CHAPTER 7
CONCLUSION AND SUGGESTIONS

7.1 Conclusion

1. The common law principles prevalent in the jurisdiction of India, Australia, England and Canada authorize the courts to have direct jurisdiction over the defendant ‘physically’ present within the territory of these courts. This right which is available to the court in terms of jurisdiction is known as ‘jurisdiction as of right or presence based jurisdictional right’. It is based on the theory of sovereignty according to which a sovereign has full right and command over all the subjects present within his territory. No nexus or connection with the forum is required to exercise the presence based jurisdiction over the defendant. This type of jurisdiction brings hindrance in unifying the law relating to jurisdiction throughout the world as it allows the plaintiff to bring the action against the defendant even in the cases where the connection is weak with the forum which in turn encourages the risk of forum shopping on the part of the plaintiff.

In today’s world when the business of the people across world is expanding from one corner of the world to another and there is lots of travel between the countries, the assertion of this type of jurisdiction on the defendant when he happens to enter any country would not only cause him trouble but would also interfere with his right to move freely. On the other hand, service by the plaintiff on the defendant based on his presence is also not so easy because it is difficult to foresee or predict the movement of any person while sitting at one place, especially when the defendant is from foreign country. A lot of time, money and energy are required to keep a check on the movement of the defendant. In order to command acceptance throughout the world the jurisdiction based on the presence of the defendant should be rooted on dual grounds of presence plus connection with the court asserting the jurisdiction.
In general, it is the connection of the defendant, based on his domicile, residence or nationality, which is conclusive for assuming jurisdiction over him in all the four jurisdictions. The provisions for service ex-juris allowing the service of the claim form outside country or outside state but within the country is based on the domicile, habitual residence or nationality status of the defendant and not of the claimant or the plaintiff. It is the connection of the defendant with the forum which is taken into account while serving the process outside the territory in these countries. This proposition is justified at the international level on the ground that where the defendant had no connection with the forum of the plaintiff than why to unduly bother him. However in Canada in certain cases, the plaintiff’s connection with the forum is also relevant and is taken into account along with the connection of the defendant with the forum while assuming jurisdiction over an out-of–province or foreign defendant on the basis of real and substantial connection. Section 20 of the Indian Code of Civil Procedure, which deals with the territorial jurisdiction of the Indian Courts, is based on connection between defendant and the forum as well as connection between the claim and the forum. The first two limbs of the section lays down the thumb rule that in India the courts are vested with the jurisdiction where each of the defendant resides, or carries on business, or personally works for gain and in case there are more than one defendant the court will have jurisdiction only when there is clear cut waiver of the jurisdiction by the defendants or the leave of the court is obtained to institute suit at one place. The third limb of the section is completely independent. It allows the court to assume jurisdiction on the basis of cause of action arising within the territory of the court either wholly or in part. The third part does not require any sort of connection either of the plaintiff with the forum or of defendant with the forum. The only thing that the plaintiff needs to prove is that the cause of action has arisen within the territory of the court. It is basically a claim related jurisdiction of the court. In India, the cases related to contractual disputes fall under this category. The other question which can be debated in favour of the claimant’s or plaintiff’s connection with the forum for exercising jurisdiction based on his
residence, domicile or nationality, is in the cases where the claimant has in fact suffered huge losses owing to non-performance of obligation on the part of the defendant and the compulsion to institute the suit in forum of the defendant? The claimant’s connection with the forum is not allowed as a ground for asserting jurisdiction against an out-of province defendant or the foreign defendant (except for Canada), but, nevertheless, the claim based jurisdiction is reflection of claimant’s basis of jurisdiction to some extent.

3. Under all the four jurisdictions, the defendant’s ‘carrying on business’ in the territory of the forum court of the claimant/plaintiff is the common ground for asserting jurisdiction over him. This jurisdiction covers both the corporate as well as individual defendants. The basis of this jurisdiction is the ‘carrying on business’ by the defendant within the territory of the court. While carrying on business the defendant establishes a link or a connection with the jurisdiction and so he should not be easily dispensed with any act which he does contrary to the law of the jurisdiction in which he is working and drawing out some benefits. One of the common notion relating to ‘carrying on business’ held by the courts in all these four countries is that in order to ascertain whether a corporate defendant was in fact carrying on business within the territory of the court regard must be had to the facts and circumstances of each case. The courts have laid down some common criteria for ascertaining whether the corporate defendant in fact carries on business within the territory of the court or not. It has been held in all these four jurisdictions that an isolated act of business activity in no way constitutes carrying on business on the part of the corporate defendant. Except for Canada, the term ‘carrying on business’ is no where defined in the statues of these countries. In Canada, the term has been defined under the Business Corporations Act or the Extra-provincial corporation Acts of the provinces of Canada, though the definition varies from province to province, but to substantial extent the definition is similar. However, the acts constituting ‘carrying on businesses in the provincial statues are not exhaustive. The courts are entitled to uphold other acts which may fall under the category of carrying on business, not limited to the one
defined under the statues. Sometimes a single transaction involving millions of rupees may fall under the category of carrying on business. Hence, it is the facts of the case which may determine as to what constitutes ‘carrying on business’ by the defendant. It is the density of the business activity which is a determinative factor in arriving at the conclusion whether any connection exists between the defendant and the forum court in which activity is being carried on.

