CHAPTER 5
JURISDICTIONAL ISSUES IN ENGLAND

5.1. Introduction

The country of England is part of the The United Kingdom of Great Britain. There are other three countries which go to make the United Kingdom namely; Scotland, Wales, and Northern Ireland. England is governed directly by the Parliament of the United Kingdom and the countries of Scotland, Wales and Northern Ireland have devolved governments. The House of Commons have vast majority of Members of Parliament of England Constituency. Today most of the common law prevailing in the common law countries has legal system based on the English Law. In the United Kingdom, the Supreme Court of the United Kingdom is the highest Court of Appeal for all the civil matters originating from the courts of all the jurisdictions of the United Kingdom. It also hears appeals from the courts of England, Wales and Northern Ireland in criminal cases. There is no common legal system between the countries of the United Kingdom. The legal system in the United Kingdom is divided into three separate parts. One part consists of England and Wales, the second part consist of Scotland and the third part consists of Northern Ireland. All these countries have their own separate courts to deal in civil and criminal matters. Only the Supreme Court of the United Kingdom is a common link court between them, as a highest Court of Appeal in civil matters. For the purpose of private international law rules, the jurisdictions of England and Wales, Northern Ireland and Scotland are treated as separate countries. The Hierarchy of courts in England and Wales in civil matters starting from the top is the Supreme Court of United Kingdom which hears appeal from the decisions of Court of Appeals of England and Wales. Below the Court of Appeal is High Court of England and Wales. The High Court hears appeals from the Country Courts. At last, the lowest court in the hierarchy in civil matters is the Tribunals. The Supreme Court has its own Rules and the Practice

1 Available at: www.supremecourt.uk (last visited on August 2, 2014).
Directions which apply to Civil and Criminal matters brought before it covering the devolution jurisdictions of Northern Ireland, Wales and Scotland.

5.2 **Types of Jurisdictions in England**

The procedural rules governing the procedural aspect of courts in England and Wales are laid down in the Civil Procedure Rules which are amended from time to time with the overriding objective of enabling the court to deal with cases justly and at proportionate cost. The New set of Civil Procedure Rules now also contains the Practice Directions to supplement the Civil Procedure Rules. The rules and the Practice Direction are applicable in the courts of the County Court, the High Court; and the Civil Division of the Court of Appeal, except for certain kind of proceedings expressly excluded from the preview of the Civil Court Rules.²

Almost every common law country has its law based on the common law of England. English law has provided edifice to the basic structure of law to most of the common law countries in the world. But, with the passage of time new developments and changes have been made in the common law systems around the world which is

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² England and Wales Civil Procedure Rules, 1998, r. 2.1(2). It reads thus: “These Rules do not apply to proceedings of the kinds specified in the first column of the following table (proceedings for which rules may be made under the enactments specified in the second column) except to the extent that they are applied to those proceedings by another enactment –

1. Insolvency proceedings
2. Non-contentious or common form probate proceedings.
3. Proceedings in the High Court when acting as a Prize Court
4. Proceedings before the Court of Protection
5. Family proceedings
6. Adoption proceedings
7. Election petitions in the High Court

**Enactments**

1. Insolvency Act 1986¹, ss.411 and 412
2. Supreme Court Act 1981², s.127
3. Prize Courts Act 1894³, s.3
4. Mental Capacity Act 2005⁴, s.51
5. Matrimonial and Family Proceedings Act 1984⁵, s.40
6. Adoption Act 1976⁶, s.66 or Adoption and Children Act 2002, s.141(c)⁷
7. Representation of the People Act 1983⁸, s.182
now replaced by statutory law, convention or regulation based law. In England itself new set of jurisdictional rules are set up. Now the jurisdictional rules are regulated by three set of Rules in England namely:-

1. The European Union Regime
2. At the intra- UK level
3. The Traditional Rules

5.2.1 The European Union Level

There are two conventions which apply in the United Kingdom to regulate the jurisdiction and recognition and enforcement of foreign jurisdiction in civil and commercial matters.

(i) Recast Brussels Regulation

England is part of United Kingdom, which is a member of European Union. In Europe the regulation of jurisdiction and recognition and enforcement of judgments in civil and commercial matters, between the EU member states are regulated by the new regulation known as Recast Brussels Regulation 1215/2012. The regulation came into force on January 2013, but it applies to the legal proceedings that are started on or after 10th January 2015. The new recast regulation replaces and repeals the old Brussels 1 Regulation of 2001. But, a reservation has been made in cases where the legal proceedings are commenced before 10th January 2015, then in such cases the old Brussels 1 Regulation will continue to apply. The new recast applies to the cases where the civil and commercial matter disputes involve jurisdictional issues against the defendants domiciled in any member state of the European Union3. But, if the defendant is not domiciled in a member state, then such defendant would be subject to the national rules of jurisdiction applicable in the territory of the member state of

the court seized.\textsuperscript{4} Hence, in England where the case is against the defendant who is a non-EU domiciliary, the courts in England will then apply their national rules comprising of both the traditional as well statutory rules in deciding the dispute against such defendant. Section 6, Article 24 of the Recast Brussels Regulations deals with the exclusive jurisdiction of the courts of the member states notwithstanding the domicile status of the parties in certain cases proceedings concerning\textsuperscript{5}:

- rights in \textit{rem} in immovable property or tenancies of immovable property: the courts of the EU country in which the property is situated;
- the validity of the constitution, the nullity or the dissolution of companies or other legal persons or of the validity of the decisions of their organs: the courts of the EU country in which the legal person has its seat;
- the validity of entries in public registers: the courts of the EU country in which the register is kept;
- the registration or validity of patents, trade marks, designs or other similar rights required to be deposited or registered, the courts of the EU country in which the deposit or registration has been applied for, has taken place or is under the terms of an Union instrument or an international convention deemed to have taken place.

The new recast allows prorogation of jurisdiction. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction unless the agreement is null and void as to its substantive validity under the law of that member state. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.\textsuperscript{6}

\textsuperscript{4} Ibid, ch 2, sec. 1, Art. 4 (2).
\textsuperscript{5} Ibid, , ch 2, sec. 6, Art.24.
\textsuperscript{6} Supra note 4, ch. 2, sec. 6, Art.25.
(ii) **Lugano Convention**

The Lugano convention was the result of the need of the European Free Trade Association to have single system for the legal and economic co-operation of recognition and enforcement of judgment, being the largest bloc and important trading partner with the European States. Initially the Lugano 1988 Convention was in force whose members were The European Free Trade Association countries and 15 pre 2004 European Union member states, Poland. The Lugano convention was all most parallel to the Brussels Convention of 1968. Since the Brussels convention was replaced with the Brussels I Regulation, it was thought to correspondingly amend the Lugano Convention so as to bring it on the lines of the Brussels Regulation. The Lugano Convention was therefore amended and in the year 2007, the new Lugano Convention came into operation. The new Convention was concluded with the efforts of the European Community States, so it was natural for them to be bound by the convention, being the principle makers of the new Lugano Convention. The Contracting parties to the new Lugano Convention are European Community members, Denmark, Norway, Switzerland and Iceland. The main aim of the new Lugano Convention is to unify the rules on jurisdiction in civil and commercial matters and to expand the applicability of the Brussels I regulation to the relations between Member States of the European Community on the one hand and Norway, Iceland and Switzerland on the other. After coming into force, the convention is open to:

1. the future members of the European Free Trade Association (EFTA);
2. Member States of the European Community acting on behalf of certain non-European territories that are part of their territory or for whose external relations they are responsible;
3. any other State, subject to the unanimous agreement of all the contracting parties.\(^7\)

It will not apply to tax, customs and administrative matters or to the status and legal capacity of natural persons, rights in property arising out of matrimonial

\(^7\) *Available at*: http://ec.europa.eu/ (last visited on October 2, 2014).
relationships, wills and succession, bankruptcy or composition, social security or arbitration. The new Lugano Convention applies where the defendant is domiciled in any of the European Union states or the countries of Denmark, Norway, Switzerland and Iceland in cases of civil and commercial matters between the party of England and the domiciliary of EU or Denmark, Norway, Switzerland and Iceland. But, if the defendant is not domiciled in a member state, then such defendant would be subject to the national rules of jurisdiction applicable in the territory of the member state of the court seized of the matter. Under the Lugano Convention the provision regarding the exclusive jurisdiction of courts in certain matters regardless of domicile of parties and the provisions related to prorogation of jurisdiction are similar to the Recast Brussels Regulation. The Civil Jurisdiction and Judgments Regulations 2009 incorporate the provisions of the Lugano convention of 2007 in United Kingdom.

5.2.2 The Intra-UK level

As has already been discussed in the introduction part of the chapter, the United Kingdom of Great Britain consist four countries namely, England, Wales, Scotland and Northern Ireland. But, for the purpose of Private International law these are considered as separate Jurisdictions, England and Wales one jurisdiction, Scotland and Northern Ireland as separate Jurisdictions. So there are three separate intra-UK jurisdictions within the United Kingdom of Great Britain. The jurisdiction at the intra-UK level is regulated by the Civil Jurisdiction and Judgment Order of 2001 which applies rules of jurisdiction based and modeled on the Brussels 1 Regulation.

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8. 21.12.2007, Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ,Title II, sec.1, Art. 2 (1). It reads thus:- “Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State”. Available at: http://ec.europa.eu/ (last visited on October 5, 2014).

9. Ibid, Title II, sec.1, Art.2 (1). It reads thus:- “Persons who are not nationals of the State bound by this Convention in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State”.

10. Ibid, Art. 22 and 23.
5.2.3 Traditional Jurisdiction Rules

The traditional rules of jurisdiction apply to the cases which are out of the scope of Brussels Recast and Lugano Convention. If the defendant is not domiciled in the EU member state and the competing jurisdiction is outside the European Union, then he is subject to the traditional jurisdictional rules of the England. These rules are now codified in the civil procedure rules and the Statutory rules. Under the traditional rules or the common law rules, the Courts of England and Wales have clear right to assume jurisdiction over the defendant if he is physically present within the Jurisdiction of the court even if there is little or no connection between the dispute and the forum court of England and Wales. But, this is no case restricts the right of the defendant to apply for the stay of the proceedings in the said courts on the ground of forum non convenience, minimizing the scope of forum shopping on the part of the plaintiff suing in the English forum having little or no connection with the forum. Even though the courts have clear right to assume jurisdiction over the defendant present within the territory of the court, but still proper service of claim form in accordance with the rules of the court on the defendant is still a necessity. It is to be noted that if defendant is domiciled in England or other EU member state, then in such case the traditional rules cannot be applied by the courts to assume jurisdiction over such defendant for the reason that UK is a signatory to Brussels Recast and the rules formulated under the regulations will become applicable.

5.2.4 Jurisdiction based on the consent of the parties

The parties to a suit may agree between themselves that they agree to the jurisdiction of the English court, then in such case the English court shall have jurisdiction to try the case notwithstanding the fact that the defendant is not present within the jurisdiction or has little or no connection with the jurisdiction\textsuperscript{11}. Submission to the jurisdiction of English court is another form of agreeing or consenting to the jurisdiction of English courts. This can be in the form of instructing a solicitor to accept the service on one’s behalf, making an appearance by the

defendant in the English court to defend the case on merits, entering into exclusive or non-exclusive jurisdiction clauses etc. But, where the defendant merely challenges the jurisdiction of English court, the act of challenging does not amount to submission or agreeing to jurisdiction of English court in any form.

5.3 Assumption of Jurisdiction over different juristic entities

As discussed above, for the purpose of assumption of jurisdiction over the defendant it is necessary to serve him by the claim form within or outside England. The England and Wales’s Civil Procedure Rules and the Practice Direction contain provisions regarding service of documents in and outside England. If the defendant is present within England the claimant can get the claim form served on the defendant without seeking the permission of the court. However, if the claim form is to be served on the defendant outside the territory of England then in such case the claimant has to seek the permission of the court to get the claim form served on an out of jurisdiction defendant. The Civil Procedure Rules (CPR) lay down different procedure for serving claim form on different juristic entities. Part 6 Rule 6.3 of CPR lays down different methods of service in case where service of claim form is to be made within the jurisdiction of England or in specified circumstances within European Economic Area (EEA). A claim includes petition and any application made before action or to commence proceedings. A claim form may be served in the jurisdiction of England by any of the following methods:-

(a) Through personal service

(b) First class post, document exchange or other service which provides for delivery on the business day.

(c) Leaving the claim form with the solicitor at the address at which the defendant resides or carries on business with the United Kingdom, at the usual or last known residence or last known place of business in case where the defendant does not give an address at which the defendant may be served.

(d) Fax or other means of electronic communication in accordance with Practice Direction 6A.
(e) Any method authorized by the court.

(f) A company-
   
   (a) by any method permitted under this Part; or
   
   (b) By any of the methods of service permitted under the Companies Act 2006.

