimed at children is forbidden in Scandinavian countries but not in India. Thus it is quite possible that any business activity executed over web site may be perfectly legal in one country but may not be so in another. This is no more hypothetical issue. Much before the advent of the e-commerce, European Community has, to facilitate transborder commerce within the Member States, adopted the Brussels Convention,141 for jurisdictional matters and Rome Convention, 1980142 for applicable law to contractual obligations. European Directive of Distance selling was enacted in June 1997 for providing homogeneous consumer protection rules which were due to come into force in the year, 2000.

4.6.1 Brussels Regulation 2002

The Brussels Regulation143 was issued by the EU, came into effect on 1st March 2002 prescribes rules to determine jurisdiction and rules for the enforcement of judgment in Civil and Commercial matters. This replaces the Brussels Convention 1968. Conventions are binding on member Countries which codifies its principles and only on ratification the convention enters into force in a particular State. Although these regulations apply in EU, the regulation can affect jurisdiction over non-EU entities conducting business in EU member States including electronic business. If these Member

141 27th Sept. 1968 as amended by the Lugano and San Sebatin Texts; SI 1990 No. 2591 Sch 1.
142 (1980) OJL 266 Available at http://www.Jus.uio.no/1m/ec/applicable.law.contracts.1980/doc.html. (Last accessed on November 13, 2013)
State’s incorporate the principle of the Brussels Regulation in their Internal Conflict legislations, a European Court may assume jurisdiction on this basis. According to Article 2 of the Regulation, if a person is domiciled in one State, irrespective of his nationality, such person can only be sued in the Courts of that State. Article 51 highlights that for matters relating to a contract, a person domiciled in a contracting State may be sued in another contracting State in the Courts for place of performance of obligations delineated in the contract. Article 53 includes the place of the event where the harm originated and also the place where the damage actually occurred, where the contract contains a choice of Court Clause, the principle of party autonomy is upheld and Clause is considered enforceable. According to Brussels Regulation a consumer may file an action in his home state, if the trader carries out commercial activities in the Member State of the consumer’s domicile or by any means directs such activities to that Member State. This includes any advertising or other form of solicitation of business and will include e-commerce activities. The European Commission brings only those websites which are interactive within its ambit by virtue of Art. 15(1)&(3). Commission does not explain the targeting criteria or the interactive criteria. Indian Courts have adopted target based approach in line with the US. In 2012 the EU institutions adopted a recast Brussels I Regulation which will replace the 2001 regulation in 2015. The main change is that while the 2001 regulation applies only to individuals resident in the European Union, the recast regulation will harmonise the rules under which individuals resident outside the EU may be sued in the courts of EU member states. In December 2012 Denmark notified the Commission of its decision to implement the contents of 2012 regulation.

4.6.2 Convention on the Law applicable to Contractual Obligations 1980 - Rome Convention

Article 3 of the Rome Convention provides that the parties have the freedom of choice to decide the applicable law in a contract. This choice can be declared expressly or

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144 Brussels Regulation 33/2001 Art.23, “Prorogation of jurisdiction”
146 Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 79, 21.3.2013, p. 4
impliedly by the terms of the contract or particular circumstances of each case. A choice of law clause, however cannot escape the mandatory provisions of a State which is substantially connected with the contract and also the Forum States where a dispute is being decided. Further Article 4 of the Rome Convention states that in case there is no express choice made by the parties, the contract will be governed by the law of the place which has the closest connection with the contract. In case of commercial contracts, the law of the place where the main office of the business entity is established or where performance of a contract is to be made could also be a place which is closely connected with the agreements. Article 5 of the convention is applicable to such contracts wherein supply of goods or services to a consumer is being made for a non commercial purpose or to a consumer under the mandatory law of a country where he habitually resides in case the consumer responded to an advertisement or invitation to form the agreement in that country. The European Union Rules adopt the principles in the Rome Convention and uphold the freedom of the parties to decide the choice of Forum Clauses, with exceptions to employment, Insurance or consumer contracts. In internet law cases where Click wrap contracts are formed, the United State Courts have adopted a strict approach to adjudicate the validity of a consumer choice of law or Forum Clauses. In many internet cases the parties may prefer to agree to arbitration as a mode of settling their disputes or may provide that disputes shall be settled by Court of a particular jurisdiction. In case the parties have equal bargaining power there is generally no legal hurdle in enforcement. But when there is inequality in bargaining power, coupled with unconscionability or public policy considerations, a Court (such as Indian or United State Court) may decide on its enforceability depending on the choice of Forum and law and how burdensome it is on the consumer. It has now been replaced by Rome I Regulation which governs the Choice of Law in the European Union. The regulation applies to all European Union member State except Denmark.