Jurisdiction based on the activity of the defendant provides uniform rules of jurisdiction between the jurisdictions of these four common law countries. Such type of jurisdiction satisfies the inhibition of both the defendant and the claimant regarding the approach with which they will be brought under the jurisdiction of the court. The defendant at the back of mind is conscious that his activities within the jurisdiction of the court would certainly make him answerable or amenable to the jurisdiction of that court, while the claimant is contented that not much effort is required to be applied on his part in bringing the defendant within the jurisdiction of the court because the activities of the defendant will automatically establish a connection with the forum and would bring him within the territorial preview of that court.

4. Under the English Law, a foreign association which has legal personality under the law of the place where it is constituted can sue or be sued in England, even if a similar English association would have no legal personality under the English Law. Similarly, under the Australian Corporation Act, a foreign company has the right to sue or be sued or hold property in the name of its secretary or other officers. Under the corporate law of both the countries, if a foreign company does not get itself registered and enters into a contract, transaction or agreement while carrying on business, then in such case failure to get itself registered does not affect the validity of contracts, transaction or agreement entered into by such foreign company while carrying on business there. It has full right sue and be sued in respect of such contract, transaction or agreement. The failure to get register in no way takes away the right of foreign company in Australia and England to sue or be sued with respect to any contract, transaction or agreement it entered into while be unregistered nor does it
render such contracts, transactions or agreement void. But under the India Companies Act and the Canadian Business Corporations Acts of Canadian provinces the law is different from the law of Australia and England. In India and Canada although the transactions, contracts or agreement which such foreign companies enter into while being unregistered are completely valid and they can be sued for any breach on their part, but they will not be allowed to sue for any claim, counter claim or set off or bring any action in the court of law with respect to such contracts, transactions or dealings, until they have complied with the provisions applicable to them under the Companies or corporate Acts prevalent in both the countries. However, the incapacity to sue gets clear away retrospectively, once the foreign companies get themselves registered. After registration, a foreign company will be entitled to sue in respect of claim arising under contract, transaction or agreement which it had entered into while being unregistered in the same way a registered foreign company is entitled to. The disentitlement of the foreign company to sue while being unregistered is solely for the purpose of protecting the interests of the people associated with such company. In India apart from disentitling the foreign company from suing, heavy penalty along with imprisonment in some cases is imposed where there is contravention of the provisions of the Indian Companies Act, applicable to such Foreign Companies.

