Jurisdictional Issues in Cross border e-Commerce Disputes: A Critical Study

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DECLARATION

I declare that the Dissertation titled **"Jurisdictional Issues in Cross border e-Commerce Disputes: A Critical Study"** is work of my own and has not been submitted to this or any other university for any degree.

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Jurisdictional Issues in Cross border e-Commerce Disputes: A Critical Study

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- **Joshika Thapa**

PREFACE

Jurisdictional issues are one of the primary issues that need to be tackled at the outset in every dispute. The impact of jurisdictional issues on e-Commerce is not limited to a particular law. Consequently, the challenges of jurisdictional issues on e-Commerce have invited various approaches for dispute resolution procedures with interpretations in the existing laws. The existing theories, doctrines, and principles of jurisdiction in e-Commerce are always confusing and make the parties difficult to understand them. Hence this study is a result of the concern created by the jurisdictional confusion in the cyberspace. It basically aims to understand and explore the issues which are the concern with impractical legal complication created in the cyberspace. Therefore, the very basis of the research is to make an effort to look for an appropriate solution in situation of conflicts of jurisdictions where the existing substantial and procedural provisions regarding jurisdictional issues on e-Commerce disputes are difficult to understand.

Chapter I: Introduction

This chapter deals with the conceptual framework of the jurisdiction in e-Commerce. An emergence of e-Commerce, e-disputes, cyber jurisdiction, its nature, classification and its advantages has been analyzed followed by the research objectives, questions, hypothesis, and literature review to understand the growing issues of e-Commerce.

Chapter II: Cross border Jurisdiction: Choice of forum vis-a-vis Choice of law:

Second chapter has analyzed the complexities with regard to choosing the forum and choosing the applicable law for determining jurisdiction in the world of e-Commerce. Different approaches used by the European Union, India and USA in order to clarify conflicting jurisdiction in e-Commerce has been discussed. Enforcement through

jurisdictional rules which are governed by the doctrine of territoriality has been discussed in this chapter.

Chapter III: Legal Framework for Jurisdictional Issues in e-Commerce: Indian Scenario: The purpose of this chapter is to highlight the applicable laws for the jurisdictional issues in India. The provisions of the IT Act, 2000 (with amendment 2008), the Code of Civil Procedure Act, 1908, and the cases supported to the jurisdictional issues for e-Commerce are being discussed. E-contract is considered as one of the very basis for every transaction, therefore considering it as a very foundation, the formation of an electronic contract under the Indian Contract Act, 1878 is also discussed. And lastly, the research has shown the shortcomings of the present legal system in India that fails to protect the e-consumers at the practical level.

Chapter IV: Conflict of Laws on Jurisdictional Issues: India and USA: The present chapter explains the various jurisdictional provisions used by these two countries to settle the jurisdictional disputes among the parties. The comparative study is done with regard to various methods and principles of e-Commerce jurisdiction. The question of applicability of such principles is also discussed.

Chapter V: Conclusion and Suggestions: The research is summarized by making conclusion of each chapters and suggesting necessary elements for the jurisdictional issues in e-Commerce worldwide. At the end, a few suggestions through which a better legal framework for the jurisdictional issues on e-Commerce will be developed are given by the researcher.

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ABBREVIATIONS

1.	AIR	: All India Reporter
2.	B2B	: Business to Business
3.	B2C	: Business to Consumer
4.	CISG	: Convention on International Sales of Goods
5.	CPA	: Consumer Protection Act
6.	CPC	: Code of Civil Procedure
7.	Cr. Pc.	: Code of Criminal Procedure
8.	CSP	: Certification Service Provider
9.	CUECIC	: Convention on the Use of Electronic Communications in International Contracts
10.	E	: Electronic
11.	ECC	: Electronic Communications Convention
12.	EDI	: Electronic Data interchange
13.	ERNET	: Education and Research Network
14.	EU	: European Union
15.	GDP	: Gross Domestic Product
16.	GIC	: Global Information Society
17.	HC	: High Court
18.	HCC	: High Court Cases
19.	IBM	: International Business Machines Corporation
20.	ICANN	: Internet Corporation for Assigned Names and Numbers
21.	ICC	: International Chamber of Commerce
22.	ICPEN	: International Consumer Protection and Enforcement Network