(g) A limited Liability Partnership-
   
   (a) by any method permitted under this Part; or
   
   (b) by any of the methods of service permitted under the Companies Act 2006 as applied with modification by regulations made under the Limited Liability Partnerships Act 2000

The provision of part 6 applies to the service of documents. However if any other enactment, part of CPR or Practice Direction makes different provision or the court itself orders the service of documents to be effected otherwise, then such other different provision or other method as directed by the court will apply, notwithstanding anything laid under part 6 of CPR. Generally the claim form will be served by the court except where rule or practice direction provides that the claimant must serve it or where the claimant notifies the court that he/she wishes to serve it or the court orders or directs otherwise. In such case the court decides the method as to how the claim form is to be served. The claimant must in addition to filling a copy for the court, provide a copy for each defendant to be served. Where the court serves the claim form by post and the claim form is returned to the court or where the court bailiff is to serve a claim form and the bailiff is unable to serve it on the defendant, the court will send notification to the claimant that the claim form has been returned. The court will not try to serve the claim form again. The claim form will be deemed to have been served in such case, unless the address give by the defendant for such service is not irrelevant, which for this rule is the address of his solicitor or the address where the defendant resides or carries on business within the United
Kingdom. Unless required by other part of CPR any other enactment, a practice direction or a court order, or where the claim form is to be served on a solicitor of the defendant, in all other cases a claim form must be served personally on the defendant. Following are the methods by which personal serve is effected on different juristic entities in England:

A. Individual

A claimant can serve with in an individual with the with the claim form, by leaving the claim form with that individual.

B. Company / OR/Other Corporation

A claim form can be personally served on a company or other corporation by leaving it with a person holding a senior position within the company or corporation.

C. Partnership

Where partners are being sued in the name of their firm, the claim form can be served personally on a partnership by leaving it with a partner or a person who has the control or management of the partnership business at its principal place of business, at the time of service of claim form.

5.3.1 Service of Claim form within England

If the defendant is domiciled in any of the European Union States or in the countries of Denmark, Norway, Switzerland or Iceland, the jurisdictional rules contained in the Brussels Recast Regulation or the Lugano Convention of 2007 will be applied on him. The same applies to the corporations and other juristic entities. In all other cases the defendant is subjected to the traditional common law rules or the statutory rules in England.

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12 England and Wales Civil Procedure Rules, pt. 6, r. 6.4.
13 Ibid., r. 6.5.
5.3.1.1 Service on an Individual

If the defendant is domiciled in any of the European Union member state or in the countries of Denmark, Norway, Switzerland and Iceland, then in such case the rules of jurisdiction contained under the Brussels Recast and Lugano Convention will apply. But, if the defendant is not domiciliary of any of the above states, then the traditional rules of jurisdiction will become applicable on him. Where an individual defendant is physically present within the territory of English courts, jurisdiction is established over him as of right by the English courts, except in the cases where the defendant’s presence is procured in England by playing fraud over him. The defendant has to be served with the claim form in the manner provided by the Civil Procedure Rules. As per Civil Procedure Rules 6.3\(^{14}\) an individual defendant can be served by way of personal service, first class post, document exchange or other service which provides for delivery on the next business day, leaving the claim form at a specified place, fax or other means of electronic communication or by any method authorized by the court. If the claimant wants to effect personal service on an individual defendant, service can be effected on the defendant by leaving the claim form with him personally. If the individual defendant appoints a solicitor to accept service on his behalf then service is to be made accordingly.\(^{15}\) Where service is to be

\(^{14}\) England and Wales Civil Procedure Rules, pt.6, r. 6.3. It reads thus:- “(1) A claim form may (subject to Section IV of this Part and the rules in this Section relating to service out of the jurisdiction on solicitors, European Lawyers and parties) be served by any of the following methods – (a) personal service in accordance with rule 6.5; (b) first class post, document exchange or other service which provides for delivery on the next business day, in accordance with Practice Direction 6A; (c) leaving it at a place specified in rule 6.7, 6.8, 6.9 or 6.10; (d) fax or other means of electronic communication in accordance with Practice Direction 6A; or (e) any method authorised by the court under rule 6.15.

\(^{15}\) Ibid, pt.6, r. 6.7. It reads thus: “Solicitor within the jurisdiction: Subject to rule 6.5(1), where – (a) the defendant has given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form; or
made other than by way of personal service, then claim form is to be served at the address given by the individual defendant.  

But, where no address or solicitor is appointed to accept the service, the claimant can serve the individual at his Usual or

(b) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction, the claim form must be served at the business address of that solicitor.  

('Solicitor' has the extended meaning set out in rule 6.2(d).)

(2) Solicitor in Scotland or Northern Ireland or EEA state other than the United Kingdom: Subject to rule 6.5(1) and the provisions of Section IV of this Part, and except where any other rule or practice direction makes different provision, where –

(a) the defendant has given in writing the business address in Scotland or Northern Ireland of a solicitor as an address at which the defendant may be served with the claim form;

(aa) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within Scotland or Northern Ireland;

(b) the defendant has given in writing the business address within any other EEA state of a solicitor as an address at which the defendant may be served with the claim form; or

(c) a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within any other EEA state, the claim form must be served at the business address of that solicitor.

(3) European Lawyer in any EEA state: Subject to rule 6.5(1) and the provisions of Section IV of this Part, and except where any other rule or practice direction makes different provision, where –

(a) the defendant has given in writing the business address of a European Lawyer in any EEA state as an address at which the defendant may be served with the claim form; or

(b) a European Lawyer in any EEA state has notified the claimant in writing that the European Lawyer is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address of the European Lawyer, the claim form must be served at the business address of that European Lawyer.

16 Ibid., pt.6, r. 6.8. It reads thus:- “Subject to rules 6.5(1) and 6.7 and the provisions of Section IV of this Part, and except where any other rule or practice direction makes different provision –

(a) the defendant may be served with the claim form at an address at which the defendant resides or carries on business within the UK or any other EEA state and which the defendant has given for the purpose of being served with the proceedings; or

(b) in any claim by a tenant against a landlord, the claim form may be served at an address given by the landlord under section 48 of the Landlord and Tenant Act 1987.”
last known residence.\textsuperscript{17} Where Individual is being sued in the name of a business, the claim form can be served at Usual or last known residence of the individual or

\begin{quote}
Ibid, pt.6, r 6.9. It reads thus:- “(1) This rule applies where –
(a) rule 6.5(1) (personal service);
(b) rule 6.7 (service of claim form on solicitor or European Lawyer); and
(c) rule 6.8 (defendant gives address at which the defendant may be served), do not apply and the claimant does not wish to effect personal service under rule 6.5(2).
(2) Subject to paragraphs (3) to (6), the claim form must be served on the defendant at the place shown in the following table.
(For service out of the jurisdiction see rules 6.40 to 6.47.)
\end{quote}

<table>
<thead>
<tr>
<th>Nature of defendant to be served</th>
<th>Place of service</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Individual</td>
<td>Usual or last known residence.</td>
</tr>
<tr>
<td>2. Individual being sued in the name</td>
<td>Usual or last known residence of the individual; or principal or last known place of business.</td>
</tr>
<tr>
<td>of a business</td>
<td></td>
</tr>
<tr>
<td>3. Individual being sued in the</td>
<td>Usual or last known residence of the individual; or principal or last known place of business of the partnership.</td>
</tr>
<tr>
<td>business name of a partnership</td>
<td></td>
</tr>
<tr>
<td>4. Limited liability partnership</td>
<td>Principal office of the partnership; any place of business of the partnership within the jurisdiction which has a real connection with the claim.</td>
</tr>
<tr>
<td>5. Corporation (other than a company)</td>
<td>Principal office of the corporation; any place within the jurisdiction where the corporation carries on its activities and which has a real connection with the claim.</td>
</tr>
<tr>
<td>incorporated in England and Wales</td>
<td></td>
</tr>
<tr>
<td>6. Company registered in England and</td>
<td>Principal office of the company; any place of business of the company within the jurisdiction which has a real connection with the claim.</td>
</tr>
<tr>
<td>Wales</td>
<td></td>
</tr>
<tr>
<td>7. Any other company or corporation</td>
<td>Any place within the jurisdiction where the corporation carries on its activities; or any place of business of the company within the jurisdiction.</td>
</tr>
</tbody>
</table>

(3) Where a claimant has reason to believe that the address of the defendant referred to in entries 1, 2 or 3 in the table in paragraph (2) is an address at which the defendant no longer resides or carries on business, the claimant must take reasonable steps to ascertain the address of the defendant’s current residence or place of business (‘current address’).
principal or last known place of business. There is controversy as to whether a defendant could be served as his usual or last known residence when he is out of jurisdiction. There are two cases with different views. In the case of Chellaram & Another v. Chellaram & Others (No. 2), 18 the Hon’ble court held that a defendant cannot be held to have been validly served at his last known residence where there is no evidence that his last known residence was ever his residence and even more when he is neither present nor domiciled in England. According to the court the fundamental rules of English jurisdictional jurisprudence is that when a defendant is not present in England at the time of the service of the claim process, he cannot be held to have been validly served with the claim form. But, a few years later, the English court in the case of City & Country Properties ltd. v. Kamali, 19 held at para 11 that, “there is no rule perpetuating the idea that a person has to be within the jurisdiction for service by post to be effected.” The court in this case held that defendant can be validly served with the claim form on his last known address even though he is not present in England when the claim form was served. Lord Justice Neuberger at para 28 and 29 of the judgment quoted that, “It could also be said to be unfair on a claimant that the validity of the service of the claim form (particularly as

(4) Where, having taken the reasonable steps required by paragraph (3), the claimant –

(a) ascertains the defendant’s current address, the claim form must be served at that address; or
(b) is unable to ascertain the defendant’s current address, the claimant must consider whether there is –
(i) an alternative place where; or
(ii) an alternative method by which, service may be effected.
(5) If, under paragraph (4)(b), there is such a place where or a method by which service may be effected, the claimant must make an application under rule 6.15.
(6) Where paragraph (3) applies, the claimant may serve on the defendant’s usual or last known address in accordance with the table in paragraph (2) where the claimant –
(a) cannot ascertain the defendant’s current residence or place of business; and
(b) cannot ascertain an alternative place or an alternative method under paragraph (4)(b)”.

18 [2002] 3 All ER 17.
19 [2007] 1 WLR 1219.
the timing of service is normally not within his control, as it is effected by the court) should depend on the location of the defendant”. At para, 29 his lordship further stated that, “Further, if a claimant with a good claim has taken reasonable steps to locate the defendant in the example I have postulated, as he would have to do, then it would be unfair on him if, because the defendant had effectively disappeared, he could not bring proceedings with a view to enforcing his claim. A balance has to be struck between the rights of a claimant and those of a defendant; and it seems to me that the balance achieved by the rule, as interpreted by the judge below, is fair and reasonable”.

The decision in Kamali case is totally opposite to what the English jurisprudence say on the service rules. If this is to be taken the right interpretation of the CPR rule, then the question is what is the need for the PD 6A para 3.1 (1) which allows the service of claim form to be served out of England with the permission of the court against a person domiciled within the jurisdiction. So, there is no clear position as to whether the claim form can be served validly in the cases where the defendant is outside the jurisdiction of England, when the claim form was served. However in the case of Key Homes Bradford Ltd & Ors v. Patel\textsuperscript{20} the court accepted the decision of Court of Appeal in Kamali case and held that claim form can be served at the last known residence of the defendant when the defendant by his conduct makes the claimant believe that he was residing there even though in reality he shifted his residence outside England.

5.3.1.2 Service on Companies

There are two jurisdictional regimes for companies in England. Service on the companies can be made under Brussels Recast Regulation or the statutory rules, comprising of Civil Procedure Rules and Rules under the statutory act, in England. Where the seat of the company is located in any of the European Union, it is assumed that that the company is domiciled in the member state of EU, then in such case the rules of jurisdiction laid down in the Brussels Recast Regulation will apply. But,\textsuperscript{20} [2014] EWHC B1 (Ch).
where the company does not have seat in the EU member state, the rules of jurisdiction contained in the Companies Act 2006 and the Civil Procedure Rules would apply. Service under the CPR rule is an alternative method of serving the claim form on the company. When the corporate juristic entities are incorporated (in case of domestic companies) or registered in England (in case of foreign companies) the statutory method of service becomes more useful, because under the companies Act, the companies or the corporate entities are required to fulfill certain criteria for registration which also mandates the giving of address of the persons authorized to accept service of documents on behalf of the companies. Hence, claim forms can be served easily on them as the place of service is easily determined. The Civil procedure rules can be invoked in the cases where the overseas companies are not registered in England, but are present in England.

5.3.1.2.1 Service on Companies under the Civil Procedure Rules

Jurisdiction over domestic companies incorporated in England can be assumed by the court by serving the claim form in any of the methods laid down under Civil Procedure Rule 6.3 which includes personal service on a company, service by first class post, document exchange or other service. Personal can be effected on the company by leaving the claim form with a person holding a senior position within the company\(^{21}\). Where a company authorizes its solicitor to accept the service of claim on its behalf, then, service should be made on such solicitor by leaving the claim form with such solicitor\(^ {22}\). Where the corporate defendant gives an address before the service of the claim form, the service at that address shall be made\(^ {23}\). However, where no address is given by the corporate defendant the service is to be made according to the provisions of CPR 6.9. The said rule distinguishes between (a) Corporation (other than a company) incorporated in England and Wales (b) Company registered in England and Wales (c) Any other company or corporation. Where a corporation is registered in England and Wales, service of claim

\(^{21}\) England and Wales Civil Procedure Rules, pt 6, r. 6.5 3(b).

\(^{22}\) Ibid, r. 6.7.

\(^{23}\) Ibid, r. 6.8.
from will be made at the Principal office of the company, or any place of business of
the company within the jurisdiction which has a real connection with the claim. In
case of companies, not incorporated in England but registered in England, service can
be made at Principal office of the company or any place of business of the company
within the jurisdiction which has a real connection with the claim. Service on
companies not registered in England or foreign companies can be made at any place
within the jurisdiction where the corporation carries on its activities or any place of
business of the company within the jurisdiction.