5. Under all the four jurisdictions the provisions relating to assumption of jurisdiction over the partnership firms are almost same. Under the law of all these countries the partners can sue and be sued in the name of partnership firms or as individual partners. In these countries courts are entitled to assume jurisdiction over a partnership firm or a partner by handling the originating process or summon personally to one or more of the partners or by leaving the copy within any partner having control and management of partnership business or by leaving it at the principle place of partnership business. Not much difference is found in the jurisdictional rules relating to partnerships of these four common law jurisdictions.
6. Under the Indian, English, Australian and the Canadian law, a party to the contract cannot confer a jurisdiction in a court by consent which in reality that court does not possess. It is well settled law in India that no estoppel or waiver can bestow jurisdiction on a civil court which otherwise it is lacking. Incompetency of the court to try the case goes to the very root of the jurisdiction and it cannot be corrected. It will be a case of inherent lack of jurisdiction, but, there is an exception to this rule under the Indian Code of Civil Procedure which provides that any defect in the jurisdiction can be waived by the defendant if he submits himself to the jurisdiction of the court which that court is otherwise lacking to try case. The types of jurisdiction which can be waived by the defendant are local, territorial or pecuniary jurisdiction of the court. Also an exception is provided under the Indian Contract Act, that if two or more courts in India have jurisdiction to try the case and the parties enter into an agreement selecting one of the courts to the exclusion of others for the trial of the suit, such an agreement is completely valid. Similarly under the English and Australian law the courts are entitled to assume jurisdiction over the defendant where the defendant gives consent to the jurisdiction through agreement, attornment or through voluntary submission. At the international level if the transaction falls under the subject of private international law, the Indian law allows the parties to enter into an agreement to confer jurisdiction on a neutral court having no connection with the parties or the claim. Such an agreement is completely valid in India. In Australia, where in a contract, foreign jurisdiction clause has been created in favour of a neutral foreign court, the Australian courts are reluctant to give effect to such a clause. Where the legislation in Australia requires that court should decline to give effect to the foreign jurisdiction clause, the courts feel themselves constitutionally obliged to refuse a grant of stay in case of proceedings brought in breach of foreign jurisdiction clause, to ensure that the specified local legislation is appropriately applied. The effect will only be given where a defendant could prove that Australian legislation would be applied in that foreign forum, where the defendant is willing to try the case because otherwise application of Australian statute to the dispute in question would
fail. In Canada where a party from Canada has consented to the jurisdiction of a foreign court outside Canada and that foreign court has assumed territorial jurisdiction over that party and pronounced the judgment in the case, that foreign judgment is legally enforceable in the provinces of Canada. As in the case of *stern et. al. v. solehdin*, it has been held that unless there is an evidence of fraud, violation of natural justice or of public policy, the enforcing court in Canada is not interested in the substantive procedural law of the foreign jurisdiction whose judgment is sought to be enforced in Canada domestically. Hence, the provincial courts in Canada do not go deep into finding out of the competency of foreign courts while passing judgment against the Canadian defendant. For the courts in Canada what is important is the territorial competency of the foreign court. Once it is fairly assumed the Canadian Courts do not go further. Under the Indian Code of Civil procedure, 1908, a foreign judgment is conclusive and can only be recognized and enforced in the courts of India, if the judgment is pronounced by a foreign court having competent jurisdiction, it is given on the merits of the case, if it is founded on the correct view of the international law or recognition of Indian law to the cases, it is not opposed to natural justice, there has been no fraud committed in obtaining the judgment or it has not been founded on a breach of law in force in India (Section 13 of CPC). The Indian Courts have preset their own set of rules regarding the recognition and enforcement of foreign judgments on the line of provisions of code of civil procedure regarding the enforceability of foreign judgments in India. In the absence of an reciprocity agreement between India and other countries, the courts in India recognize and enforce a foreign judgment originating under the law of private international law field, only if the judgment is founded by the foreign court on the principle of effectiveness or the submission. The principle of effectiveness refers to the adjudication of the judgment by the court against the defendant by way of his physical presence or property in the territory of the court giving the judgment. Submission refers to the agreeing of the jurisdiction of the court chosen by the

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1 2010 ONSC 1012 (CanLII).
plaintiff. It may be express or implied depending upon the facts of the case. The courts in India refuse to enforce and recognize the judgment of the foreign court, if it is given by the fact of incompetency of that foreign court to adjudicate the matters between the parties. It may be possible that such a judgment may have enforceable power and would also be legally enforceable within the territory of that foreign court, but, for private international purposes, that judgment would be nullity. For a foreign court to have its judgment enforced validly in the courts of another state, it is necessary that foreign court must have exercised jurisdiction as per private international law. The mere fact that the cause of action has arisen in the foreign country, the judgment given by the foreign court is not binding on the Indian court. Under the rules of private international law in India, the court in India recognizes only two types of foreign judgments given, either on the basis of presence of the defendant within the territory of foreign court or on the submission of the defendant to that foreign court. Judgment given on any other basis is not given any effect in India. However, in Canada, the Canadian courts give effective recognition and enforcement to the judgment given by the foreign courts against its country's defendant on the basis of assumed jurisdiction qualifying the question of real and substantial connection. Once the foreign court assumed territorial competency over the subject matter of the dispute against the Canadian defendant, the Canadian court does not go further. The only defence available against the enforcement of foreign judgment in Canada is the defence of fraud, public policy and lack of natural justice as developed in the case law of Morguard. The list is not exhaustive, new defenses against the enforcement of a foreign judgment may be developed by the Canadian court according to the situation of the case. The courts in India consider the concept of assumed jurisdiction as the concept which militates against the principles of private international law. Judgment pronounced on the basis of assumed jurisdiction may be perfectly valid under the municipal jurisdiction of the foreign court pronouncing it, but it does not have international validity. From the international point of view, judgments are valid, only, especially in India, if there is effectiveness on the part of
the court pronouncing it and submission of the defendant to the court. In the case of Potulery Rajeshwar Rao v. Syndicate Bank 2000(3) ALD, 508, the court held at para 11, "that a cause of action may arise in foreign country, but cause of action itself is not a general ground of jurisdiction in private international law". When an objection to a jurisdiction is taken, it is not taken from the point of view of a municipal law, but from the point of view of private international law. The above said case enumerated the following principles based on the decision of apex court in various high courts:

1. That for a foreign judgment to be enforced as conclusive judgment in India, it is necessary that it is given by the court of competent jurisdiction, where both the parties voluntarily and unconditionally subject themselves to the jurisdiction of that court. The competency under the private international law should be vis-à-vis the Indian code of civil procedure.