23. ICT : Information and Communication Technology

24. IP : Internet Protocol

25. IPC : Indian Penal Code

26. ISI : Instruction Set Incorporation

27. ISP : Internet Service Provider

28. IT Act : Information Technology Act (India)

29. MLEC : Model Law on e-Commerce

30. NLPI : National Litigation Policy of India

31. OECD : Organization for Economic and Co-operation Development

32. RC : Rome Convention

33. SC : Supreme Court

34. SCC : Supreme Court Cases

35. TMA : Trade Marks Act

36. TLCEODRI : Techno Legal Centre of Excellence for Online Dispute Resolution in India

37. UDRP : Uniform Dispute Resolution Policy

38. UK : United Kingdom

39. UNCITRAL : United Nations Commission on International Trade Law

40. URL : Uniform Resource Locater

41. US : United States

42. v. : Versus

43. WIPO : World Intellectual Property Rights

44. WTO : World Trade Organization

45. WWE : World Wide Web

46. WWW : World Wrestling Entertainment

CHAPTER-I

INTRODUCTION

"While the states were fighting with one another, trade found out and leveled the roads that lead from one nation to another and established between them a relation of exchange of goods and ideas"[1] , a German Jurist *Rudolf Von Ihering* said in the nineteenth century. This statement rings true even today rather with more authority than at the time he made it. This is because of the reason that activities at the international level are going up at a record rate and it is anticipated that due to the growth of 'e-Commerce' (Electronic Commerce)[2] and computer networks, the drifts will gather speed. Of late, internet has emerged as the mode of quick and rapid purchase revolution making inroads in the busy life of the consumers.[3] The internet has provided the consumers with a powerful tool for searching for and buying goods and services.[4] Benefits have included increased competition and lower prices, more choices in product services, and the convenience of shopping for goods and services from vendors located around the world, from anywhere and at any time. The movement from the Industrial Age to the Information Age and later on shifting the new Digital world, our economy has developed rapidly. The new digital economy together with the globalization is having a major impact on the global economy. Today, the trend of communication has changed from a face to face communication to an advanced form of communication. One such modern form of communication mechanism is Internet.[5] It is the need of the society in every sphere of their life. They

[1] Felix S. Cohen, "Transcendental Nonsense and the Functional Approach" 25 *CLR* (1935).
[2] Buying and selling of goods online.
[3] Saher Owais, "Legal compliances to start an e-Commerce business in India" 3 *IJMRD* 43-46 (2016).
[4] M. M. K. Sardana, *"Evolution of E-Commerce in India: Challenges Ahead Part II"* (2010).
[5] A global computer network providing a variety of information and communication facilities, consisting of interconnected networks using standardized communication protocols.

can perform almost all their transaction through the internet. One such important transaction in the today's world is e-Commerce. Such transaction creates e-contract between the vendors and the consumers. Due to the increasing use of the internet worldwide, e-Commerce is growing day by day across the globe and the number of disputes from internet commerce is on the rise.[6] The explosive expansion of the use of the Internet makes it possible for businesses to expand their markets and render services to large group of e-consumers. Where off-line transactions can lead to problems and disputes, the same is true for online transactions.

Cyberspace is a "borderless world"- a world of its own. It refuses to accord to the traditional geopolitical boundaries the respect and sanctity which has been historically accorded to them. The disregard of these boundaries by the internet gives rise to a multitude of problems, of which jurisdiction is the foremost. The term Jurisdiction is synonyms with the word power, as there is a fundamental question of law that which particular court has jurisdiction to prescribe over a case?[7] There are three kinds of power in the jurisdiction.[8] They are power to prescribe, adjudicate and enforce.

In order to understand the concept of jurisdiction in e-Commerce, it is important to understand the term e-Commerce. Electronic commerce has different definitions.

From a communications perspective, electronic commerce is the delivery of information, products/ services, or payments via telephone lines, computer networks, or any other means.

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[6] Issues and Challenges of E-Commerce and their solutions, *available at:* http://www.cdotsys.com/issues-and-challenges-in-ecommerce-and-its-solution/ (Visited on 4/2/2017).
[7] Asian School of Cyber Law
[8] Kinds of Jurisdiction, *available at:* http://www.faqs.org/docs/ecom/disputes/text.html (Visited on March 23, 2017).

From a business process perspective, electronic commerce is the application of technology toward the automation of business transactions and workflows.

When it comes to providing the services, electronic commerce is an instrument which takes into account the requirement and necessities of the costumer for providing improved and fast delivery of goods along with its improved quality.

From an online perspective, electronic commerce provides the capability of buying and selling products and information on the internet and other online services.

All of the above definitions are valid. It is just a matter of which less is used to view the electronic commerce landscape. Broadly speaking, electronic commerce emphasizes the generation and exploitation of new business opportunities and, to use popular phrases: "generate business value" or "do more with less".[9]

The term "Electronic Commerce" has been used for describing a variety of market transactions, enabled by information technology and conducted over the electronic network. In the past, a dominant firm in the value chain typically put up a network that deployed proprietary applications over this private network. For example, Chrysler, Ford, and General Motors put up a network and required all its parts and sub-assembly suppliers to participate in its Electronic Data Interchange (EDI) over the network. The emergence of the internet as a vast network with millions of people connected online has given rise to a new interactive marketplace for buying and selling. Thus, for some electronic commerce simply means the capability to buy and sell goods, and information and services online, through public networks.

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[9] Ravi Kalakota and Andrew B. Whinston, *Electronic Commerce: A Manager's Guide* (Dorling Kindersley Pvt. Ltd., India, 2008).

The phenomenal growth of electronic commerce can be attributed to the reduction of friction in business transactions over the network. This reduction has lead to improvements in the quality of service, customer care, lower costs to the consumer and faster execution of transactions, including instantaneous delivery of goods in some cases (software, digital music). To achieve this, electronic commerce is concerned with systems and business processes that support:

- Creation of information sources
- Movement of information over global networks
- Effective and efficient interaction among producers, consumers, intermediaries, and sellers

Electronic commerce utilizes electronic networks to implement daily economic activities such as pricing, contracting, payments and in some case even the shipment and delivery of goods and services.[10]

Impact of electronic Commerce

Science & Technology has always influenced modes, practices, and procedures of business and trade. Of late, a never before phenomenon has been witnessed in the arena of Science & Technology more particularly in electronics and internet. The fast changing information technology and convergence of various communication technologies have virtually taken the business practices by storm. E-commerce is becoming the key to success. The use of internet has made the world small and business transactions are conducted globally at a faster pace. The age of connectivity

[10] Bharat Bhasker, *Electronic Commerce- Frameworks, Technologies and Applications* (Tata McGraw Hill Education Private Limited, New Delhi, 3rd edn. 2008).

has reduced distances and brought people closer. This can be directly attributed to the development of electronics and communication technology.