5.3.1.2.2 Service on foreign Companies under the Civil Procedure Rules

A foreign company that is registered and is carrying on business in England
can be served with claim form by any of the methods by which a domestic company
can be served under the Civil Procedure Rules under CPR 6.3, 6.5, 6.7 and 6.8. The
only difference lies regarding the service of method on a domestic and a foreign
company is when both type of companies fail to give an address for service. Under
CPR 6.9 if a foreign company has registered itself in England, it will be served at
Principal office of the company; or any place of business of the company within the
jurisdiction which has a real connection with the claim. In case it has not has not
registered itself, but is carrying on business in England, then it can be served any
place of business of the company within the jurisdiction of the court. The term
‘carrying on business” in relation to a foreign company means, the relevant act relied
on as showing that a company is carrying on business within the jurisdiction of
English court must have continued for a sufficiently substantial period of time, the
acts must have been done at some fixed place of business and there must have been a
person carrying on business for the company in this jurisdiction. Where a foreign
company is not carrying business in England, it shall be deemed to be not present in
England and claim form cannot be served on a company within the jurisdiction of
England by resorting to the CPR for service within England. In such case if there is a

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claim against a corporate defendant who is outside the Jurisdiction of English court than procedure for service as laid down in Civil Procedure Rules Part6B will be followed. The claimant will have to seek permission from the court to serve the claim from outside England. One interesting question arose in the case of *SSL International plc v TTK Lig Ltd*\(^{25}\), where the matter in issue was whether personal service on the director of a foreign company can be made under the CPR 6.5 3(b), when in fact that foreign company is not carrying on business within the jurisdiction of the court issuing the claim form. The defendant TTK was an Indian joint venture company and the claimant SSL international Plc, an English company. CPR 6.5 3(b) is basically used for the companies that carry on business within the jurisdiction of the court. In this case the appellant court discussed exhaustively the CPR 6.5(3)(b) which permit service on ‘a person holding a senior position’ within a company or a corporation. In this case the claimants/ appellants served the claim form on one of the director of respondent company personally. The interesting fact was that the claimants served the claim form personally pursuant to CPR part 6.5(3)(b), on one of the remaining directors, who was not only nominated by the claimants but also served at the claimants office and who happened to be in England for some time. So, the principal issues on the appeal was whether CPR Part 6.5(3)(b) permits service on a person holding a senior position within a company, when the company does not carry on business and is not present within the English jurisdiction. Both the courts namely, the High Court of Justice and the Court of Appeal dismissed the claimant’s case on one of the ground that a claim form cannot be served on a person holding senior position within a company, when infact that company is not carrying on business in England. So, the personal service as contented by the claimant was not a valid service pursuant to CPR part 6. The appellant court analyzed number of authorities on the point that can a corporate defendant not carrying on business or is not present within the jurisdiction, be served with the claim form personally by serving it on a person holding a senior position within a company or corporation. The first case analyzed by

the court was that of Okura and Co. Ltd v. Forsbacka Jernverks Aktiebolag where the court held that for a foreign corporation to be served with a writ, the said corporation should be ‘here’ and not ‘there’. ‘Here’ means that the foreign corporation should be residing in the jurisdiction of the English court. Residence is used in the sense of carrying on business in the jurisdiction. If the foreign corporation can be said to be here, its officer can be served with a writ. Then the court analyzed the cases of the Theodohos, the Vronpados, Adam v. Cape Industries. In all these cases it was found that unless a foreign company is carrying on business at a place within the jurisdiction of the English Court, it cannot be served with process within the jurisdiction, nor even by service on the president or other similar officers of the company. According to the Hon’ble court CPR rule 6.5(3) (b) and part 6.9 are laid down in unqualified terms. As per Hon’ble Justice, when CPR PD6B is there to permit the claimant to serve the defendant with the claim form outside England in cases where the claim has real connection with the English Jurisdiction, then why part 6 rule 6.5 (3)(b) is being pulled to apply in such cases. There is no rationale to apply part6 rule 6.5 (3)(b) for serving the claim form outside England on foreign companies when already separate provisions are made for the service of claim form on the foreign companies carrying on business within the jurisdiction of England under the Civil Procedure Rules. So, it is implicit in part 6.5 (3) (b) that it applies to companies carrying on business in England and is inapplicable to companies that are not carrying on business in England. Hence, the court held that TTK was not duly served within the jurisdiction. In the same case the Hon’ble court held that mere holding of occasional board meeting in England does not mean that the foreign corporation is carrying on business in the jurisdiction of England. Especially when the joint venture has broken before the claim form was served.

5.3.1.2.3 Service on Companies under the Companies Act, 2006

The companies Act 2006 under section 1139 lay down the provision as to the service of documents on the company. According to the section a document may be served on a company registered under the Companies Act by leaving it at or sending
it by post, to the company’s registered office. The section is applicable on the Companies incorporated and registered in England. For the companies incorporated outside England but registered in England the same section but sub section 2, applies 1139(2). As per which a document may be served on an overseas companies whose particular are registered under section 1046, by leaving the document at or sending it by post to the registered address of any person resident in the United Kingdom who is authorized to accept service of documents on the company behalf. But where there is no such person or if any such person refuses service or service cannot for any other reason, the service can be effected by leaving at or sending by post to any place of business of the company in the United Kingdom. In this section registered address means the current address of the person concerned in the part of the register available for public inspection. The companies Act make special provisions with regard to the companies registered in Scotland or Northern Ireland. If such companies are carrying on business in England and Wales, process of any court in England and Wales may be served on the company by leaving it at or sending it by post to the company’s principal place of business in England and Wales. The service is to be addressed to the manager or other head officer of the company in England and Wales. Also, the person issuing out the process must send a copy of it by post to the company’s registered office.

Section 1140 of the Companies Act 2006, lay down provision regarding the service of documents on directors, secretaries and other officers of the company. A director or secretary of the company may be served with a document by leaving it at, or sending it by post to the person’s registered address, no matter whatever the purpose of the document in question is. Here also registered address means any address for the time being shown as current address in relation to that person in the part of the register available for public interest. In a recently decided case relating to service of claim form on the company or its director, the importance of registered address came into light. In a recent decision of *Key Holmes Bradford Ltd. & Ors v.*
Rafik Patel the interpretation of section 1140 of the Companies Act 2006, was at issue. The claimant issued proceedings against the defendants on 16th August 2013. According to them they served the defendant a claim form on 13th September 2013 at two addresses of the defendant namely at Romford, which was a residential address and the other at Barking address, which was business premises. But the defendant disputed the service of claim form and on 9th October 2013 filed an application seeking an order setting aside the said service of the claim form on the grounds that the said two addresses were not their usual or last known residence as he has shifted his residence in UAE. The defendant filed a declaration in the court on the ground

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26 (2014) EWHC B1(Ch).
27 The United Kingdom Companies Act, 2006, pt.37, sec.1140. It reads thus:—“Service of documents on directors, secretaries and others
(1) A document may be served on a person to whom this section applies by leaving it at, or sending it by post to, the person’s registered address.
(2) This section applies to—
(a) a director or secretary of a company;
(b) in the case of an overseas company whose particulars are registered under section 1046, a person holding any such position as may be specified for the purposes of this section by regulations under that section;
(c) a person appointed in relation to a company as—
(i) a judicial factor (in Scotland),
(ii) a receiver and manager appointed under section 18 of the Charities Act 1993 (c. 10), or
(3) This section applies whatever the purpose of the document in question. It is not restricted to service for purposes arising out of or in connection with the appointment or position mentioned in subsection (2) or in connection with the company concerned.
(4) For the purposes of this section a person’s “registered address” means any address for the time being shown as a current address in relation to that person in the part of the register available for public inspection.
(5) If notice of a change of that address is given to the registrar, a person may validly serve a document at the address previously registered until the end of the period of 14 days beginning with the date on which notice of the change is registered.
(6) Service may not be effected by virtue of this section at an address—
(a) if notice has been registered of the termination of the appointment in relation to which the address was registered and the address is not a registered address of the person concerned in relation to any other appointment;
(b) in the case of a person holding any such position as is mentioned in subsection (2)(b), if the overseas company has ceased to have any connection with the United Kingdom by virtue of which it is required to register particulars under section 1046.
(7) Further provision as to service and other matters is made in the company communications provisions (see section 1143).
(8) Nothing in this section shall be read as affecting any enactment or rule of law under which permission is required for service out of the jurisdiction”.

that service of claim form was in actual no service at all for by 13\textsuperscript{th} September 2013, he was no longer resident in United Kingdom. But, the claimants contented that even if service under the CPR 6.15 is disregarded as ineffective service of claim form on the defendant, they can still rely on the provision of section 1140 of the Companies Act, 2006 and by virtue of the said section the service of claim form had been effected on the defendant. Simultaneously, the claimant on 12\textsuperscript{th} November 2013, issued an application in the court seeking permission to serve the defendant out of the jurisdiction at an address in United Arab Emirates and to permit them to serve the defendant by the alternative method pursuant to CPR 6.15(1). On 20\textsuperscript{th} November 2013, the claimants were granted permission by the court to serve the claim form out of the jurisdiction on the defendant in UAE. The issue before the court is whether a valid service is made on the defendant as per section 1140 of the Companies Act ignoring the provisions of Civil Procedure Rules. It is pertinent to mention here is that it is the first ever case in the UK dealing with section 1140 of the Companies Act, 2006 in commercial litigation. There is no such case referring to the said section has ever come before the court. The fact has come to the notice of the court on the research being made by both the councils of the parties. The main two provisions attached with the section are that (a) the section applies to the document whatsoever may be the purpose of document and (b) the section does not effect any other enactment or rule of law permitting service out of the jurisdiction. Another important provision is of Section 1141\textsuperscript{28} of the 2006 Act, which provides definition of “Service address” for the companies Act and states that it means in relation to a person “an address at which document may be effectively served on that person”. The secretary of the state is given power to make regulations to specify the conditions with which a service address must comply. Part 3 of the Companies Act 2006 (Annul Returns &

\begin{footnotesize}
\begin{enumerate}
\item The United Kingdom Companies Act, 2006, pt.37, s. 1141. It reads thus:- “ Service addresses (1) In the Companies Acts a “service address”, in relation to a person, means an address at which documents may be effectively served on that person. (2) The Secretary of State may by regulations specify conditions with which a service address must comply. (3) Regulations under this section are subject to negative resolution procedure”.
\end{enumerate}
\end{footnotesize}
Service Address) Regulations 2008 contain relevant conditions which permit service of documents by physical or postal delivery. Both the sections 1140 and 1141 are linked to the information that is required to be recorded in the register of director pursuant to section 163 of the Companies act 2006. Under Section 163(1)\(^\text{29}\) the register must contain each director’s service address and the country or state in which the director is usually resident. Section 163 (5)\(^\text{30}\) states that a person’s service address may be stated to be a company’s registered officer. The court analyzed explicably each provision of the Companies Act, 2006 dealing with service of document. As per Hon’ble Judge, section 163 of the Act contains an entirely new provision requiring a service address of the director so as to easily serve the appropriate documents on the directors of the company. There is however no fast rule that the director should provide such a address on the register, they may opt to give company’s registered office address as an address for serving the documents. Section 1140 is clear and unambiguous. Sub section 1140(3), clearly lays down in explicit terms that the section applies to whatever the purpose of the document in question and the section is not restricted to service for purposes arising out of or in connection with the company to which the register relates, meaning thereby that the section could also be used for the service of claim forms on the directors, secretaries etc. at their registered addresses. But subsection 1140(8) limits its application. According to the Hon’ble Judge, section 1140(8) is only to prevent section 1140 permitting service of proceedings on a director who has provided a service address outside the United Kingdom. So where a director who is resident abroad is entitled to provide an address outside the jurisdiction and, if he does so, permission to serve out of the jurisdiction

\(^{29}\) \textit{Ibid.}, pt.10, ch.1, sec.163. It reads thus:-Particulars of directors to be registered: individuals
(1) A company’s register of directors must contain the following particulars in the case of an individual—
(a) name and any former name;
(b) a service address;
(c) the country or state (or part of the United Kingdom) in which he is usually resident;
(d) nationality;
(e) business occupation (if any);
(f) date of birth

\(^{30}\) \textit{Supra} note 38, Sec. 163 (5). It reads thus:-“ A person’s service address may be stated to be “The company’s registered Office”.
must be obtained before service can be effected. In such cases it is necessary to comply with the provisions of CPR part 6 and to obtain permission to serve out of the jurisdiction. But, if he provides an address for service that is within the jurisdiction then he may be served at that address. As per the court nothing in section 1140 suggests that its provision is limited to prevent service upon a director who is not resident within the jurisdiction. The parliament of UK has tried to introduce a new regime by making provision for service on the directors of the company. Part 3 of 2008 Regulation provides that a director is at full liberty to opt to provide a service address which is outside the jurisdiction. By choosing to provide a foreign address, a director is clearly expressing his intention not to try by the English Court. But, if he fails to give a foreign address and instead gives an address which is within United Kingdom he cannot blame anyone if the claim form is served at the UK address. He will be bound by it. The next question before the court was, assuming that the service under section 1140 of the companies Act, 2006 did not take place, was service on defendant under CPR 6.9(2) at his usual or last known residence was a valid service on the part of the claimants. The Provision of CPR 6.9 (2) was Considered by the Hon’ble court in the light of the principles laid down in the case of Relfo Ltd. v. Varsani , the court held that the test for last or usual residence is that whether the defendant resided there in the settled pattern of his life and which was not a matter of merely comparing the duration or period of occupation, taking little account of the nature or quality of his use of the premises and ignoring that the premises were occupied permanently by the defendant’s family. Applying the test in Relfo’s case, the court concluded that the evidence suggests that the defendant’s usual residence in only UAE although he has maintained substantial business connection with UK. Romford was no more than a convenient address for the defendant to use from time to time , both as a place at which he can stay and an address he can use when it suits him. All these facts indicate that for the settled pattern of his life, his usual residence is only in UAE. Now coming to the question of last known residence the onus is on the claimants to establish that Romford was the defendant’s last known address to
them as at that date. This all depends upon the state of the claimant’s knowledge about the defendant’s residence. Last known is an alternative to usual but they overlap, as a usual residence will normally be the last known residence, but not the other way round. In this case the defendant’s length of residence in Ramford, evidently made the claimant to believe that his last known address is that of Romford. Also the defendant never told the claimant that he was leaving UK and he was having intention to sever his residential connection with UK, so to take residence in UAE. Moreover in sale purchase agreement also the defendant held out that Romford remained his UK adders, which was reinforced by his later email. For all the above reasons, the Hon’ble Judge concluded that Romford was the Defendant’s last known residence for the purpose of CPK 6.9(2) at the date the claim form was delivered there and the service was effective if he was not served under the Companies Act 2006.