2. The foreign judgment will be enforced only if it is contested or adjudicated on merits.

The same view has been taken by Duncan Fairgrieve and Eva Lein in their book, extraterritoriality and collective redress. The authors expressed their discontentment over the way the Canadian courts are using the real and substantial connection test to assume jurisdiction over the foreign defendants. At page 292, the authors expressed their views that other countries of the world do not consider a ‘real and substantial connection’ to be one of the generally accepted principles for assuming jurisdiction under the Private International Law for the purposes of an internationally enforceable judgment. Hence, the courts in Canada should stick to their old traditional principles for assuming jurisdiction over the foreign defendants. But, nevertheless in case of the court held that the real and substantial connection test as laid down in the Morguard’s case does not over ride the traditional methods of assuming jurisdiction. Rather, the new test includes the traditional factors of assuming jurisdiction.

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2 Duncan Fairgrieve and Eva Lein (eds.), Extraterritoriality and Collective Redress 292 (Oxford University Press, United Kingdom, 2012) Available at: https://books.google.co.in (last visited on March 2, 2016).
7. When the traditional common law rules failed to establish jurisdiction on the defendant on the basis of his presence within the territory of the court owing to his absenteeism, it became a necessity to evolve rules to reach out the absent defendant on the basis of extra-territoriality. Slowly, the countries started renouncing the rigid concept of territorial sovereignty and moved towards the more flexible approach to reach out an absent foreign defendant. Except for India, all other jurisdictions namely, Canada, Australia and England have clearly laid down special jurisdictional rules concerning contractual disputes for exercising long run or extra-territorial jurisdiction over an absent defendant on the basis of his close connection between the claim against him and the forum. Specific heads of different subject matters are created to help the plaintiff in identifying the head in which his claim falls and to provide him the opportunity to serve the claim outside the territorial limits of courts on the defendant attempting to evade the service of claim form on the plea of non presence within the territory of plaintiff’s court. Jurisdictional rules created under ‘specific head’ require specific connection with the forum before serving the process ex-juris on the defendant outside the territory of the court. Under the English, Canadian and Australian rules of ex-juris, service of process outside the territorial limits is allowed on the basis of close connection between the claim of the claimant and the forum authorizing the service of process. Under the India law jurisdiction of the civil courts is exclusive determined according to section 15 to 20 of the code. No specific heads are created under the India code of civil procedure for serving the summons outside the territory of India. Section 20 applies to the contractual disputes of national and international character. There are three parts of section 20. The first two parts require that the suits are to be instituted in a place where the defendant resides, carry on business or personally works for gain. So, the first two parts require connection between the forum and the defendant. The third part of the section empowers the court to assume jurisdiction if the cause of action has arisen wholly or in part within the jurisdiction of the court, hence, in this sense the section requires connection of the claim with the forum. Section 20 of Indian civil Procedure Code is of general
application. No specific heads are created for specific subjects like contractual disputes. The basis on which the jurisdiction is founded on contractual disputes in India has to be looked up from the case laws decided on third limb of the section. All though third part of the section provides claim-related jurisdiction, but the types of claim falling under this category are not specifically defined when compared to other three countries.

8. One of the basic problems of common law countries is that the rules of law are judge made and so are mostly founded in the case laws, as opposed to the civil law countries where the statues are the primary source of law and the judges have to decide the matter strictly on the provisions of the statutes. Apart from the common law principles, the rules relating to contractual disputes in private international law are well codified in Australia, Canada and England. In reality all the common law principles have been inculcated in the statutory laws, thus providing more certainty of law. It is only in India that except for the codification of territorial law nothing more has been done in the field of commercial litigation. The basis on which contractual disputes can be brought under the territorial jurisdiction of the India courts has not been laid down under the Indian Code of Civil Procedure. If the question arises whether contract made in India would give right to Indian courts to assume jurisdiction, one will have to refer the case laws. Though the approach of the Indian law seems to be dissatisfactory with which the private international law rules are treated, yet it has its own benefit. Since the rules of private international law are not well defended are decided according to the whims of the judge, there are more chances of establishing fact based jurisdictional rules in India as opposed to ridged close end rules defined in the statutes. Today, new type of contracts are formed each day with complex legal procedures, the law already laid down may not be able to provide solution to every problem, so the judges in India may use a open hand to tackle the issue, which is possible only if flexibility is allowed in decision making.
9. The Indian Code of Civil Procedure does not lay down any provision for the service of summons according to the wishes of the parties concerning the manner, time or place of service of summons. Under the English law and in some provinces of Canada and some states of Australia, the parties to a contract have the freedom to incorporate a term in a contract providing the manner and the method of service of claim form on the defendant in case of dispute which may arise between them from such contract in future. Such terms of service are completely valid under the laws of all these three countries. These terms are usually incorporated in the international contracts to save the time of the parties.