Some economists say that the newly emerged economy can be very appropriately be called as the transparent economy because the Internet makes has made it more open and exposed. The implication of e-Commerce encompasses various important issues like economic, legislative, technological and social. As under World Trade Organization[11] obligations, member countries are providing tariff-free access to their markets resulting in greater competition. Transactions through e-Commerce take less time and are economically viable too. This would help increase the growth and for this, a strong and a stable legal system are required. It is a fact that in liberal and open markets, e-Commerce would dominate the other important essential features of electronic commerce i.e. Privacy and Security. There should be suitable guidelines to establish them to ensure confidence among the players who transact through e-Commerce.

Today all countries are working to achieve structural reforms in society under the key paradigms of liberalization and globalization. The nation's competitive power will determine the trade and the nation's strength in science and technology will play an important role to dominate the trade. All organizations are making the best use of digitalization and use of the internet to achieve the desired goal. Computers and the Internet are now increasingly widely used to function as part of the business. Transactions conducted through the Internet will have enormous implications on the international competitiveness of every nation, giving rise to new and exciting opportunities in both the domestic and international arena to industries and also the

[11] The WTO is a rule based, member-driven organization-all decisions are made by the member governments, and the rules are the outcome of negotiations among members.

governments to be a part of the global economic system. Electronic commerce is burgeoning as a means to doing business at a very rapid rate and is also showing every sign of continuing to expand. The rise of this new medium is attracting increasing attention by both private and public sector in order to remain upgraded and competitive so as to give 100 percent services to their customers efficiently and effectively.[12]

No single force embodies over electronic transformation more than the Internet. The Internet has emerged as a vital link for connecting almost every point on the planet. Students, doctors, engineers and various other professionals get to access vast information through the World Wide Web (WWW) network system. It will revolutionize retail and direct marketing systems and facilitate international business transactions because it reduces the economic distance between producers and consumers.

The e-Commerce also involves using all round electronic methods and procedures to conduct business activities to achieve the organizational goal. It uses different technologies and embraces a wide range of financial firms such as electronic banking, electronic trading, electronic cataloging, video conferencing, and multimedia communications, electronic data interchange (EDI), electronic mail (E-mail), facsimile (fax) and all forms of messaging between enterprises. It combines technologies (Internet, EDI, electronic forms, electronic cash, Barcodes), information technology standards (such as EDIACT, EAN/UPC), strategies (Just-in-time inventory management, efficient consumer response).

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[12] Impact of e-commerce on today's business world, *available at:* http://www.synaxiom.com/impact-of-ecommerce-in-todays-business-world/ (Visited on 4/3/2017).

Electronic Commerce provides new opportunities for all overseas firms to access India's domestic market and vice versa. In fact, it has set the ball rolling in India. Every service and information about the product is available just on a mouse click on computers. Today not only chatting or shopping but business transactions are also executed electronically between parties such as companies business to business or (B2B), companies and consumers (B2C). The modern technology offers an opportunity to enterprises to upgrade themselves and enter the global market at the right time and at a low cost. This would work like a wonder drug for our entrepreneurs. Because of e-Commerce, the world stands at the threshold of a new revolution. Currently, regulatory structures in many countries limit market access by infrastructure providers. But with the transformations coming around frequently, with the liberalization of the telecommunication sector worldwide, the use of electronic commerce will increase rapidly.

In India, e-Commerce is just a beginning but its advantages are going to be realized soon. Whether the net impact of these developments will bring the desired result will depend on the capacity of the whole nation to prepare a domestic environment which encourages full participation in the global information economy, the effectiveness in contributing to an international environment which makes necessary the use of Internet as a tool to enhance communications, conduct commerce, and increase the value offered to the customer and the eagerness, the willingness, and also the capacity of the whole nation to act and respond quickly and purposefully in developing policy approaches on electronic commerce. India is on the threshold of emerging as a key player in global electronic commerce especially in terms of the third largest reservoir of the technical human resource. It is not that the Internet is new to India but in fact it

has existed here for the last 10 years in the form of ERNET.[13] The Internet users have grown phenomenally in the past 3 years and their number is expected to touch the figure of more than crore by the end of this year.

The IT sector is growing at an annual rate of 30 percent across the board. Between 1985 and 1995, the growth rate of IT sector was almost 5 times faster than the world GDP growth. India has a large and well-diversified base of small and medium Enterprises. The global electronic-Commerce provides our SMEs an opportunity to approach potential customers worldwide through a low-cost alternative.

There is no denying the fact that by facilitating the integration of Indian economy and society with rest of the world, electronic commerce will encourage a broader and a global outlook. The e-Commerce will help to bridge the inter-regional disparities. Since India has considerable competence in the area of software, it should develop the congenial environment and enact appropriate rules and regulations to integrate with the global market. As e-Commerce offers new opportunities, Indian entrepreneurs should try to reap the maximum advantage. By knowing global markets, they can reach and create a niche in those markets. Thus, it is high time that India should act fast and decisively in order to use the growing electronic trade to our advantage.