The above said provision is a welcoming effort on the part of the parliament of United Kingdom to secure the service of claim form on the companies through service on the directors of the companies.

5.3.1.2.4 Service on Overseas companies under the Companies Act, 2006

Part 34, section 1044 of the Companies Act 2006 describe the provisions in relation to overseas companies. As per section 1044 an overseas company means a company incorporated outside the United Kingdom. An overseas company is required to get itself registered under section 1046 of the Companies Act , 2006. Section 1046 empowers the secretary of the state to make regulations requiring an overseas company to deliver to the registrar for registration a return containing specified particulars and specified documents. The regulations require the foreign company to must register particulars if it opens a branch in the United Kingdom. The regulation may also make different provision according to the place where the company is incorporated and the activities carried on or proposed to be carried by it. Where a company is a Gibraltar company, the regulation may require the company to register particulars if the company opens a branch in the United Kingdom. A
Gibraltar company means a company incorporated in Gibraltar. If after getting the particulars or documents registered with the registrar, the company has made any alteration in the said particulars or documents thereafter, then it must file the new altered particulars or documents with the registrar.

Pursuant to the power bestowed by the companies Act, 2006, Overseas Companies Regulation 2009, has come into force on 1st Oct, 2009. The explanatory memorandum that explains the purpose of the Regulation is as follows: “Every company incorporated in a country outside the United Kingdom (an overseas company) that operates its business in the United Kingdom through atleast one establishment (that is to say either a branch or a place of business that is not a branch) and is not a UK- incorporated subsidiary company, must register its particulars with the Registrar of Companies. The overseas Companies Regulation 2009, made under the Companies Act 2006 (“the 2006 Act”), set out the UK company law filing requirements for this type of company, which come into effect on 1st October 2009”. The regulation imposes various registration requirements on companies incorporated outside the UK, having an establishment a place of business or a branch in the UK. Important provisions of the regulation relating to registration and service of document are contained in Part 2 and part 4. Part 2 deals with the initial registration of particulars of an overseas company with the registrar of the companies within one month of the opening of a UK establishment. Part 4 requires the directors and permanent representatives of the overseas company to register particulars relating to their usual residential address.

In a recent case of *Teekay Tankers Ltd. v. STX Offshore and Shipping Co.*, the court has held that service of claim form on an overseas company’s registered UK establishment was valid service for the purpose of regulation 7 of the Overseas Companies Regulations 2009 and section 1139(2) Companies Act 2006, even though the claim did not relate to the UK establishment itself. The facts of the case are that

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31 Available at: www.legislation.gov.uk (last visited on November 10, 2014).
32 Supra note 40.
33 [2014] EWHC 3612.
Teekay is publicly listed shipping company which owns and operates a fleet of tankers. It is incorporated in the Marshall Islands, has Corporate head office in Bermuda and an affiliate which it relies on in relation to shipping matters based in Vancouver. STX, the defendant, is a company incorporated in the Republic of Korea, which operates a number of ship yards in South Korea. Both the companies entered into an Option Agreement for ship building contracts, but on 6 February 2014, Teekay terminated the Option Agreement due to alleged repudiation of contract by STX. On 11 April 2014, Teekay issued a claim form in the court claiming damages in the sum of US $179 million plus interest from STX. But the defendant challenged the jurisdiction of the English Court to hear the claimant’s (Teekay) claim for damages for repudiation of an Option Agreement. The main issue before the Hon’ble court was whether STX was validly served within the jurisdiction or not? Teekay served the claim form at the London address of the defendants pursuant to section 1139 (2) of the companies Act and CPR r. 6.9(2) para 7. The defendants are registered with the Companies House as “having established a UK establishment in the United Kingdom”, with effect from 3rd March 2014 under section 1046 of the Companies Act, 2006. The Hon’ble Court analyzed the followings sections and regulations carefully to draw conclusion and inter link between them.

1. Section 1139(2) of the Companies Act 2006
2. 1056(a) of the Companies Act 2006
3. Regulation 7 of the Companies Regulation 2009 no. 1801.

Section 1139(2) of the Companies Act state that a document may be served on an overseas company whose particulars are registered under 1046, by leaving it at, or sending it by post to, the registered address of any person resident in the UK who is authorized to accept service of documents on the Company’s behalf or if there is no such person or if any such person refuses service or service cannot for any other reason, the service be effected, by leaving it at or sending by post to any place of business of the company in the UK. Section 1156(a) of the Companies Act 2006 is linked with the section 1139(2) and 1046. Section 1046 empowers the secretary of the
state to make regulations requiring an overseas company to deliver to the registrar for registration a section containing specified particular and with the return containing specified particulars and documents. Section 1056(a) of the companies Act require that the regulations relating to registration of the overseas company must require an overseas company to register (a) Particulars identifying every person resident in the UK authorized to accept service of documents on behalf of the company or (b) a statement that there is no such person. Regulation 7 of the Overseas Companies Regulation 2009 No. 1801 requires an overseas company to include its particulars, name and service address of every person resident in the United Kingdom authorized to accept service of documents on behalf of the company in respect of the establishment or a statement that there is no such person. The contention of the defendants (STX) was that Mr. Kang whose address was given by STX in its London address under the head ‘detail of person authorized to accept service of documents in UK’, is in fact not authorized to accept service of such documents because Regulation 7 of the Overseas Regulation 2009 No. 1801 refer to a person resident in the UK, authorized to accept service of documents on behalf of the company in respect of the establishment and that the claim is not in respect of the UK establishment. But the Hon’ble Court rejected the contention of the defendants (STX) for the reasons stated (a) Section 1139(2) of the companies Act 2006 is expressed in general times and is not limited to claims in respect of the UK establishment because the words are ‘document on behalf of the company’. The reference to “registered address” implies that the person who is delivering the documents is intended to be able to identify the appropriate person and his/her service address from the public companies house register. Section 1056(a) should not be construed in narrow terms as to imply that it indicates registration of particulars of person authorized to accept service of documents on behalf of establishment. Section 1056(a) is expressed in mandatory terms. It connotes mandatory registration of particulars in respect of every person resident in the UK authorized to accept to accept service of documents on behalf of the company. Also, there is nothing in regulation 7 that limits the impact of its
application. If it were intended, it would have been mentioned that the provision so provided is in respect of the business carried on by the establishment, but it is simply mentioned particulars of every person resident in the UK authorized to accept service of documents on behalf of the company in respect of the establishment. The court considered some explanatory memorandum to the Companies Act, 2006 and an important case of *Saab v. Saudi American Bank*, and held at para 39 that, “in summary, the historical position had long been that in relation to service of overseas companies it was not necessary to establish any link between the subject matter of the proceedings and the business carried out in UK”. For this reason the court found that service at Mr. Kang’s registered office address was good service on STX under section 1139 (2) of the Companies Act, 2006. Assuming that suppose documents were not served validly on the defendants pursuant to section 1139(2) (a) of the Companies Act, 2006, then was there any good service on the defendants pursuant to section 1139(2) (b) of the said Act? The claimants were entitled to serve the defendants under section 1139 (2) (b), “at any place of business of the company in the UK”. STX contended that its London address was not a ‘place of business of the company’. But, the Hon’ble court disapproved the contention of the defendant by holding that when STX voluntarily got registered its particular under section 1046 as an overseas company, it cannot deny that it has a place of business within the jurisdiction. Regulation 4 of the Overseas Companies Regulation 2009 requires an overseas company to register, within one month of ‘having opened’, its particulars. This implies that the UK establishment is already opened doing business in UK for it is not possible to register an overseas company under the regulation without having already started business. An overseas company who has not started doing business in UK cannot get itself registered. Regulation 77(1) requires the oversea company whose UK establishment closes its business to give notice of the fact so as to get it deregistered. If it fails to do so, it would be assumed to be opened in the register of the Companies House. Once for all, the Hon’ble court concluded that if an overseas company has a UK establishment, it necessarily has a place of business in the UK.
STX then contended that it is necessary for there to be a place of business, the business activities to be carried out. The court going through number of authorities held that the phrase place of business is to be construed broadly. It extends to a place where the overseas company conducts business activities, even if incidental. Also, if the address with which the company has no more than a transient or irregular connection, then it will not be regarded as place of business of the company. On the basis of evidence, the court held that the defendant’s place of business is at London address at which it was validly served pursuant to section 1139 (2) (b) of the Companies Act, 2006 and or CPR rule 6.9 (2), Para 7.

5.3.1.3 Service on Partnership firms

A partnership firm and a Limited Liability Partnership firm can be served with a claim form in England by any of the methods laid down in CPR 6.3.34 Rule CPR Rule 6.5(3)(b) defines how a personal service is to be effected on a partnership. The provision lays down that a claim form can be served personally on the partnership, where partners are being sued in the name of their firm, by leaving it with a partner or a person who, at the time of service, has the control or management of the partnership business at its principal place of business. Where the claimant decides not to effect personal service on the defendant and the defendant has in fact given in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form or a solicitor acting for the defendant has notified the claimant in writing that the solicitor is instructed by the defendant to accept service of the claim form on behalf of the defendant at a business address within the jurisdiction, then in such case claim form may be served on the solicitor of such defendant.35 This provision is basically used when the individual partner(s) are outside the jurisdiction of England. In such case the partnership firm or the individual partners may appoint their solicitor to accept the claim form. Where the partnership gives an address at which it may be served, then service at that address may be made

34 Supra note 13.
35 England and Wales Civil Procedure Rules, pt. 6, rule 6.7.
according to provision of CPR rule 6.8. But, where neither solicitor has been authorized to accept the service, nor any address has been given where the claim form could be served on partnership, then service of the claim form shall be made according to the Provisions of CPR rule 6.9 (2). The rules lays down that where an Individual is being sued in the business name of a partnership, service of claim form shall be made at the Usual or last known residence of the individual or principal or last known place of business of the partnership. Where Limited liability partnership is sued, then claim form can be served at the Principal office of the partnership or any place of business of the partnership within the jurisdiction which has a real connection with the claim. Apart from the method as laid down in CPR rule 6.3, a Limited Liability Partnership firm can be served by any of the methods of service permitted under the Companies Act 2006 as applied with modification by regulations made under the Limited Liability Partnerships Act 2000. Which means the methods as laid down in the companies Act 2006,section 139, for the service of the document on company are also applicable to the Limited Liability Partnership firm. Section 1139 of the Companies Act 2006 is an additional method of effecting service on the Limited Liability Partnership. The service on the Limited Liability Partnership is effective even in the cases the Limited Liability Partnership has legal representatives acting, who have signified that they have been authorized to accept the service on behalf of the Limited Liability Partnership.\footnote{PD 7A para 5A.3 says that Where partnership has a name, unless it is inappropriate to do so, claims must be brought in or against the name under which that partnership carried on business at the time the cause of action accrued. Which means that, now the claimant can serve the claim form on the partnership firm as a whole and there is no need to serve the partners individually? But, where the claim is to be bought against the foreign partnership then in such a case the claim is to be served against individual partners.} 


\footnote{37 Prof Stuart Sime, and Derek French (eds.), Blackstone's Civil Practice 2013: The Commentary 329 (Oxford University Press, UK, 2013) available at: https://books.google.co.in (last visited on November 15, 2014).}
that PD7A para 5A.1 mentions that the para 5A applies to claims that are brought by or against two or more persons who were partners and carried on that partnership business within the jurisdiction of England, at the time when the cause of action accrued.