10. Doctrine of Forum non convenience

**India and England** – Except for the cases involving the writ petition of India, the doctrine of forum non convenience is not followed by the India courts in the civil cases of domestic nature. Where the case falls under the civil jurisdiction exclusively dealt by the Code of Civil Procedure, the provisions relating to stay or transfer applies and not the principles of forum non convenience. However, in the international cases involving transnational litigation the courts in India have inherent power to apply the principle whenever the facts of a particular case so require. Hence, in the international cases involving foreign element the courts in India have the power to apply the principle based on the footsteps of English Law which is based on the appropriateness of foreign forum and interest of justice to the parties. But in some of the cases the Indian courts has also applied the criteria of Australian courts on forum non convenience when they use the words ‘vexatious or oppressive’ while deciding the question of forum non convenience alongside the English concept. These two words namely 'oppressive' and 'vexatious' are used in Australian courts. Hence, in short the concept of forum non convenience is a mixture of English and Australian doctrine. (See *Moser Baer India Ltd. v. Koninklijke Philips Electronics*) (At Para 7) the court lays, "the burden of establishing that the forum of choice is a forum non convenience or the proceedings therein are oppressive or vexatious would be on the party so contenting to aver and prove the same".

India and Canada- Under the Canadian Law, the doctrine of forum non convenience is applicable to both inter-provincial and international cases. The Canadian courts also follow the English law on forum non conveniens, but it is limited only to first part namely ‘appropriations of other forum’. The courts have laid down certain list of non exhaustive factors on the basis of which they decide whether to grant or refuse stay on the principle of forum non convenience. The aim for the provincial courts is to find out the more appropriate forum rather than more convenient forum. The search for ‘appropriateness of forum’ is directed towards achieving the ends of justice. Under the Canadian Law on forum non convenience all the factors justifying the grant of stay to the defendant are collectively taken into consideration by the court for arriving at the decision of “appropriateness of another forum”, whereas the English law special consideration is given to the factor of ‘juridical advantage’ as compared to other factors which also justify the grant of stay to the defendant. The Canadian courts prefer to use the word “more appropriate” than for “more convenient forum”.

India and Australia- The Australian law is well developed and made a clear view point on the doctrine of forum non convenience, which is followed throughout Australia, whereas, the Indian Courts follow the rules of doctrine as evolved by other countries. The courts in India mostly follow the English rules which have given birth to common law rules to other countries as well.

1. Under the Indian law the test for forum non convenience is 'appropriate forum' whereas in Australia it is 'clearly inappropriate forum'. The courts in India will grant a stay on the basis of forum non convenience, if the defendant is able to prove that there is some other forum, which is appropriate for the trial of the case and it is in the interest of the justice that the trial should be continued in that other 'appropriate forum'. Whereas under the Australian law, the defendant seeking stay on the basis of forum non convenience should have to prove before the court that the local court in which proceedings are commenced is ‘clearly inappropriate’ tribunal for the trial of the court.
2. The Australian courts follow certain well set rules of principles which they apply while deciding the question on forum non convenience as opposed to the courts in India. The Australian Courts believe firmly in the principle that a plaintiff who has regularly invoked the jurisdiction of the court has a prima facie right to insist upon its exercise. Similarly there are other principles also which apply to the principle of forum non convenience in Australia, as discussed earlier. However, no such principles are strictly laid or followed because the subject on private international law has not much developed in India.

3. Under the Indian law on the principle of forum non convenience, balance of convenience is a material consideration, but not the sole criteria for justifying the dismissal of action or the grant of stay on the principle of forum non convenience, similarly, under the Australian concept of forum non convenience the mere fact that the balance of convenience favours another jurisdiction or that some other jurisdiction would provide a more appropriate forum does not justify the dismissal of the action or the grant of a stay.

4. Under the Australian law for forum non convenience, legitimate personal or juridical advantage to the plaintiff in having the proceedings heard in the domestic forum is relevant consideration. Whereas under the Indian law, what is more relevant is the desirability to avoid multiplicity of proceedings and conflicting judgments given by two courts of different states or countries, this consideration is not so determinative under the Australian law.