Electronic Commerce Disputes

In e-Commerce transaction, there are different disputes which are likely to arise due to the virtual nature of the cyberspace. In case of offline disputes, it can be settled within the respective jurisdiction but when the question of e-Commerce comes, the parties may reside in different locations and out of trace. In such a situation a question

[13] Education and Research Network

of jurisdiction of court may arise. Since in e-Commerce it is very difficult to identify the location of the parties and ascertain the jurisdiction. There are number factors which courts need to take into consideration like location of the parties, the place where websites accessed. Today due to the advancement of technology and communication a customer can even pay for services through e-cash which is digital in nature. A dispute in such case is inevitable. There is another situation where the goods has to delivered physically, for example buying goods from Flipkart[14]/Amazon or other online shopping sites, in that case such e-Commerce company can even restrict from delivering the product due to the jurisdiction issues. "But with regard to services provided online it is almost impossible to restrict with reason for jurisdiction because the nature of the online service is wide and it can be rendered to anyone irrespective of their jurisdiction."[15] Jurisdiction in e-Commerce transaction is posing challenges as defining the jurisdiction in virtual world is complicated.

Types of electronic disputes

Benefits of e-Commerce are countless but we cannot ignore the fact that it has also created a complication to human lives. Some of the advantages of e-Commerce are 24x7 availability of services, competitive prices, time saving, delivery at door, convenience etc. Complications include cheating, fraud, cyber crimes, privacy & security issues, jurisdiction issues etc. Using the traditional laws on the issues of this kind has created the buyers unhappy and dissatisfied. Therefore, disputes are always problematic whether they occur by online or offline mode. The types of disputes which may come across in e-Commerce are discussed below,

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[14] Deepak Shenoy, Flipkart won't deliver order more than 10k to Uttar Pradesh, "Capitalmind: Active Investing", 9th June 2013, *available at:* https://capitalmind.in/2013/06/flipkart-wont-deliver-orders-more-than-10k-to-uttar-pradesh/, (Visited on 21/01/2018).

[15] E-Commerce: An Introduction Series Outline, Berkman Centre for Internet and Society, *available at:* http://cyber.law.harvard.edu/ecommerce/disputes.html (Visited on 12/5/2017).

a. Contractual Disputes[16]

A dispute is said to be Contractual when the contractual accountability between the parties are not fulfilled. Contractual disputes mainly occur between the enterprises and the consumers. It is due to the breach of the contract, false information, non-fulfillment of obligations, non-payment for goods or services etc.[17]

Some of the contractual disputes arise between,

i. The company and the Internet Service Provider[18]

ii. Business to Business

- "Miscommunication,
- defaults and claims,
- contract interpretations,
- lack of clear dispute resolution clauses,
- payment delays,
- Misunderstanding"[19]

iii. Business to Consumer

- "Jurisdiction issues,
- unenforceable contract,
- risk of sanctions."[20]

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[16] A party failed to perform a duty or promise that they agreed to in the contract.

[17] E-Commerce Disputes, *available at:* http://cyber.law.harvard.edu/ecommerce/disputes.html (Visited on 12/5/2017).

[18] *Ibid*

[19] Mediators without borders-Arbitrators without borders, B2B Disputes, *available at:* https://www.mwbdr.com/b2b-disputes/ (Visited on 12/01/2018).

[20] Thomson Reuters Practical Law, B2C disputes, 1st Oct, 2001, *available at:* https://uk.practicallaw.thomsonreuters.com/4-101-

b. Non-contractual disputes[21]

A dispute is said to be non-contractual when the parties to the transaction do not fulfill any obligations that they ought to. Non-Contractual disputes are very common in e-Commerce. Some of the these disputes are,

i. **Privacy violation/ data leaking**[22]

ii. **Failure in Data Protection**

According to Information Technology Act, 2000, the enterprise may be liable for sharing or revealing confidential data on customers, as discussed in the segment on Privacy.[23]

iii. **Domain Name dispute**

Infringement of registered domain name under Trademark Act, 1954 is punishable.[24]

iv. **Copyright Dispute**

Any person or any enterprise that uses the copyrighted material in excess or without permission is Infringement under Section 51 under the Copyright Act, 1957.[25]

5678?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 (Visited on 12/01/2017).

[21] Relating to obligations not expressed in a contract.

[22] Consumer Privacy: Privacy issues are considered as complicated concept in e-Commerce. Many sites, such as the one in our case study, have little interest in actively profiling their users or discovering personal information about them. However, these sites will often collect significant amounts of personally identifiable data that may trigger liability risks, *available at:* https://cyber.harvard.edu/olds/ecommerce/privacytext.html (Visited on 13/1/2018).

[23] Under the Provisions of IT Act, 2000.

[24] Under the Provisions of the Trademarks Act, 1999.

[25] Under the Provision of Copyright Act, 1957.

v. **Right to freedom of expression**

There is a right to freedom of expression but this does not mean that the enterprise may speak anything they want. Any defamatory words posted online according to the provisions given under Section 499 IPC shall be liable to fine and imprisonment.

Therefore, all possible issues that arise in e-Commerce are more or less similar to each other. Sometimes the cost for the product brought from the online forum may be less and if a dispute may arise between them in future the cost for dispute resolution procedure may be expensive. Solving e-Commerce disputes through international arbitration are often expensive, time taking and inconvenient.

Jurisdiction for e-Commerce disputes

Forum selection clauses in the international business contracts have became an increasingly important and accepted method for resolving international conflict of laws issues in the world of global e-Commerce. Applicable laws and choice of forum are interchangeable. When it comes to the choice of law, the appropriate court has to decide the applicability of a particular law.

The e-Commerce application of the internet is limitless and the jurisdictional issues produced by it are many and diverse. What causes the difficulties is that Internet interactions potentially occur everywhere and come under the jurisdiction and the laws of multiple legal systems. However, it is not the end, once e-Commerce application of the Internet is unfolded to its potential, jurisdictional issues likely to emerge may not be predictable at present. Disputes are particularly likely to arise in cyberspace, where the location of an occurrence is never certain, where the differences are likely to create conflicting laws, and where the rules are made not only

by the nations and their representatives but also by the sub-national and transnational institutions.