In the year 2000, Limited Liability Partnership Act was passed in UK with the purpose of providing a hybrid entity to its partners with the simplicity of a partnership arrangement and limiting liability to the capital contributed by each member. Many provisions of the Companies Act 2006 apply to LLPs by regulations made in 2008 and 2009. The act requires compulsory registration of the LLP in the United Kingdom. The rules relating to registered offices of Limited Liability Partnership are same as that of companies under the Companies Act 2006. An LLP is registered at Companies House using form LLPIN01. The Limited Liability Regulation makes certain regulation from time to time with respect to the LLPs. The regulation lay down that an LLP must at all times have a registered office situated in England and Wales (or in Wales), in Scotland or in Northern Ireland, to which all communications and notices may be addressed. In addition to it every LLP must keep a register of particulars of its members and their residential addressees. This would help in serving the documents easily on the members of the LLP firms. Part 10 Practice Direction (PD) 10 deals with the acknowledgement of service of the claim form. Para 4.1 of PD 10 says that an acknowledgment of service must be signed by the defendant or by his legal representative. In case where a claim is brought against partnership, service must be acknowledged in the name of the partnership on behalf of all persons who were partners at the time when the cause of action accrued and the acknowledgment of service may be signed by any of those partners, or by any person authorized by any of those partners to sign it. Under PD 10, para 5, the

38 The United Kingdom Companies Act, 2006, pt. 6A, Sec.86.
39 Available at: http://www.companylawclub.co.uk/ (last visited on November 30, 2014).
40 Limited liability partnership regulation 2009, Pt 4.
41 Limited liability partnership regulation 2009, Pt 5, ch. 1.
42 England and Wales Practice Direction 10 Para 4.4.
43 Ibid, Para 5.1, 5.2, 5.3, 5.4.
defendant’s name should be set out in full on the acknowledgment of service. Where
the defendant’s name has been incorrectly set out in the claim form, it should be
correctly set out on the acknowledgment of service followed by the words ‘described
as’ and the incorrect name. If two or more defendants to a claim acknowledge service
of a claim through the same legal representative at the same time, only one
acknowledgment of service need be used. Where the defendant wants to amend or
withdraw the acknowledgement of service that could only be done with the
permission of the court.

In a recent case of **Trevor John Brooks v. AH Brooks & Co & Others** 44
dealing with the issue of service on claim form on a partnership, the High Court of
England and Wales interpreted CPR rule 6.9 and the effect of acknowledgment under
PD 10 Part 10 of the civil procedure rules of England. In this case the claimant served
the claim form on the defendants pursuant to CPR 6.9 (2) i.e. at the Usual or last
known residence of the individual or at the Principal or last known place of business
of the partnership against the partnership firm and on the partners who were original
members of the firm when the partnership firm was constituted. But, to present no
original members were the partners of the partnership firm though the name of the
firm remained the same to continue. The claim from was served under a cover letter
which was addressed to the Managing Director of the firm at its office in leek,
Staffordshire. The defendant disputed the service of claim form on them on the
ground that the contents of the particulars of the claim form had the effect of serving
on the present partners using the firm name and since they are no more partners in the
present firm there cannot be any valid service on them. The court interpreted the
provision by stating that where number of partners are sued in the name of the
partnership firm, the effect of the third entry in the table attached to CPR 6.9 (2) is
that the claimant has the option to serve all or any of the members of the firm at the
usual or last known place of business of the firm. Service at the business firm
constitutes service on all the partners. It is more convenient for the claimant to serve

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the claim form in the name of the partnership when in fact he is unaware or does not know the names of the partners who were members of the partnership firm when the cause of action accrued. CPR 6.9 is to be construed on the footing that an action against a partnership is in substance an action against the individual partners. Each such partner is a defendant in the action, and his position requires to be considered individually in determining the permissible address or addresses for service in the table. Each of them is an "individual being sued in the business name of a partnership". Equally, each of them is "the defendant" for the purposes of entry (3) in the table related to CPR 6.9(2). If the claimant knows or has reason to believe that a particular person is no longer a partner, he is also likely to have reason to believe that the usual or last known place of business of the firm "is an address at which the defendant no longer... carries on business". So if the claimant wishes to ensure that the former partner is effectively served he will therefore be required to follow the procedure set out in paragraphs (3) to (6) to CPR 6.9. In practice, there will not always be a need to serve all former partners; the claimant may for instance be content if at least one partner with joint liability has been served and is insured.

Coming to the question of acknowledgement that service must be acknowledged in the name of the partnership on behalf of all persons who were partners at the time when the cause of action accrued the court held that since there is no qualification to the provision as to what if a partner acknowledging the service of claim is not in fact authorized to do. Will that acknowledgement be taken as invalid? The court held that this would not be the case. The acknowledgement will be taken to be on behalf of all the partners, including the former partners. Further, if the person signing it comes within paragraph 4.4(2) of PD 10 as being one of the partners at the time a cause of action accrued, or a person authorized by any such partner, the acknowledgment will by virtue of that paragraph be effective on behalf of those who were partners at that time, notwithstanding any lack of actual authority as between themselves, unless and until any of them is given permission to withdraw it pursuant to paragraph 5.4 of PD 10. Because, the acknowledgement is signed in the name of
the partnership, it is no longer required to specify the names of the partners on whose behalf it is made. Also, a party who has acknowledged service is taken to be served properly, even if there are procedural defects which could have been objected in the absence of the acknowledgement.

Also, it would be open for any partner on whose behalf a valid acknowledgement was made under PD10 para 4.4(2), in the name of the partnership firm, to dispute that enforcement proceedings could not be made against him on the ground that he was not partner when the cause of action accrued. In such case if he succeeds in validly establishing his part, then it would be deemed that service of claim form was not in fact made on his behalf, notwithstanding that service was expressly acknowledged on his behalf.

5.3.2 Service of claim form outside England

A defendant who is outside the territory of England can be served with the claim form by the claimant with the permission of the court. For the Commercial contract dispute the claimant has to show the court, his claim is based on one of grounds mentioned in paragraph 3.1 of the practice direction 6B. However, the

\[45\] England and Wales Practice Direction 3.1. It reads thus:-“ The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where –
(1) A claim is made for a remedy against a person domiciled within the jurisdiction.
(2) …..
(3) ….
(4)…..
(4A)…. 
(5) A claim is made for an interim remedy under section 25(1) of the Civil Jurisdiction and Judgments Act 1982.
Claims in relation to contracts
(6) A claim is made in respect of a contract where the contract –
(a) was made within the jurisdiction;
(b) was made by or through an agent trading or residing within the jurisdiction;
(c) is governed by English law; or
(d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract.
(7) A claim is made in respect of a breach of contract committed within the jurisdiction.
court is not under the obligation to grant the claimant the permission to serve the claim form outside England. The power of the court is discretionary. The court reserves the power to refuse to the claimant the permission sought by him to serve the defendant outside the jurisdiction of England. Once the permission is granted to the claimant, the jurisdictional gateways get opened for him. He owes the burden of proving before the court that the claim form has been duly served on the defendant in foreign jurisdiction. The tests for jurisdiction There are three requirements which are to be fulfilled on the part of the claimant if he wishes the court to grant him the permission to serve the defendant outside England. The test of requirement is et out by Lord Collins, in the case of AK Investment CJSC v. Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2012] 1 WLR 1804, at para 71:

(i) the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success;

(ii) the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context 'good arguable case' connotes that one side has a much better argument than the other;

(iii) the claimant must satisfy the court that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

At para 47, of the above said case, the Hon’ble court quoted the wordings of lord Collins in case of Spiliada Maritime Corp v. Cansulex Ltd, so as to make clear the

(8) A claim is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in paragraph (6).”

46 Also see VTB Capital PIL v. Nutritek Instrumental Corp (2013) 2 AC 337.
purpose of legal principles applicable to the case where service out of jurisdiction is sought by the claimant.

„….. “the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; second, in service out of the jurisdiction cases the burden is on the claimant to persuade the court that England ... is clearly the appropriate forum;…”

Under the Civil Procedure Rules the first and third requirement set out in the above stated case has been codified in Part 6, CPR 3.37. The rule lays down that the application of the plaintiff sorting permission to serve the claim form outside the jurisdiction of England must state that the claimant believes that the claim has a reasonable prospect of success on the merits and the court will not give permission unless it is satisfied that the court of England and Wales is the proper place to bring the claim for trial.47

Where there is a contractual disputes the phase ‘good arguable case’ for the purpose of establishing jurisdiction under PD6b 3.1 (6) by the plaintiff means that the plaintiff has to sufficiently show for the purpose of establishing jurisdiction in the case of, for example, PD6b 3.1 (6) (a), not merely that, if the contract existed, it was made within the jurisdiction, but that (1) there was a contract, and (2) such contract was made within the jurisdiction. Likewise, under PD6b 3.1 (b), (c) and (d), the existence of the relevant contract had to be sufficiently proved.48

47 England and Wales Civil Procedure Rules, pt.6 r. 6.37. It reads thus:-“ (1) An application for permission under rule 6.36 must set out –
(a) …
(b) that the claimant believes that the claim has a reasonable prospect of success; and
(c)...
(2)…
(3) The court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim.

In the case of *Caresse Navigation Ltd v. Office National De L'electricite & Ors (the Channel Ranger)* [2013] EWHC 3081,\(^\)\(^4^9\) court held that the standard of a proof in ‘good arguable case’ is less stringent when compared to proof on the ‘balance of probabilities’, but, is higher than the test of ‘serious issues to be tried’. It involves considering the relative strengths of the arguments in the light of the material available, bearing in mind the limitations of the interlocutory process. For this reason, it is often glossed by saying that the claimant must show that it has much the better, or at any rate the better, of the argument. The standard of proof is low in case of second condition, when compared to the first one. The claimant must show there is real as opposed to a fanciful prospect of success. As far as the third condition is required the claimant has to show that England is clearly the appropriate forum for the resolution of the claims. In the case of *Seaconsar Far East Ltd. v. Bank Markazi Jomhouri Islami Irani*,\(^\)\(^5^0\) it has been held that the second stage of inquiry requires modest burden of proof rather than full appreciation of facts.

For the purpose of jurisdiction the claimant has to establish a good arguable case, he does not have to prove his case on a balance of probabilities.\(^\)\(^5^1\)

In the case of *Damian Ratilal Chunnial v. Merrill Lynch International Incorporated*,\(^\)\(^5^2\) it is held by the court that where the claimant is seeking the English Court to exercise its exorbitant jurisdiction against a non-domiciled defendant, the burden is on him to prove that England is clearly the most appropriate forum. He has to prove that he has a good arguable case which Connotes that the claimant has much better argument than the defendant. The grounds like the contract were made in England, the contract is governed by English law or the breach of contract took place in England helps the claimant in establishing a good arguable case in his favour.

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\(^4^9\) Available at: [http://www.unalex.eu/](http://www.unalex.eu/) (last visited on December 3, 2014).


\(^5^1\) *Apple Corps Ltd v. Apple Computers Inc*. [2004] EWHC 768 (Ch).

\(^5^2\) [2010] EWHC 1467 (Comm).
5.4 Some general provisions regarding service of claim form under the England Civil Procedure Rules

5.4.1 Service on Solicitor of the Defendant CPR 6.7\textsuperscript{53}

A claim form may be served on the solicitor of the defendant. In such case no personal service is required to be made on the defendant. It is sufficient to serve the solicitor on his behalf. But the defendant has to give in writing the business address within the jurisdiction of a solicitor as an address at which the defendant may be served with the claim form. The solicitor may also while acting for the defendant notify the claimant in writing that he is instructed by the defendant to accept the service of the claim form at a business address within the jurisdiction, then in such case the claim form must be served at the business address of that solicitor. This rules is subject to rule 6.5(1) which lays down that where any part of CPR, other enactment, a practice direction or a court order requires a claim to be served personally, then in such case, the claim form has to be served personally and service on solicitor of the defendant will not be regarded as a valid service of claim form.

5.4.2 Service on the address given by the defendant CPR.6.8\textsuperscript{54}

Where before service of a claim form, the defendant gives an address at which he may be served, he may be served at that address at which the defendant resides or carries on business within United Kingdom ass per rule 6.8. Where personal service is required to made on him, or where service on solicitor can be validly made and or where any other rule or practice direction makes different provision then service is to be made accordingly. But where the defendant does not give an address at which he may be served with the claim form, then accordingly to CPR 6.9\textsuperscript{55} the claim form must be served at the following places:-

\textsuperscript{53} Supra note 14.
\textsuperscript{54} Supra note 15.
\textsuperscript{55} Supra note 16.
1. If the defendant is an individual, then place of service of claim form is his usual or last known residence.

2. In case of defendant being an individual sued in the name of business, usual or last known residence of the individual or principal or last known place of business.

3. Where the individual is being sued in the business name of partnership the claim form may be served at the usual or last known residence of the individual or principal or last known place of business of the partnership.

4. Claim form may be served at Limited Liability Partnership at it principal office or any place of business of partnership within the jurisdiction which has a real connection with the claim.

5. Where the defendant is a corporation (other than a company) incorporated in England and Wales, claim form can be served at the principal office of the corporation or any place within the jurisdiction where the corporation carries on its activities and which has a real connection with the claim.

6. In case of company registered in England and Wales, the claim form may be served at the Principal office of the company or any place of business of the company within the jurisdiction which has a real connection with the claim.

7. In case of any other company or corporation the claim form may be served at any place within the jurisdiction where the corporation carries on its activities, or any place of business of the company within the jurisdiction.

However if the claimant has reason believe that the defendant no longer resides or carries on business at the above mentioned address, then the claimant must take reasonable steps to ascertain the current address of the defendant and having able to find out the current address, he must serve the defendant at that very current address. But, in case he is unable to ascertain the defendant’s current address, the claimant must consider whether there is an alternative place where or an alternative method by which service may be
effected. If there is such place or method by which the service may be
effected, the claimant must make an application to that in the court.