5. Under the Indian law, the list of factors concerning the private interest of the parties such as convenience of parties, expenses involved in the litigation, law governing the relevant transaction, the place where the cause of action arose in whole or in part etc. are clearly itemized under the Indian law to large extent, whereas it is not so under the Australian law. The noted case on the forum non convenience in Australia, Voth v. Manildra Flour Mills Pty Ltd., just refer to the case of Spiliada Maritime Corporation v. Cansulex ltd. and mention that the relevant factors as
discussed in that case provides valuable assistance. This approach of Australian courts toward the principle of forum non convenience raises doubt as to their stand on their so called self evolved concept of ‘forum non convenience’. On one hand the courts in Australia are reluctant to follow the English doctrine on forum non convenience and on the other hand the courts in England follow the list of factors which are laid down in English case of Spiliada to decide the ‘inappropriateness’ their own forums.

6. The availability of other 'appropriate forum' is a precondition for grant of stay under the Indian law, whereas the Australian law on forum non convenience focuses on the sustainability of the local forum. It may happen that a local court in Australian while applying ‘clearly inappropriate forum’ test come to the conclusion that it is itself an inappropriate tribunal for the trial of the case, thereby suggesting the preposition that in Australia the availability of another forum is not a precondition for granting stay on the principle of forum non convenience.

10. Substituted service-

In India special methods under the heading substituted service have been laid down for effecting service of summons on the defendant where regular service under the Civil Procedure Code is not possible. The rules allow the courts to affix a copy of summons in some conspicuous place in the court- house and at conspicuous part of the house in which the defendant is known to have last resided or carried on business or has personally worked for gain or in such other manner as the court thinks fit. The term 'any other manner' gives wide discretion to the court to effect service by any other mode which may be a notice in newspaper or service through registered letter or any other mode, provided such service by substituted manner is not a service in absurdity. The provisions of substituted service apply both to domestic as well as international cases. The India, the courts are not bound to mandatory record the reasons while ordering substituted service of summons. They are not statutorily bound to express their satisfaction as per the rule. Satisfaction may be explicit. In
England, the English Civil Procedure Rules and Practice Direction authorizes service of claim form in a manner and at place not specifically laid down in the Civil Procedure Rules in addition to the methods of alternate service which are specified in the Civil Procedure Rules and Practice Direction. Unlike the civil procedure rules in India, the courts in England have the power to approve the steps already taken by the claimant to bring the claim form to the attention of the defendant. Such efforts of the claimant to bring the claim form to the attention of the defendant when approved by the court is deemed as good service on the defendant and falls under the category of alternative service in England. The provisions of alternative service under the Civil Procedure Rules and Practice Direction in England are not lose as under the civil Procedure of India. The claimant in England has not only to lead proper evidence before the court that service under any of the methods laid down in Civil Procedure Rules is not possible, but also to give an assurance to the court that way the claimant believe that the document is likely to have reached the person to be served by the method used by the claimant at the alternative place by alternative method. In short, the rules and provisions of the English Civil Procedure Rules and Practice Direction are more specific, aiming in assuring proper service on the defendant and at the same time giving an opportunity and relief to the claimant to serve the claim form on the defendant as per his convenience. Similarly, in Australia, no specific method of serving the process by substituted method is provided under the Supreme Court rules of the States and the Territories. The courts in Australia are authorized to make an order for substituted service when it is ‘impracticable’ to serve the defendant. Although ‘Impracticability’ implies inability on the part of the plaintiff to effect personal service on the foreign defendant ,but the word demands only reasonable efforts on the part of the plaintiff. Thus, the standard is one of reasonableness. The courts may on the application of the claimant, specify the steps to be taken, in order to bring to the notice of the defendant the originating process. For, the order to be made on the impracticability, the parties has to lay before the court the steps they have taken to bring the originating process before the defendant. Under the Canadian
Provincial Rules of Court no doubt the rules for alternate and substituted service are provided well, but, the methods of serving the commencement documents are different. The alternate or substituted methods are limited to service on lawyer, service at the place of residence of the defendant or service on the adult member of the same household in which the person to be served resides or service at the last known residence of the defendant. Whereas the Indian Code of Civil Procedure provides additional methods of substituted service in addition to what has been provided under the Provincial Court Rules of Canada.