The whole question of jurisdiction is complex, because of the conflict of laws rules.[26] The questions which are likely to arise are which court has the jurisdiction in a case of dispute? Whether the law of the country in which customer resides or the laws of the country in which suppliers resides apply or whether the court has jurisdiction to try the dispute or not and if so, how far the selected forum can provide justice to the parties and whether such judgment in one country is enforceable in another country or not. To ensure that all parties concerned will feel safe for participating in e-Commerce transactions it is essential that e-disputes are resolved effectively.

The geography of the internet, however, cannot be ascertained owing to its virtual nature. In operation, it pays no importance to geographical or political boundaries. Furthermore, the physical world location of those parts of the internet infrastructure via which a communication is carried may be purely accidental. The result in many cases is that the parties to Internet transactions are faced with overlapping and often contradictory claims that domestic laws apply to some part of their activities. In the physical world such overlaps are comparatively rare and, except in private legal actions, are often ignored as being too trivial to require legal action. In the internet world, these overlaps are pervasive and have the potential to stifle legitimate activity or even to encourage deliberate law-breaking.[27]

The internet is a new and separate jurisdiction in which the rules and regulations of the physical world do not apply- a seamless global economic zone and borderless.

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[26] Malcolm N. Shaw, *International Law* 573 (Cambridge University Press, 5th edn., 2003).
[27] Chris Reed*, Internet Law* 217-218 (Universal Law Publishing, 2nd edn., 2010).

Internet activities do not take place anywhere in the physical world but occur solely in this new place called cyberspace. If this connection of cyberspace as a separate jurisdiction were well founded, the problem outlined above would not exist. Competing claims of domestic law would be denied on the ground that the transaction occurred exclusively within the jurisdiction of cyberspace and is thus governed by its laws, customs, and practices.[28] Imposing the traditional common law principles of jurisdiction to the borderless world of internet transactions has proved to be very challenging for the courts and has resulted in the application of a different tests and principles. The main reason for the internet regulation problems is that laws and regulations have been created on the assumption that activities are geographically bound and, in consequence, location is the criterion for determining jurisdiction. Due to an absence of a uniform jurisdictional code, legal practitioners are generally left with a conflict of law. Further, Indian courts are also facing a dilemma for choosing the applicable laws for the e-dispute. Cases like '*WWE v. Reshma Collection and Others'*[29] is a sufficient example where the application of the *'Minimum Contact Principle'* was validated in India for the issues of three different jurisdictions. The issue, in this case, was to decide the place over the internet to determine the jurisdiction. The question held in this case was that *"when a transaction takes place over the Internet, where is the contract concluded?"* The case is the only authority in India till date on the issue which has decided the jurisdictional issues in the e-Commerce transaction.

With regard, the legislative arrangements in India 'The Civil Procedure Code, 1908', 'The Indian Contract Act, 1872', 'The Information Technology Act, 2000' and 'The

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[28] *Ibid*
[29] *WWE v. Reshma Collection and Others* FAO (OS) No. 506 2013.

Information Technology (Amendment) Act, 2008' are the laws that handle the e-disputes in India. The courts basically rely upon the principles of civil cases of commercial disputes to handle e-Commerce cases.

Due to the limited jurisprudence, it is important for the Indian Courts to examine existing common law cases which lay down principles for the exercise of jurisdiction over an e-Commerce dispute. These principles may be appropriately applied by Indian courts in the future to solve e-Commerce disputes. While, the Information Technology Act, 2000 and judicial interpretations related to contracts in general to a certain extent have clarified the jurisdictional aspect of e-contracts. In view of the aforesaid discussions, it is generally advisable to clearly specify both jurisdictional and governing law provisions in the e-contracts, to avoid future conflicts on jurisdictional or choice of law issues.

Due to various legal conflicts originating from the internet, the courts around the world face the difficult question of deciding whether to develop a new body of jurisprudence to deal with a novel legal problem or to identify analogous legal precedents that best fit the facts of the case.[30]

STATEMENT OF THE PROBLEM

The main issue of the internet jurisdiction is the presence of multiple parties residing in various parts of the world. E-Commerce means the ability to conduct business electronically, or over the internet. It may be the goods or the services where the two

[30] Tushar Kanti Saha, "Cyberspace-Conflicting Jurisdictional Spheres of Litigating IPR Claims" *15 JIPR* 364-173 (2010).

parties can be residing in two different countries, and the transaction can take place in the third country.

The question arises in such cases that if one party wants to sue the other, then where can one sue? There are national rules of every country for determining the jurisdiction in their respective territory. But to determine the jurisdiction in cross-border transactions which is occurred in the cyberspace has been challenging for the courts worldwide because of the absence of the uniform legal system and conflicts of laws rule. The Indian law requires two principles for identifying the jurisdiction, either the place where the defendant resides, or where the cause of action arises. However, in the context of the internet, both these are difficult to establish with any certainty. The advent of the internet makes multiple jurisdiction transactions the rule rather than the exception. Therefore, the study has focused on the legal issues that make a jurisdiction a complicated legal concept.

Firstly, **Choice of Forum** (which country's courts should have jurisdiction to try the dispute)

Secondly, **Choice of Law** (which country's laws should be applied to resolve the dispute) and lastly, **Judgment Enforcement** (whether any foreign judgment obtained abroad might be enforceable in the home country or not).