5.4.3 Service by contractually agreed method CPR 6.11\textsuperscript{56}

CPR, 6.11 provides that service of claim form can also be made by
contractually agreed method between the parties. The rule lay down that in case of
contractual claims, the term of the contract provides the method or the place of
service of the claim form, then in such case the claim form is to be served on the
defendant by the method or at the place specified in the contract. In case where the
contract contains the term that the claim form is to be served out of the jurisdiction
then in such case it has to be served with the permission of the court if the case of the
claimant Practice Direction 6B paragraph 3.1.

5.4.4 Service by Alternative Method CPR 6.15\textsuperscript{57}

Apart from the methods laid down in Civil Procedure Rules for effecting
service on the defendant, the CPR 6.15 also provide alternative methods for serving
the defendant at the alternative place. Where it appears to the court that there is a
good reason to authorize service by a method or at a place which is not otherwise
permitted by CPR, the court may make an order permitting service by an alternative
method or at an alternative place. The court is at liberty to authorize any mode or any
place for serving the document not restricted to the methods or places mentioned in
the CPR. Another interesting provision of this rule is that the court has the power to
approve the steps already taken by the plaintiff to bring the claim form to the
attention of the defendant. So service at the alternative place or by alternative method
selected by the court itself or by the claimant but approved by the court shall be
deemed to be good service on the defendant. However, the claimant has to tender an
application to the court setting out supporting evidence for resorting to alternative
service. An application for an order under this rule may be made without notice. The
order of the court approving the application must specify the method or place of

\textsuperscript{56} England and Wales Civil Procedure Rules, pt.6.r 6.11.

\textsuperscript{57} England and Wales Civil Procedure Rules, pt.6.r 6.15.
service, the date on which the claim form is deemed served and the period for filing an acknowledgment of service, filing an admission or filing a defence. PD 6A, para 9.1 provides that where an application for an order under rule 6.15 is made before the document is served, the application must be supported by evidence stating the reason why an order is sought, what alternative method or place is proposed, and why the applicant believes that the document is likely to reach the person to be served by the method or at the place proposed. However PD 6A para 6.2 provides that where the application for an order is made after the applicant has taken steps to bring the document to the attention of the person to be served by an alternative method or at an alternative place, the application must be supported by evidence stating the reason why the order is sought, what and when alternative method or alternative place was used and why the applicant believes that the document is likely to have reached the person to be served by the alternative method or at the alternative place. Examples have also been attached to PD 6A 6.4, para 6.3 for making clear the requirements to be fulfilled before an order for service under this rule can be made. To make more clear one of the quoted example attached to PD6A 6.4 is, an application by the claimant to serve the defendant by sending a SMS text message or leaving a voicemail message at a particular telephone number saying where the document is must be accompanied by evidence that the person serving the document has taken, or will take, appropriate steps to ensure that the party being served is using that telephone number and is likely to receive the message.

In the case of Brown v. Innovatorone plc, the court laid down the following guidelines to be observed by all the courts in England while exercising discretion in allowing an application for alternative service of claim form under CPR 6.15 :-

(i) the fact that the CPR expressly require that there be a good reason for the court to exercise the power to permit service by an alternative method and do not simply confer a discretion to permit it emphasizes that the power should not be exercised over-readily (para 41),

(ii) it is necessary in the interests of certainty that the courts allow a litigant to depart from the rules about service only where there is a sufficiently compelling case made out so to do (para 44),

(iii) the court should adopt a rigorous approach to an application by a claimant for indulgence and should examine with some care why it has come about that it is being asked to make an order (para 40),

(iv) the mere absence of prejudice to a defendant will not usually in itself be sufficient reason to make an order under CPR 6.15 (para 40),

(v) ‘exceptional circumstances’ were not required to make an order, but that there must be a good reason (para 39), and

(vi) there is no proper basis for confining the circumstances in which there is ‘a good reason’ for making an order under CPR 6.15 to specific and limited categories of cases; the expression is a general one (para 41).

In the case of Dunbar Assets Plc v. BCP Premier Ltd the court held that the claimant has to give proper explanation as why he was not able to serve the claim form in accordance with the rules of the court if he wants his application for alternative service under CPR 6.15 be allowed by the court. At para 46, the court held that, “... if a litigant seeks the indulgence of the court to regularize a position which is irregular as a result of something which he has either done or not done then it is incumbent on that litigant to give a candid explanation as to how the circumstances which he wishes to avoid have come about. In my view, when seeking to persuade a court to exercise a discretion in his favour and so regularize something, it is simply not enough for a litigant to say; 'I have not done what I should have done, please put it right'. He must go further and explain to the court the circumstances why it is that the position has arisen. For it is only then that the court has material with which to form a view as to how the discretion should be exercised’. According to the court

59 [2015] EWHC 10 (Ch).
where the defendant is expecting proper service of the claim form from the side of the claimant, the court cannot give retrospective effect to a service which is otherwise improper so as to cause prejudice to the defendant.

5.4.5 Power of court to dispense with service of the claim form CPR 6.16.\(^6^0\)

CPR 6.16 empowers the court to dispense with the service of the claim form in exceptional circumstances. The claimant has to make an application before the court supported by the evidence that service cannot be effected on the defendant. Application under this rule can be made at any time and may be made without notice. In the case of Kuenyehia v. International Hospitals [2006] EWCA\(^6^1\), the Hon’ble court laid down following principles to be followed by the court before making an order for dispensing with the service of the claim form.

1. There should be an exceptional case before the court requiring the dispensing of service of claim form on the defendant, for example in the cases where the time limit for the service of claim form has expired before service was effected in accordance with CPR.

2. The power to dispense with the service is unlikely to be exercised except in the circumstances where the claimant has not made effective efforts to serve the defendant with the methods permitted by CPR 6.3 or has served the defendant in time or in a manner which involved a minor departure from methods of service laid down in the Civil Procedure Rules.

3. The court cannot give an exhaustive list of the circumstances which would justify the dispensing of service of claim form on the defendant.

5.5 Jurisdictional Rules in case of Commercial Contracts

Part 6 Rule 6.36 of the Civil Procedure Rule states that a claimant, with the permission of the Court, may serve a claim form on the defendant outside the jurisdiction of UK courts, if the court grants him the permission to serve outside, on the application made by him under rule 6.37 of CPR. The grounds, on which the

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\(^6^0\) England and Wales Civil Procedure Rules, pt.6.r 6.16.
permission of the court is required to serve the defendant outside the English jurisdiction are sent out in paragraph 3.1 of the Practice Direction 6B.

The Practice Direction supplements part 6 of CPR and contain relevant provisions in relation to service of claim form when service out of jurisdiction is permitted by the court. Para 3.1 of Practice Direction Lays down the grounds on which a claim form may be served outside by the claimant with the permission of the court in case of claims made in respect of a contract, when contract:-

1. Was made within the jurisdiction,
2. Was made by or through an agent trading or residing within the jurisdiction,
3. Is governed by English law,
4. Contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract,
5. A claim is made in respect of a breach of contract committed within the jurisdiction, or
6. A claim is made for a declaration that no contract exits where, if the contract was found to exist, it would comply with the conditions set out in paragraph (6) [means point from back]

1. **Contract was made in England. PD6b 3.1(6)(a)**

PD6b 3.1(6)(a) authorizes the English courts to assume jurisdiction over a foreign defendant in case of contractual disputes if the contract is made within the jurisdiction of England. The general rules to be followed while finding out the place where the contract is made in case of instantaneous communications (i.e. Telex) are set out in the cases of *Entores v. Miles Far East Corporation* 62 and *Brinkbon v. Stahag Stahl*. 63 It is held that in case of instantaneous communications the contract is made where the acceptance is received. But, tremendous change in means of communication has taken place post the Brinkbon and Entores case. Now, oral telephone communications have been very common. Today contracts are also made

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63 [1983] 2 AC 34.
through video links, where parties might even conclude a written contract by each signing and observing each other signing, over a video link. In such cases where the parties agree to sign a written agreement by signing simultaneously over a three way video link it becomes difficult to ascertain the true place of formation of contract. Also sometimes, where the contracts are made through telephonic communications it may happen that parties to contract are three or more participants residing in three or more different jurisdictions, then in such cases it become difficult to conclude the place of formation of contract. The law has to device ways to accommodate such changes taking place. It has to become flexible so as to recognize that where such situation takes place, there is nothing wrong in coming to the conclusion that contract can be made in two or more jurisdictions at the same time. If in such case one of place of formation of contract is England, then the English courts can assume jurisdiction but subject to the fact that claimant who seeks to sue in English court would still have to establish that English court is the most appropriate court to assume jurisdiction. The court held that there are certain types of contract where normal analysis of contract cannot be made on offer and acceptance basis. Sometimes it is not simply possible to analyse a contract in offer and acceptance terms. Where variation occurs in relation to the communication and receipt of a telex in a contract, such variations must be resolved by referring to the intention of the parties to the contract, sound business practices and in some cases by judgment.

The place of formation of contract depends upon the means of communication used by the parties to contract while making offer and acceptance of the contract. As per the English Rules where contract is made through post, then the postal rules apply in determining the place of formation of contract. The postal rule suggests that the place of formation of contract is the place from where the letter of acceptance was posted. Whereas, where instantaneous means of communication such as telephone, email, fax, text message or telex are used for offer and acceptance of the contract, then the place of formation of contract is the place where the acceptance is received. However, in case of instantaneous communication difficult arises in certain situations
especially where email or text message is used to communicate the acceptance of the contract. In such cases the location of the ‘receipt’ is difficult to ascertain for he may open the email or received the text message at the place outside his place of business due to his being on a business tour or on a holiday. A similar situation arose in the case of *Corps Limited v. Apple computers Inc.*, 64 where the court held that the contract could be made at two or more places at the same time. Such a situation arises very rarely, but, where it does arise, then, for the purpose of assuming jurisdiction, the law of the court has to provide some useful guidelines or solution, when answers could not be found out by applying experiences of everyday life. Similarly in the case of *Conductive Inkjet Technology Ltd. V. Uni–Pixel Displays Inc.*, 65 the High court of England and Wales, held that contract can be made at two places and where one of the place of formation of contract is England, then English court is entitled to assume jurisdiction over the foreign defendant by virtue of CPR 6.20 (5).

So, where a contract is made through a series of telephone and e-mail communication and it is difficult to ascertain the place and time of formation of contract, then in such circumstances the court will conclude that the contract is made in both the jurisdictions. The Traditional rule of ‘posting’ cannot be applied by analogy to each and every case.

2. **Contract governed by the law of the forum. PD6b 3.1(6)(c)**

   If the contract is governed by the English law, the English courts are entitled to assume jurisdiction over a foreign defendant. In determining whether a contract is governed by the English law the English courts apply their own choice of law rules. Although the factor that the contract is governed by English law is an important factor for the purpose of assuming jurisdiction over a foreign defendant, but it is not conclusive. 66 How much importance is to be given to this factor should be decided by

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64 [2004] EWHC 768 (Cth).
65 [2013] EWHC 2968 (Ch).
taking into account the context of the whole case.\textsuperscript{67} The choice of law rules or the law governing the contract in England is determined according to the provisions of Articles laid down in Rome I Regulation in cases where the parties are from European Union States. In other states not belonging to the union of European States, the common law rules of England on choice of law still applies. Under the common law doctrine on choice of law, three are three rules which ever court should take into account while determining the governing law in the contract\textsuperscript{68}.

1. If there is express choice of law in the contract, the court should give effect to it, so long it is bonafide, legal and not contrary to public policy.
2. If there is no express choice of law governing the contract, then in such case the governing law will be the system of law by reference to which the contract was made.
3. If the parties fail to make a choice, the governing law of the contract is the law with which the transaction has its closest and most real connection.

3. \textbf{Breach of contract has taken place in England. PD6b 3.1(7)}

If there is a breach of contract in England, the claimant is entitled to serve the defendant with the claim outside the territory of England under PD6b 3.1(7). Not only this, where there is repudiation of contract that occurred in England, the claimant is also entitled to serve the defendant outside UK on this ground. Breach by repudiation is of two types, express or implied. Express repudiation occurs where one party to contract informs the other that he no longer intends to perform the contract. Whereas, implied breach by repudiation occurs when one party does an act which is inconsistent with his performance of the contract. Where breach is by non-performance of act stipulated in the contract, the place of breach of contract would be the place where the performance was to be made.\textsuperscript{69}

\begin{itemize}
\item \textsuperscript{67} VTB Capital plc (Appellant) v. Nutritek International Corp and others (Respondents) [2013] UKSC.
\item \textsuperscript{68} C.M.V Clarkson and Jonathan Hill, The Conflict of Laws 204(Oxford University Press, New York, 4\textsuperscript{th} edn.,2006).
\item \textsuperscript{69} Supra note 57.
\end{itemize}
To get the service of claim form served outside England on the ground of breach of contract in England, it is necessary that the performance stipulated in Contract should have to be performed in England. It is sufficient if part of the performance was to be performed in England. But, where there is a choice that the performance of contract may either be performed in England or elsewhere, then the claimant cannot plead this ground as a ground for serving the claim form outside England. The next question that arises is, what if, there is no express term in the contract that provides for the performance of contract in England then on what basis the court will decide the place of breach of contract. In such circumstances usually the court takes into consideration the surrounding factors and circumstances of case, intention of the parties, the course of dealing between the parties to contract etc. and then decides accordingly.\textsuperscript{70} In an Interesting case of \textit{Mrs. Daad Sharab v. HRH Prince Al-Waleed Bin Talal Bin Abdal–Aziz-Al-Saud},\textsuperscript{71} while deciding the question of service of claim form outside England, apart from the other grounds supporting the service of claim outside England, the court did not support one of the ground for service outside England where the claimant alleged that a breach of contract occurred in England. The contention of the Claimant/respondent was that she made a telephone call to the defendant in Saudi Arabia requesting him to pay commission into one of her bank accounts in London. Since, the defendant failed to pay the said commission into her London bank account, therefore, according to her, the failure amounted to breach committed within the jurisdiction of England. The deputy judge agreed with the claimant’s contention and held that establishing a breach committed within the jurisdiction entails establishing that the contract required performance of the relevant duty within the jurisdiction and not elsewhere. Accordingly, the deputy judge concluded that, the place of payment of her commission was London and a breach had been committed on the part of defendant in not paying the said amount into her bank account.