147 EC Convention on the law applicable to contractual obligations, 19th June 1980, 80/933/EEC, 1980 OJ (L266) I, Art 3(2)
149 Regulation EC No.538/2008
4.6.3 Hague Convention

Article 1 of the Hague Convention\textsuperscript{150} on Private International Law, 2001, applies to civil and commercial matters that may arise between two contracting States that have ratified the Convention. The Convention aims to harmonize rules, determine jurisdiction in case of cross border disputes between the parties and cover disputes relating to contracts Intellectual property, defamation etc. This is analogous with Brussels Convention.

4.6.3 Hague Convention on Choice of Court Agreement

This was passed on 30\textsuperscript{th} June 2005. It aims to harmonise International Trade Law particularly Business to Business arrangements and settlements of cross border disputes. The Hague choice of Court Convention\textsuperscript{151} presents alternatives to articulation to resolve cross border disputes. This is a Multilateral Treaty which embodies the Private International Law principles of fairness, comity and good faith\textsuperscript{152}. The members approved the convention on choice of Court Agreements that harmonise rules for enforcement of choice of Court provisions in a contract. The Convention States usually assume jurisdiction based on Forum Selection Clause and such judgments shall be recognised and enforced between Member States that are signatories to the Convention. This is regarded as a positive step and many ambiguities of jurisdictional rules will vanish if such homogeneity is achieved.

4.7 Jurisdiction under the Indian Information Technology Act 2000

The Information Technology Act passed in India is one legislation which has been enacted to recognise online transactions with respect to the concept of jurisdiction Sec: 1(2) states it extends to the whole of India and applies to any offence or contravention there under committed outside India by any person. Sec: 75(2) of the Act further states it

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shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves the computer system or computer network located in India. Though the framers have enacted a law it cannot be effectively implemented for a number of reasons. An action defined as an offence would not be the same in another country in the same manner the site might be hosting a context perfectly legal in the home country but may be considered illegal in any other Country. The question arises as to how the person can be prosecuted if he happens to view this site on a system say when he is in India or abroad. Apart from it if it is not an Indian who has committed offence how would a non-Indian be bound by the principles expostulated by the Indian IT Act, and further how would foreign Courts enforce these judgements and recognise the orders passed by the Indian Courts.

The provisions Section 65A & 65B of the Indian Evidence Act has been amended so as to recognise electronic record and admissibility of electronic data with effect from 17th Oct. 2000. In the same way proper precautionary measures have to be taken in consultation with other countries to amend the provisions with respect to jurisdiction.

4.8 Conclusion

The technological advancement has bloomed to an extent that conventional form of offline transactions will slowly vanish. In the research conducted it is understood that the corporate are transforming their mode of business transactions from the conventional form to the electronic form as it has many advantages like better accessibility to the clients, quicker and faster mode of communication, high profitability, reduction in labour requirements, increase in the efficiency, accuracy and save hours of labour. Nearly 78 percent of the respondents felt that greatest advantage of online transaction being freed from geographical barrier. Little did they know about the legal intricacies involved in the jurisdictional aspect. In this chapter cases have been discussed in length and a different theory propounded by the Courts has also been taken into consideration. A way that governments consciously attempt to avoid problems of diversity of jurisdiction is to harmonize the law applicable cross jurisdictions, so that it will not matter whose law
applies or what forum will apply it. To overcome the legal issues with respect to jurisdiction the parties to a contract may select a preferred Forum as part of their agreements. Parties may also select a Forum or applicable law. The Courts could then give effect to the desire of the contracting parties. Hence one of the suggestions that has been made is to evolve a new system off rules to govern jurisdiction of the internet. These regulatory structures should treat cyberspace as a distinct place of the purpose of legal analysis. Few jurists are of the view that cyberspace is a free space and it needs to regulation. They reject the physical or real world laws. But this researcher is of the view that so long as the physical contact with the cyberspace exists there should be a regulatory body to regulate Information Technology and the legal advancements to cope up with the scenario. By developing uniform law governing cyberspace transactions, it will be much easier to determine which rules regulates online activities rather than deciding the laws of which territory would apply. In the present era, even for offline contracts settlement of issues have been done through different forms of Alternate Dispute Resolution Mechanisms. This can very well be applied in jurisdiction, where availment of arbitration is through consent only. Until law in this area becomes clearer there are very many legal issues which can be tackled only by enacting common rules and regulations for all the countries which should go in harmony with the nations. There should not be any conflict of law or violation of neither Private International Law nor the Law of the respective land. It is highly imperative to frame homogenous and transparent laws to determine the jurisdiction. The computer industry is flourishing and it is becoming inseparable from human life. The two concepts, technology and law should go hand in hand to solve major issues resulting out of online transactions in the cyberspace.