Choice of Forum: To give speed and clarity to dispute resolution cross-border matters customarily insist upon contract provisions. Usually, this is done with clauses specifying the choice of forum, choosing the law of a particular jurisdiction and, often agreeing to arbitrate disputes. A choice of forum is a provision in a contract in which the parties stipulate that any lawsuit between them arising from the contract shall be

litigated before a particular court or in a particular jurisdiction. The choice-of-forum provisions really add a large degree of certainty. Forum selection clause in a contract with a conflict of laws allows the parties to agree that any litigation resulting from that contract will be initiated in a specific forum. Generally, if the parties agree with the particular court for the disputes, the forum will select the applicable laws. If the disputes arise within the domestic jurisdiction, the forum and the applicable laws can easily be decided but the complication arises when the dispute is of international nature and has arisen through the use of the internet. The difficulties faced by the courts in dealing with this new medium of business are illustrated as in the year 1996 the United States by a Federal district court in Connecticut held that accessibility of a website, standing the alone, does not form a sound basis for jurisdiction over a non-resident.[31]

The case of *International Shoe Co. v. Washington*[32] is the landmark judgment for the jurisdiction issues and became the foundation of the US Theory of Jurisdiction. The Court took the view that 'Due process requires that a defendant should have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice'. Through this case, the court set out fundamental guidelines under which the States must operate. The language in the court's opinions allowed for flexibility and a measure of fairness under the law, but it has removed the certainty and uniformity that can only exist under a bright line rule.[33]

[31] *Inset System v. Instruction Set Inc.* , 937 F. Supp. 161 (D. Conn. 1996)
[32] *International Shoe Co. V. Washington* 326 U.S. 310.
[33] Cheryl L Conner, "Creating Jurisdiction through Internet Contacts", 4 *RJLT* 9 (1998).

If the minimum contact is the criterion, what are the circumstances that United States court assert jurisdiction over the e-Commerce party based on contracts that the company has with the forum territory via use of the internet? In the Internet context, the defendants have generally claimed that a remote forum cannot establish jurisdiction because the contacts are only established through a server that is not within the forum. The defendants claimed that their activities are not directed at the forum state. The contrary would mean that an e-company could be sued in all of the 50 states where its advertisements can be accessed.

Another approach for determining jurisdiction was outlined in the US case of *Zippo Manufacturing v. Zippo Dot Com.*[34] The Court, in this case, applied a passive versus active test to the question of jurisdiction which involved a 'sliding scale analysis' computing the nature and quality of the commercial activity of the defendant on the internet. To invoke jurisdiction, the *Zippo* test requires an interactive website and commercial activity. 'The passive versus active approach has been criticized for discouraging interactivity in a time when websites are in fact becoming more interactive.'[35] In *Panavision International, L.P. v. Toeppen*[36] the court established jurisdiction where a domain name was registered in order to divert internet traffic away from the forum. These same inter-states principles would apply in determining whether a US court can assert authority over companies abroad. This makes it very difficult to assess where jurisdiction can actually be found. A worst-case scenario would provide personal jurisdiction in every physical location where the e-business can be accessed or where it is susceptible to cause some effects.

[34] *Zippo Manufacturing Co. v. Zippo Dot Com. Inc* 952 F. Supp. 1119 1997.
[35] 2007 NY Slip Op 27081. (a US Trial Court judgment).
[36] *Panavision International, L. P.v. Toeppen* 141 F.3d 1316 (9th Cir.1998)

In *Sayeedi v. Walser* [37] a US trial court refused to exercise jurisdiction over an e-Bay transaction between two individuals on the basis that one sale, without more, does not constitute sufficient purposeful availment to satisfy the *minimum contacts* necessary to justify summoning across State lines, to a New York court, the seller of an allegedly non-conforming good.

Indeed, under doctrines which have become prevalent in most judicial interpretations in the United States, France could not have Jurisdiction over Yahoo! Inc's auction website as the site was not located in France, was not targeted at France and, indeed, offered only a venue in which persons other than Yahoo! Inc offered goods for sale. In fact, Yahoo! Inc has a subsidiary resident in France which complies with the French law forbidding the sale of Nazi-related goods on its French website, namely 'Yahoo.fr'. Climaxing a series of earlier rulings by the same court, it ordered Yahoo! Inc to put filtering systems on its United States website so as to prevent access by French residents to portions of the Yahoo! Inc auction site on which persons offer to sell World War II memorabilia containing Nazi symbols. In its initial ruling of 22nd May 2000, the court held that the United States website for Yahoo! Inc was subject to French jurisdiction simply because it could be accessed from France.[38]

The only authority to determine the jurisdictional issues in e-Commerce in India is *Wrestling Entertainment, Inc. v. M/s. Reshma Collection & Ors.*[39], The question held in this case was that "when a transaction takes place over the Internet, where is the contract concluded?"[40] The Delhi High Court while reversing the order of a single

[37] *Sayeedi v. Walser* N. Y. Misc. 2007.
[38] Ordonne du 20 November 2000, VEJF and LICRA v Yahoo! Inc and Yahoo! France (Tribunal de Grand Instance de Paris).
[39] W*orld Wrestling Entertainment, Inc. v. M/s. Reshma Collections and Ors.* (FAO (OS) 506/2013)
[40] Jurisdiction in E-Commerce IP Disputes, SpicyIP, 18/10/2014, *available at:* https://spicyip.com/2014/10/jurisdiction-in-e-Commerce-ip-disputes.html (Visited on 10/09/2017).

judge have laid down that the jurisdiction in e-Commerce is determined by the buyer's place of residence. The principle of *'minimum contact'* was also applied in this case.