7.2 Suggestions

India is a hub for foreign investments. Millions and billions of rupees are transacted every year in commercial contracts between cross-border countries. But, till date no proper legislation has yet been enacted in India dealing with the issue of Private International Law. Whatever was drafted by the Britishers during their ruling time in India has been followed even today with blind eyes. No effort has been made by the ministers in the parliament to give certainty to the rules of private international law in India especially in the field of commercial litigation. There is also no uniformity between all the High Courts in India over the jurisdictional rules because some of the very important High Courts in India like Mumbai High Court, Calcutta High Court and the Madras High Court are governed by the provisions of Letters Patent and the rest of the High Courts with the India Code of Civil Procedure. Hence, there is conflict of laws between jurisdictional rule of High Courts in India. The jurisdiction of High Courts of Mumbai, Madras and Calcutta is governed by clause 12 of the Letters Patent whereas for all other High Courts section 15 to 20 applies for territorial jurisdiction. As already discussed earlier the High Courts of Mumbai, Madras and Calcutta are chartered High Courts and section 20 of the Civil Procedure Code is not applicable on them. If a suit is instituted under any of the provisions of civil Procedure Code no permission is required from the court to institute the suit, whereas under clause 12 of the Letters Patent applicable to each of these three High
Courts permission is required to be obtained by the plaintiff before instituting the suit especially in the case where a part of action has arisen within the original jurisdiction of these three High Courts. Similarly, there is conflict as to the applicability of principle of forum non convenience in the cases involving domestic and international jurisdiction and the cases originating under clause 12 of the Letters Patent for the High Courts of Mumbai, Calcutta and Madras. Till date there is a single decision of the High Court of Delhi which states that the forum non convenience principle does not apply to the cases which are of domestic nature and governed by the Civil Procedure Code of India. No, Supreme Court decision has been given exclusively on this very matter where the parties are private and the dispute is of commercial nature. Whatever the authorities have come from the Supreme Court of India on the principle of forum non convenience is from the cases involving jurisdiction under article 226 or 227 of the constitution of India. For the cases originating under clause 12 of the Letters Patent it has been held that the principle would apply while considering whether leave is to be granted to the plaintiff for instituting case against the defendant within the original jurisdiction of the court or not. In my point of view these differences are unnecessary and uncalled for. There is no reason to complicate the rules. There should be a single procedure throughout the country, whether to obtain prior leave to file the suit against the defendant or not especially in the case of foreign parties and whether the principle of forum non convenience should apply while deciding on such permission.

Today one of the major problems that Indian judiciary is facing is the way the whole of Indian judicial system is being projected at the international level by the foreign countries. It has become a conception with the foreign courts that litigation in India may cause harassment to their country’s national due to long delays and backlogs in delivery of judgments by the Indian courts. Due to delay trails by the justice system of India, the foreign courts are rejecting the jurisdiction of the India court even in the cases where Indian courts are clear contender to have the case heard in its territory. Although India has always denied the fact of delay of justice and even
in its 188th Law Commission Report, India has pointed to the courts of other countries which have taken years in delivering justice, but, very recently the 245th and 253rd law commission report of India have stamped the fact of delay in justice by suggesting the need to speed up trial in India. Realizing the need to speed up the litigation process in India, the 253rd Law Commission of India recommended the establishment of commercial courts in India. Acting on the said report the Indian parliament has proposed the enactment of The Commercial Court, Commercial Division and Commercial Appellate Division of High Court Bill 2015 to remove the weakness of the Indian judicial process. The Act enables the creation of commercial divisions and commercial appellate divisions in high courts, and commercial courts at the district level with the aim to expedite the speedy disposal of commercial cases more efficiently in India. It is thus a welcoming move on behalf of India government. To what extent the Act will be successful in speeding up the commercial litigation in India will only be adjudged after its successful implementation. It will not be so easy to bring a revolution in the field of speedy commercial litigation in the given state of problems which the Indian judiciary is already facing in terms of budget, infrastructure, human resource etc.

Under the Indian Code of Civil Procedure no special provision has been laid regarding the basis on which jurisdiction can be assumed in cases of commercial disputes relating to contracts. The basis on which jurisdiction could be assumed are to be gathered from the case laws only. No special jurisdictional rules are made for service on foreign defendants. Hence, the following are the suggestions which may be incorporated under the Indian Code of Civil Procedure in order to provide a strong edifice of rules relating to private international law in India to boost the interest of private foreign investors:

1. Section 9 of the Indian Code of Civil Procedure should be amended. The section provides that subject to the provisions herein contained, the courts in India have jurisdiction to try all the suits of a civil nature excepting suits of which their
cognizance is either expressly or impliedly barred. One another proviso should be added along with the section which provide that commercial disputes of specified value and matters connected therewith or incidental thereto are to be adjudicated under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015.