\textsuperscript{70} James Fawcett and Jannen M. Carruthers, \textit{Cheshire, North and Fawcett: Private International Law} 322 (Oxford University Press, UK, 14\textsuperscript{th} edn., 2008).
\textsuperscript{71} [2009] EWCA Civ 353.
But on appeal to Court of Appeal, the appellant judge found the findings other way round. In order to serve the defendant outside, on the ground of breach of contract, the place of performance of contract must only be England. Appellant judges found that the conversation between the respondent and defendant did not mean that payment would be at a place nominated by the respondent. The respondent only requested the appellant to make the payment in the London bank account which did not mean that appellant agreed to her request. The defendant did not show any interest in asking her the details of her bank account so as to pay the money in the bank account nominated by her. The Hon’ble court agreed with the defendant/appellant’s contention that telephonic conversation between the respondent and the defendant was just a normal discussion between both of them. The defendant did not accept verbally or impliedly any obligation to pay the commission in London and not elsewhere. The appellant Hon’ble judges held that the claimant/respondent has failed to establish a good arguable case to serve the defendant outside England under (old) CPR 6.20(6). But, since the claimant/respondent were able to prove that the contract was made in London, permission was granted to her to serve the defendant outside England by virtue of CPR 6.20(5). The claim of the respondent got through the (old) CPR 620 (5)(a) gateway.

4. Contract was made by or through an agent trading or residing within the jurisdiction of England. PD6b3.1(6)(b)

The court has the authority to serve the defendant outside England on the plea of the claimant that the defendant has entered into a contract made by or through an agent, who is residing or carrying on trade in England by virtue of PD6b3.1(6)(b). Under this ground though the contract is entered by or though an agent, but, service of claim form can made on the foreign defendant ex-juris. The basis of jurisdiction which justifies such service is the defendant business, which is carried on by him in England through or by an agent in England. The ground is only available where the contract is made by or through an agent of defendant and not of the claimant. The agent should be of defendant. The English court follows the
authority given in Australian Case of National Mortgage & Agency Co of New Zealand v. Gosselin, in which case it was held that the clause uses the word ‘by or through an agent’ and not ‘by’ an agent. Which means that the clause covers the cases where the agent has no authority to make contracts on behalf of his foreign principal, but only has the authority to obtain orders and transmit them to his principle for acceptance or rejection\(^\text{72}\).

In the case of Mrs. Daad Sharab v. His Royal it Highness Prince Al Waleed Bin Talal Bin Abdal Aziz Saud,\(^\text{73}\) it has been held that, “the wordings of old CPR 6.20 (5)(b) now, PD6b 3.1 (6)(b)\(^\text{74}\) is apt to cover not only a contract made through as well as by an agent, but also a contract made outside the jurisdiction by or through an agent who trades or resides within the jurisdiction. The word “through” denotes the case of a contract negotiated by an agent in this country but concluded by the principle abroad”. The terms of CPR PD6B para 3.1(6) (b) do not distinguish between a contract made by the defendant as principal or a contract made on his behalf by an agent. Its wording covers both situations where a contract is made by an agent on behalf of a foreign defendant whether or not that agent is trading or residing within the jurisdiction.

**Service of the claim form relating to a contract on an agent of a principal who is out of the jurisdiction**

Part 6 Rule 6.12 of Civil Procedure Rules authorize the claimant to get the claim form served on the defendant with the permission of the court who is outside


\(^\text{73}\) [2008] EWHC 1893 (ch).

\(^\text{74}\) England and Wales Practice Direction, 6b 3.1 (6). It reads thus:-“ A claim is made in respect of a contract where the contract –
(a) was made within the jurisdiction;
(b) was made by or through an agent trading or residing within the jurisdiction;
(c) is governed by English law; or
(d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract”.
UK at the time of service of claim form in case where the contract was entered into within the jurisdiction with or through the defendant's agent. However, the plaintiff has to make sure that at the time of the making an application before the court either the agent’s authority has not been terminated or the agent is still in business relations with the defendant. Service on the agent of the defendant is an alternative way of securing contractual claims. It has been held that permission to serve out on the basis of PD6b 3.1(6) (b) should be more appropriate and easily obtained in cases where defendant has a ‘general’ agent doing large business for him in England. Whereas Rule 6.12 is more appropriate when defendant carries out a single business transaction through a broker in England. Application of the claimant for serving the agent must be supported by evidence setting out details of the contract, the fact that it was entered into within the jurisdiction or through an agent who is within the jurisdiction, that the principal for whom the agent is acting was, at the time the contract was entered into and is at the time of the application, out of the jurisdiction; and the reasons why service out of the jurisdiction cannot be effected. Application under this rule may be made without notice. The court making the order states the period within which the defendant must respond to the particulars of claim. Where the court makes the order the claimant must serve the agent a copy of the application notice along with the order of the court. The same must also be served on the defendant with an addition of claim form. But where the court directs otherwise then in such case there the defendant need not be served with the aforesaid particulars. It is to be noted that service on agent is an alternative method which does not exclude the court’s power to make an order under rule 6.15 which deals with service by an alternative method or at an alternative place.

5. **Contract contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract PD6b3.1(6)(d)**

According to PD6b3.1(6)(d) where the parties to contract, have mutually agreed by incorporating a jurisdictional clause in the contract that the court of
particular jurisdiction shall have jurisdiction to try the case, in case of any dispute which may arise between them, then such court shall have jurisdiction to try the case between the parties. If the parties agree that court in England shall have jurisdiction to determine any claim in respect of the contract, then in such case, the English court shall have jurisdiction by virtue of such clause in the contract over the foreign defendant. The provision encompasses not only clauses providing for the exclusive jurisdiction of the English courts but also clauses providing for the non exclusive jurisdiction of the English courts i.e. the parties are not precluded from commencing proceedings abroad.75

6. Where a claim in respect of contract is made for a declaration that no contract exists where, if the contract was found to exist, it would comply with the conditions set out in Paragraph 6, PD6b 3.1(8).

The provision covers the cases where the suit is contested on the ground that in reality no contract exists between the parties.

5.6 Forum non Convenience in England

The defendant who has been served with the claim form outside the jurisdiction of the English court can deny the jurisdiction of the English court on the ground that the English court is not a forum Convenience or convenient court for the trial of the case. When the claimant applies to the court for the permission to serve the claim forum on the foreign defendant then he has to prove to the court that England is a convenient forum for the trial of the case. The burden then shifts on the defendant applying for the stay of the proceedings on the ground that England is a forum non convenience to prove that some other tribunal or court in another country is more appropriate for the trial of the case. The power of the English court to grant or refuse the stay is discretionary. Even when the claimant approaches the court to exercise jurisdiction over the defendant present within the jurisdiction and the claim of the claimant has little connection with the England, the English court has inherent power to stay the proceedings in England thereby preventing the claimant to shop forum best

75 Supra note 70 at 382.
to his advantage of the court. The doctrine of forum non convenience comes into play usually when the defendant approaches the court for an application to stay the proceedings. The defendant has to first formally make an application under Part II, Rule 11\textsuperscript{76} of the Civil Procedure Rules for disputing courts jurisdiction for whatever

\textsuperscript{76} England and Wales Civil Procedure Rules, pt. 11, r.11. It reads thus:- “(1) A defendant who wishes to –
(a) dispute the court’s jurisdiction to try the claim; or
(b) argue that the court should not exercise its jurisdiction
may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.
(2) A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.
(3) A defendant who files an acknowledgment of service does not, by doing so, lose any right that he may have to dispute the court’s jurisdiction.
(4) An application under this rule must –
(a) be made within 14 days after filing an acknowledgment of service; and
(b) be supported by evidence.
(5) If the defendant –
(a) files an acknowledgment of service; and
(b) does not make such an application within the period specified in paragraph (4),
he is to be treated as having accepted that the court has jurisdiction to try the claim.
(6) An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make further provision including –
(a) setting aside the claim form;
(b) setting aside service of the claim form;
(c) discharging any order made before the claim was commenced or before the claim form was served; and
(d) staying the proceedings.
(7) If on an application under this rule the court does not make a declaration –
(a) the acknowledgment of service shall cease to have effect;
(b) the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct; and
(c) the court shall give directions as to the filing and service of the defence in a claim under Part 7 or the filing of evidence in a claim under Part 8 in the event that a further acknowledgment of service is filed.
(8) If the defendant files a further acknowledgment of service in accordance with paragraph (7)(b) he shall be treated as having accepted that the court has jurisdiction to try the claim.
reasons. Rule 11 of the CPR lays down that a defendant who wishes to dispute the court Jurisdiction to try the claim or argue that the court should not exercise its jurisdiction may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have. But, before filing an application ‘disputing the court jurisdiction’, the defendant has to first file an acknowledgement of service as per rule 10 of CPR. As per rule 10 of CPR, a defendant who wishes to dispute the court jurisdiction has to file an acknowledgement of service failing to which, the claimant may obtain default judgment. On the receipt of an acknowledgment of service, the court must notify the claimant in writing. 77 An acknowledgement of service must be signed by the defendant or the defendant legal representative and include the defendant address for service. 78

The doctrine of forum non conveniens had limited application to the cases in England earlier. English courts could exercise the discretion to grant stay only if the proceedings were vexatious and oppressive to the defendant. But in 1970 and 1980 the English courts expanded their horizon to adopt the forum non conveniens in broader sense.

The English courts have the discretionary power to stay the proceedings in England in three situations:-

(a) On the basis of doctrine of forum non conveniens or

(b) Where the proceedings are in break of a jurisdiction agreement.

(c) Where there is an agreement on arbitration.

(9) If a defendant makes an application under this rule, he must file and serve his written evidence in support with the application notice, but he need not before the hearing of the application file –

(a) in a Part 7 claim, a defence; or

(b) in a Part 8 claim, any other written evidence”.

77 Ibid, pt.10, r. 10.4.
78 Ibid, r.10.5.
1. **On the basis of doctrine of forum non conveniens**

   A revolutionary change was brought in the attitudes of English court with the case of *Spiliada Maritime Corp. v. Cansulex Ltd*\textsuperscript{79} case. The kind of rigidity in refusing to exercise stay discretion was somewhat lower down in this historical case and the English courts opened the door for more flexible outlook. Lord Goff of Chieveley, summarized the English doctrine of forum non convenience in Spiliada case focusing on the following elements\textsuperscript{80}:

   1. A stay will only be granted on the ground of forum non convenience where the court is satisfied that there is some other available forum, having competent jurisdiction, which is appropriate forum for the trial of action.
   2. In general the burden of proof rests on the defendant to persuade the court to exercise its discretion to grant stay.
   3. If jurisdiction is a matter of right in England, as opposed to jurisdiction ex juris in which the plaintiff must request leave to serve the defendant outside the jurisdiction, then “the burden resting on the defendant is not just to show that England is not or the appropriate forum for the trial, but to establish that there is another forum which is clearly or distinctly more appropriate than the English forum. If, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas.
   4. While not every case presents a “natural forum”… ‘with which the action had the most real and substantial connection,’ the court must look at the connecting factors including (a) the availability of witnesses, (b) the law

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governing the relevant transaction, and (c) the places where the parties reside or carry on business.

5. If there is no other available forum “which is clearly more appropriate for the trial of the action,” the court will refuse a stay.

6. If “there is some other available forum which prima facie is clearly more appropriate for the trial of the action,” the court ordinarily will grant a stay. At this point, however, the burden of proof shifts to the plaintiff, who may prove “circumstances by reason of which justice requires that a stay should nevertheless not be granted”. Moreover, “the court should not be deterred from granting a stay.. simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum.