The Division Bench relied on the three-pronged tests for carrying on businesses laid down by the Supreme Court in *Dhodha House v. S.K. Maingi*[41]. To determine whether the plaintiff could be said to "carry on business" in a particular place the Supreme Court had interpreted the expression "carries on business" given in Section 134(2) and Section 62(2) of the Trade Marks Act and the Copyright Act respectively.

Based on the above reasoning of the Supreme Court, the Delhi High Court opined that the plaintiff could be said to carry on his business to an extent in Delhi and has fulfilled the condition "carrying on business" as laid down in the Dhodha case. The Court was of the view that *"due to advancements in technology and the rapid growth of new models of conducting business over the internet, it is possible for an entity to have a virtual presence in a place which is located at a distance from the place where it has a physical presence."*[42]

From the above cases discussed, it is realized that to determine the competent forum to decide the disputes in cross-border transactions which is occurred via internet is not only problematic but also controversial.

Choice of Law: The next question which has to be determined is which law should be applied to the dispute. It is determined by either referring the particular domestic legal system or referring the rights and liabilities of the parties. The rules which direct the court to identify the applicable law are called "the Choice of Law rules". But in

[41] *Dodha House v. S. K. Maingi* AIR 2006 SC 370
[42] Supra 12

complicated disputes like e-disputes, application of these rules will be difficult. With regard to e-Commerce, the application of private international law to electronic consumer contracts raises new, complex, and controversial questions. It is new because consumer protection was not a concern of private international law until very recently and e-Commerce only became an important commercial activity within the last ten years. E-consumer contracts generate original questions which have not been considered under traditional private international law theories. The traditional rules of private international law on jurisdiction are based on geographical connecting factors, such as domicile of the parties, which are sometimes not applicable on the internet. Some other connecting factors, such as the place of contracting, the place of performance, the place where an establishment is situated, etc, are not so easy to be determined in the electronic world. At the same time, traditional rules of international law on jurisdiction cannot be set aside only because they seem not to be appropriate or relevant in this case. It is difficult because it has to deal both with difficulties raised by consumer contracts and the challenges of e-Commerce. The sound resolutions which are applicable to consumer contracts may prove inappropriate in e-Commerce, while effective approaches to resolve the private international law problems in e-Commerce may be proper for consumer contracts. It is controversial because it concerns the conflicting interests of consumers and businesses in a fast moving commercial environment; therefore, it is hard to achieve a fair balance.[43]

Firstly, the problem arises when the inadequacy of current private international law applies to a borderless internet. The courts have problems in conciliating the nature of cyberspace with the traditional competent jurisdiction and choice of law concepts, which have been funded by the notion of territoriality. Secondly, it is the incapability

[43] Arvind M. Velu, "IP Disputes: A Jurisdictional Dilemma", *Altacit Global* 2016.

and unwillingness of the courts to spend time for keep updating the changes in both technology and processes. This represents the biggest obstacle to the development appropriate skills for the settlement of e-Commerce disputes. The other problems are related to cost and time.[44]

The issue of choice of law in the EU is also problematic. The Rome Convention (RC) allows the parties to choose which law to rule their contracts.[45] In a world without boundaries like cyberspace, it makes no sense to allow the contracts to govern which law applies and which do not. The US conflict of laws system is not better designed. It lacks clear rules and consists of several different, co-existing approaches.

There is an extensive Indian jurisdiction on the issues of whether contracting parties can choose the law applicable to a contract and whether that choice is conclusive, whether there are any limits on the parties' right to select the applicable law, and what the proper law is for the contract where there is no choice of law clause in the contract.[46] Further, Indian courts have addressed the issue of how foreign law is to be ascertained in cases where foreign law has been selected by the parties as the proper law, of the contract.[47] However, this line of jurisprudence does not address issues arising from the exercise of jurisdiction over a defendant operating a website due to content posted on the website or an online transaction.[48] With Indian courts had developed a limited jurisprudence it is important to examine existing common law cases which lay down principles for the exercise of jurisdiction over an e-

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[44] *Ibid*
[45] Adrian Briggs, *The Conflict of Laws,* 54 (Oxford University Press, Oxford, 3rd ed., 2002).
[46] Aparna Viswanathan, *Cyber Law-Indian and International Perspectives* 276 (LexisNexis, Buttorworths, Wadhwa, 1st edn., 2012).
[47] *National Thermal Power v. Singer Company and Ors* 1993 AIR 998, 1992 SCR (3) 106, *available at:* https://indiankanoon.org/doc/633347/ (Visited on: 12/10/2017).
[48] *Ibid*

Commerce dispute. These principles may be appropriately applied in Indian courts in the future to solve e-Commerce disputes.

Judgment Enforcement: The problem of judgment enforcement in e-Commerce disputes is another important issue that cannot be neglected. In India, the courts are not averse to uphold the decree of a foreign court and can, in fact, only hold the decree of a foreign court to be non-conclusive, if such decree does not fulfill the criteria set out in Section 13 of the Code of Civil Procedure, 1908. Thus, in the event a decree is passed against the Indian citizen in respect of any perceived breach of the laws of another state, the decree will be upheld in India, against the Indian citizen, provided it does not suffer from any of the infirmities listed under Section 13.[49] Section 75 of IT Act, 2000[50] is well applied in extra territorial cases provided under but is not strong enough to implement its decision on the foreign party. The court possesses no power to bring the foreign party to India for trial. The availability of several equally capable courts and the difficulty in gathering evidence of location and existence makes it difficult for Indian courts to gain jurisdiction. However, application of these provisions on the internet raises insurmountable difficulties. Transmissions on internet flee through innumerable countries through communication networks crisscrossing the globe at any given point of time and many states can claim jurisdictional authority simultaneously over the same transaction leading to chaos.[51]

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[49] Rakesh Kumar and Ajay Bhupen Jaiswal, *Cyber Laws* 71-72 (A P H Publishing Corporation, New Delhi, 2011).