2. The code should permit service of document outside India in commercial cases where there is real and substantial connection between India and the facts on which the action is based. The plaintiff should be required to disclose the facts or the grounds on which he rely his claim which justifies the service of summons outside India. This is important to protect the foreign defendant from unnecessary harassment by the lodge of frivolous or tenuous connection claim against him.

3. Service of summons outside India should be allowed outside India without obtaining the leave of the court in contractual disputes in cases where:-
   
   (1) The contract is made in India, or
   (2) The contract is governed by the law of India, or
   (3) The contract wholly or in part is to be performed in India, or
   (4) The contract is made by one or more parties carrying on business or residing in India, or
   (5) The contract is made by or through an agent carrying on business or residing in India on behalf of a principal carrying on business or residing outside India; or
   (6) The breach of contract has taken place in India, or
   (7) The proceeding is based on a contract containing a condition by which the parties agree to submit to the jurisdiction of the court;
   (8) The proceeding is based on the claim that infact no contract exists in reality.

The above are the special grounds of jurisdiction which will enable the Indian courts to assume jurisdiction in trans-border commercial contracts over the foreign
The other grounds which may also justify the assumption of jurisdiction over the foreign defendant are –

1. The defendant is domicile or ordinary resident in India,

2. The defendant, although outside India, is a necessary or proper party to the action brought against another person who was served in India.

4. If summons are to be served outside India, a notice in the prescribed form is to be served along with the summons to that effect.

5. Provision should be made in the Civil Procedure Code to grant leave to proceed where no appearance is made by the defendant despite valid service of summons on him. The satisfaction of the court should be based on the valid service of summons on the defendant outside India and the subject matter of proceeding falling within the category of contractual disputes.

6. The Code should provide the methods of service of summons outside India. Provisions should be made for service of summons outside India by any of the following methods-

1. Service may be effected by the rules provided for service in India under the Indian Code of Civil Procedure,

2. Since India is a party to Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, if the parties to contract agree that the service of summons be effected by any of methods of service provided under Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, service may be effected accordingly, or

3. The service may be effected in accordance with the law of the jurisdiction in which the person to be served is located.

7. There should be a provision in the code regarding service of summons in a mutually contractual way agreed between the parties under a contract to save their time. The provision should contain place, mode and the persons on whom summons may be effected under the contract. But such provision should be subject to the
methods provided for service of summons under any convention or instrument to which India is a party or where mandatory international method of service applies.

8. The code should lay down provisions for proving the due service of summons outside India on the defendant. Such service may be proved by any of the following methods:

1. In accordance with the manner provided by the rules of civil procedure code,
2. By an affidavit-
   (1) Stating the real and substantial connection between India and the claim.
   (2) Stating that the person was served,
   (3) Describing the method of service, and
   (4) Stating the date and place of service.
3. By an acknowledgement or acceptance of service in writing by the person served or by a lawyer on the person’s behalf,
4. In the manner provided by the law of the country in which service is effected. In case, where the convention applies, in the manner provided under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.
5. By an order validating the service.

9. The courts should be empowered to Validate, dispense or substitute the service of the summons on the application of the plaintiff within or outside India in the following cases:-

1. The court may make an order for validating the service of summons within or outside India in a manner not specified by the rules of the Civil Procedure if the court is satisfied that the method of service used brought or was likely to have brought the document to the attention of the persons to be served or if the court is satisfied that the summons would have been served on the person or would have come to the attention of the person if the person had not evaded service.
2. The court make an order for substituted service if it appears to the court that it is impracticable to serve the summons inside or outside India and there is an evidence stating the reasons why service is impractical; Proposing an alternative method of service, and why the applicant believes that the alternative method is likely to bring the document to the notice of the person to be served.

3. It may make an order for dispensing with service, inside or outside India, if service of a document prescribed by the rules under the Code is impractical or impossible. But, the court should only make such an order if the application of the plaintiff is supported by an affidavit stating that all reasonable efforts to serve the document have been exhausted or are impractical or impossible, Stating why there is no or little likelihood that the issue will be disputed, and stating that no other method of serving the document is or appears to be available.

10. Opportunity should be provided to the defendant on whom service of summons has been effected outside India to apply for a motion to set aside service outside India before delivering a defence, a notice of intent to defendant or a notice of appearance. The defendant should be allowed to move an application to the court praying that service of summons, an order of substituted service of summons or of validating summons should be set aside on the ground that service is not authorized under the Indian Code of Civil Procedure, or for an order staying the proceedings. If the court gets satisfied that Service outside India is not authorized by the rules of the court or that service was not effected properly on the defendant or India is not a convenient forum for hearing of the dispute, the court make an order accordingly.