The case set out the conditions on which the stay may be granted by the English Courts. The test to allow stay on the principle of forum non convenience basically has two stages inquiry.

i. The defendant must prove to the court that there is another forum available which is clearly more appropriate for the trial than the English court.

ii. The second stage inquiry requires that where the defendant succeeds in establishing that English court is not the clearly appropriate forum for the trial, the claimant refuting such claim of defendant must prove the circumstances which require that justice be only done if stay is not granted, i.e., stay should not be granted to the defendant.

i. Another available forum which is clearly more appropriate than English forum

The defendant owes the burden of proving that there is ‘another forum’ available which is ‘clearly more appropriate’ than English forum for the trial of case. The term availability does not solely mean that the other form is available only to
defendant but should also be available to the claimant also. The claimant should be able to institute suit in the forum selected by the defendant as of right. Where the defendant is personally present or resident in the foreign territory or he agrees to submit himself to the jurisdiction of the foreign court in which he wants to commence the proceedings, the claimant will have clear right to commence the proceedings against him in that foreign court. But, if the defendant has judicial immunity or do not agree to submit himself to the jurisdiction of the foreign court in which he wants the claimant to commence proceedings against him, then in such cases the English courts are reluctant to grant the defendant a stay of proceedings in England. In the case of *Mohammed v. Bank of Kuwait and Middle East KSC*,[82] Evans JJ, gave the term ‘availability’ a more complex and more questionable meaning. According to him the term ‘availability’ means available in practice to the plaintiff to have his dispute resolved, and that the question whether substantial justice is likely to be achieved is relevant to the issue. Now coming to the term ‘clearly more appropriate’ it signifies that the other available forum is the natural forum for the trial of the case. The terms natural form and appropriate forum have been used synonymously. It is not enough just to show that England is the natural or appropriate forum for trial. Neither is it enough to establish a mere balance of convenience in favour of the foreign forum. This principle is designed to reflect the fact that in cases where stay is sought on the basis of forum non conveniens, jurisdiction will have been founded as of right i.e. a claim forum will have been served within the jurisdiction.[83]

The court searches for that forum while enquiring about the clearly more appropriate forum, with which the cause of action has the most real and substantial connection. It takes various factor into consideration while determining the clear and distinct more appropriate form. These factors are:

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[82] [1996] 1 WLR 1483.

[83] *Supra* note 70 at 430.

1. Personal factors between the parties to the dispute such as practical inconvenience to be parties in litigating in the domestic or foreign courts, the place of their residence or the place where the parties carry on business.

2. The factual connection between the events and particular courts such as availability of witness.

3. The applicable law to resolve the substantive dispute, the possibility of lis pendens and the relevance of other parties to the litigation or multiple defendants. This group is more focused on procedural convenience concerning the interest of justice.

In case of **Stephen John Akers, Mark Byers, Huge Dickson (as Joint Official Liquidators of Saad Investments Company Ltd.) Saad Investments Company Limited (In Liquidation) v. Samba Financial group**,\(^{85}\) The court while laying down the relevant principles of stay has held that, the law granting or refusing a stay is well settled by Lord Goff in the case of *Spiliada Maritime Crop v. Consulex Ltd*. The court has a direction to stay proceedings if there is another more appropriate forum, even where, the court’s jurisdiction has been invoked by the claimant as of right. But, the court will grant stay only in the cases when certain conditions are satisfied. The defendant must satisfy the court that there is another forum which is clearly or distinctly more appropriate than the English court. The court will take into consideration the forum with which the issues have the most real and substantial connection, including the governing law of the relevant transactions, the place where the parties respectively reside or operate and the convenience of witnesses and the location of evidence. If the court considers that there is no other forum which is clearly more appropriate for the trial of the action, it will ordinarily refuse a stay. If however, the court is satisfied that there is another forum which is clearly more appropriate, then the court will ordinarily order a stay unless the claimant can satisfy the court that justice requires that the proceedings should be continued in England.

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\(^{85}\) [2014] EWHC 540.
The claimant has to establish his contention objectively and by cogent evidence that justice will not be done is that other forum. The court will ultimately decide the question keeping in mind the interest of all the parties and the ends of justice.

In case of Caresee Navigation Ltd. v. Office National De L'electricite & Ors, the court has held that where the parties to contract have agreed to a express choice of English law, the claimant would probably get substantial weightage when the circumstances of the case are such that defendant wants stay of proceedings on the ground that another forum is more appropriate forum than English forum and the claimant argue that English Court is more appropriate for the trial of case . An express choice of English rules in a contract is a significant factor to be weighed decisively, particularly in the cases where application of different law by a foreign court might lead to a result that would deprive the claimant of the benefit of his bargain.

In the case of Surrey (UK) Ltd. v. Mazandaran Wood and Paper Industries where the claimant had only one condition in his favour namely, the contract entered into between the claimant and the defendant was to be the governed by the English Law and all other conditions favoured the defendant, such as domicile of the defendant is Iran and the main evidence relating to contractual dispute is to be collected from Iran, the court held that the claimant has failed to show that England is clearly the appropriate forum and refused to grant permission to serve the proceedings out of the jurisdiction. The court also held that in considering whether or not England is the most appropriate forum, it is necessary to have in particular what are, or what are at least likely to be the issues between the parties, which will be required be determined at any trial . In the case of Navigators Insurance Company and other v. Atlantic Methanol Production Company LLC, quoting, Dicey and Morris, the court held that if the legal issues are straight forward, or if the competing forum have

86 [2013] EWHC 3081 (Comm).
87 [2014] EWHC 3165 (Comm).
domestic laws which are substantially similar, the governing law will be a factor of little significances.

In *VTB Capital PIL v. Nutritek Instrumental Corp,*\(^8^9\) The court held that where the other things are equal between the claimant on one side and those of defendant on the other side, then it is general tendency of the court to hold that the case should be tried in the country whose governing law applies to the case. The governing law factor becomes even more important when there is evidence that there is relevant difference in the legal principles applicable to issues in the two countries. If the governing law is English law in a given case, then it is considered a positive factor by the courts to hold the trial in England.

**Second Stage:** After the defendant has successfully established that English court is not an appropriate forum for the trial of the and some other forum is more appropriate than English court for the issue to be tried, the claimant can still object to the contentions of the defendant and argue that justice cannot be done in that other appropriate forum even though English court is not the most appropriate court for the trial of the case. The claimant owes the burden of proving that in the interest of justice a stay should not be granted and the proceedings be carried out in England. The burden of proof now shifts on his shoulders. The court considers the second stage only when having regard to the relevant connecting factors at the first stage, the dispute is more closely connected with a foreign court. Where a case falls under CPR rule 6.20 and the claimant fails at the first stage because the defendant has succeeded in satisfying the court that England is not the appropriate court with which the dispute is most closely connected, he may still argue and succeed at the second stage that in the interest of justice the trial be continued in England.\(^9^0\) The second stage focuses more on the ‘requirements of justice’ and requires the plaintiff to establish his claim objectively by cogent evidence that he will not obtain justice in the foreign

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89 (2013) 2 AC 337.
90 *Supra* note 68 at 108.
jurisdiction and so the proceedings should not be stayed.\textsuperscript{91} It is to be noted that it is not sufficient for the claimant to state that he will lose a legitimate personal or juridical advantages but instead he has to prove that substantial justice will not be done if the proceedings are stayed. Sometimes some procedural disadvantages causes the claimant substantial injustice when the proceedings are stayed and allowed to be carried out in the foreign forum. It is very difficult for the court to draw a line between a factor which is merely an advantage to the claimant and between a factor which is so important that if the court did not consider the said factor in favour of the claimant, it will cause injustice to the claimant for e.g. where a claim is time barred in the foreign forum, the grant of stay would cause the claimant substantial injustice for he would not be able to get any benefit if the alternative or foreign forum would dismiss his claim on the basis that the claim was time barred. In contract cases where the trial is for breach of contractual damages there is no unanimity between the courts whether to or not to grant a stay to the defendant, when the claimant approaches the court to refuse stay application of the defendant on the ground that the alternative forum would award less amount of damages if the proceedings are stayed in English Court and allowed to be carried on in foreign court. Some courts allow the stay on defendant’s plea and ignore the claimant’s contention about the award of less damage in foreign forum. But some courts refuse the stay to the defendant on the ground that substantial injustice would be caused to the claimant if the proceedings are stayed when there is substantial amount of difference between the amount of damages a to be awarded by the English court and the foreign court. Also in cases where the court comes to the conclusion that the claimant will not get justice in the foreign court if the foreign court would apply its own law and comes to a conclusion different from what the English Court would have come by applying its own English Law thereby causing substantial injustice to the claimant, the English court would refuse stay to the defendant. Similarly where there is a procedural unfairness to the claimant the court will refuse to grant stay to the defendant. But, it is to be noted that to prove his point,

\textsuperscript{91} Supra note 84.
the claimant has to adduce positive and cogent evidence. Merely making oral allegations or just having unsubstantiated fear, would not be sufficient to pacify the courts to refuse the stay in his favour.\textsuperscript{92} The principle of forum (non) convenience doctrine does not involve itself in comparing the rules of different legal systems with regard to their merits or demerits, quality of justice system or efficiently of foreign legal system. But when it is closely established that it is unjust for the claimant to carry in proceedings in a foreign forum, then it would not be correct to send the claimant to that forum\textsuperscript{93}.

\textbf{ii. Proceedings are in breach of Jurisdiction agreement}

Where to a given issue before the court, Article 24\textsuperscript{94} of the Brussels Recast Regulation or Article 23\textsuperscript{95} of the Lugano convention does not apply and the suits

\begin{itemize}
\item \textsuperscript{92} Supra note 68 at 111.
\item \textsuperscript{93} Supra note 84 at 188.
\item \textsuperscript{94} Brussels Recast Regulation 2012, SECTION 6,Exclusive jurisdiction, Article 24, “The following courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties:

(1) in proceedings which have as their object rights \textit{in rem} in immovable property or tenancies of immovable property, the courts of the Member State in which the property is situated.

However, in proceedings which have as their object tenancies of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the Member State in which the defendant is domiciled shall also have jurisdiction, provided that the tenant is a natural person and that the landlord and the tenant are domiciled in the same Member State;

(2) in proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs, the courts of the Member State in which the company, legal person or association has its seat. In order to determine that seat, the court shall apply its rules of private international law;

(3) in proceedings which have as their object the validity of entries in public registers, the courts of the Member State in which the register is kept;

(4) in proceedings concerned with the registration or validity of patents, trade marks, designs, or other similar rights required to be deposited or registered, irrespective of whether the issue is raised by way of an action or as a defence, the courts of the Member State in which the deposit or registration has been applied for, has taken place or is under the terms of an instrument of the Union or an international convention deemed to have taken place.

Without prejudice to the jurisdiction of the European Patent Office under the Convention on the Grant of European Patents, signed at Munich on 5 October 1973, the courts of each Member State shall have exclusive jurisdiction in proceedings concerned with the registration or validity of any European patent granted for that Member State;

\end{itemize}
before the court is in breach of express foreign jurisdictional clause, then in such cases the courts apply the traditional rules to ascertain whether not to grant stay in such case. In the case of *Roger Thomas Donohue v. Armco Inc & other,* the court held that where there is a valid Exclusive Jurisdictional Clause the court will give effect to it by staying the proceedings before it unless strong cause or strong reasons are shown as to why the stay should not be granted. Some justices use the words like very strong reasons, strong grounds etc. while granting stay. In this case the Hon’ble justice held that a party to the Exclusive jurisdictional clause should be able to defeat its effect by causing its subsidiaries or affiliates to bring other actions on different subject matter against the other party to the Exclusive Jurisdiction Clause.

In the case of *Owners of Cargo Lately Laden on Board the Ship or Vessel Eleftheria v. The Eleftheria* [1969]2 ALL ER 641 as known by the name of *The Eleftheria* [1969]2 ALL ER 641

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95 Lugano Convention 2007, sec.7, art.23. It reads thus: “Prorogation of jurisdiction- 1. If the parties, one or more of whom is domiciled in a State bound by this Convention, have agreed that a court or the courts of a State bound by this Convention are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either: (a) in writing or evidenced in writing; or (b) in a form which accords with practices which the parties have established between themselves; or (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned. 2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to ‘writing’. 3. Where such an agreement is concluded by parties, none of whom is domiciled in a State bound by this Convention, the courts of other States bound by this Convention shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction. 4. The court or courts of a State bound by this Convention on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved. 5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22”. Available at: ec.europa.eu (last visited on December 25, 2014).

96 [2000] EWCA Civ 94.

Eleftheria case, the House of Lords laid down some considerations which must be taken care of by the court while deciding a case on the stay of English proceedings brought in breach of a foreign exclusive jurisdiction clause. These are:

1. The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
2. The burden of proving such strong cause is on the plaintiffs.
3. In exercising its discretion the court should take into account all the circumstances of a particular case.
4. In particular, but without particular to the (3), the following matters, where they arise, may properly be regarded:
   (a) In what country the evidence on the issues of fact is situated or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts.
   (b) Whether the law of the foreign court applies and if so, whether it differs from English law in any material respect.
   (c) With what country either party is connected and how closely.
   (d) Whether the defendants genuinely desire trial in the foreign country or are only seeking procedural advantages.
   (e) Whether the plaintiff would be prejudiced by having to sue in the foreign court because they would (i) be deprived of security for their claims (ii) be unable to enforce any judgment obtained (iii) be faced with a time bar not applicable in England or (iv) for political, racial, religion or other means be unlikely to get a fair trial.

It is to be noted that the list is not exhaustive and their lordship can exercise the discretion based on some serious circumstances.

There is essential point of difference regarding the burden of proof in forum non conveniens and exclusive jurisdiction clause. In case of forum non conveniens, the defendant has to prove that the foreign court is the natural forum and in case of exclusive jurisdiction clause, the burden is on the claimant to show why a stay should
not be granted by the court to the defendant despite initially agreeing to exclusive jurisdiction of the other court. Where the parties to the case have agreed to the exclusive jurisdiction clause it does not mean that the exclusive jurisdiction clause is valid in all circumstances, the party resisting it can challenge in the court that such a clause is itself void. In such case, the court shall apply the governing law to decide the validity of the exclusive jurisdiction clause and can declare it to be void if it is found that the clause is not according to the governing law.\textsuperscript{98}

\textsuperscript{98} Supra note 70 at 441.