[50] Section 75: Act to apply for offence or contravention committed outside India:(1) Subject to the provisions of sub-section (2), the provisions of this Act shall apply also to any offence or contravention committed outside India by any person irrespective of his nationality.(2) For the purposes of sub-section (1), this Act shall apply to an offence or contravention committed outside India by any person if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India.

[51] Supra 17

With the current international jurisdiction, E-Commerce Directives in the EU and Rome II (still in the drafting process) are unlikely to be an effective enforcement alternative for jurisdiction obtained in a consumer's country of residence against a business located outside the jurisdictions influence.[52] If the government were to leave the issue of jurisdiction to business, the controversial argument is, can business enforce it?

In addition to the issue of a lack of enforceability, businesses and consumers further support the argument that jurisdiction failed to buy their confidence and trust because disputes potentially have multiple solutions. With the jurisdiction currently in operation, a single 'input' in a particular e-Commerce business transaction, can end in multiple different 'outputs', or legal jurisdictions. This is due to different private international legislation that engages at an international, regional and a national level. By way of illustration, back in 1997, when the European Community and the Japanese Ministry of Industry and Trade delivered policy documents on e-Commerce, these parties encountered the same issue, one input, and multiple outcomes. In this case, the profoundly broad agreement on e-Commerce policy in this document is rather striking given the countries diverse legislation and various cultural traditions. In addition to that, e-Commerce is still developing. Courts do not follow the same thinking when conforming on matters of online dispute and further confuse businesses and consumers with different interpretations by different courts. Consequently, this gives rise to the need to establish certainty on the outcomes of any jurisdiction, and also on the liabilities of businesses and consumers involved.

[52] According to United State Council for International Business, 2000.

Therefore, the issue is not only the absence of law, choice of forum and choice of law provisions but also enforcement through jurisdictional rules which are governed by the doctrine of territoriality. The issue of this kind has contributed to the complete confusion and contradictions that plague decisions in the area of internet jurisdiction.

REVIEW OF LITERATURES

The complexities of the issues on the jurisdiction in e-Commerce are made out by the diverse topics which are discussed below. A few paramount kinds of literature reviewed with regard to Internet Jurisdiction, Civil Jurisdiction, Cross-border Jurisdiction, Choice of forum and Choice of Law, protection of e-consumers are mentioned below.

Michael J. Weber, in his article ***"Jurisdictional Issues in Cyberspace",***[53] states that the Cyberspace jurisdiction is an emerging area of Internet law because cyberspace lacks geographical borders. Courts are increasingly asked to decide whether commercial activity conducted over the Internet subjects an individual or entity to personal jurisdiction in suits brought in another forum. When should a particular state or federal court exercise personal jurisdiction over an Internet defendant?

He thinks that applying the traditional notions of personal jurisdiction to the Internet is difficult at best. The courts nonetheless must seek guidance from the statutory and constitutional law, state long-arm provisions, and contemporary notions of them in order to decide if personal jurisdiction exists over an Internet defendant. Whether a defendant is a big business or a one-person operation, the Due Process Clause

[53] Michael J. Weber, "Tort & Insurance Law Journal" 36 *ABA* 803-827 (2001).

"mandates that potential defendants be able to structure their primary conduct with some minimum assurance as to where the conduct will and will not render them liable to suit."

A book called "***Cyber Law"***[54] by **Rakesh Kumar & Ajay Bhupen Jaiswal** highlights the e-Commerce and its growing issues worldwide due to the use of the internet. They have tried to make an effort for analyzing and evaluating the mechanism to curb and cure the cybercrime. Further, they have critically evaluated the constitutional mandates and judicial decisions relating to cyberspace. They have believed that application of traditional legal paradigms in the cyberspace will create complexities and instead requires a separate governing body of a new legal regime.

Amit M. Sachdeva, on his article "***International Jurisdiction in cyberspace: A Comparative Perspectives"*** [55], desires for a treaty-based international harmonization model as the most ideal one where rules are certain and predictable and at the same time flexible in order to ensure that the potential benefits of this technology are meaningfully consumed by the human civilization. The author believes that the *mutantis mutandis* is always arguable for the existing conflicts rules to govern cyberspace jurisdiction. The problem of jurisdiction is foremost. The most difficult question is one of choosing a judicial forum and seeking remedies.

In this article, the author has put up the issue of jurisdiction is of interest for two reasons: first, it takes a lot of litigation to know where to litigate; and, secondly, the issue of jurisdiction is the first one that the court must face and answer in affirmative before it may proceed to adjudicate upon any other. The author gives critically assess

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[54] Rakesh Kumar and Ajay Bhupen Jaiswal, *Cyber Laws* (A P H Publishing Corporation, New Delhi, 2011).
[55] Amit M. Sachdeva, "International Jurisdiction in Cyberspace: A Comparative Perspective" 8 *CTLR* 245-247 (2007).

the feasibility of the different proposed "Solutions" for different countries. It highlights the merits of treaty-based international harmonization as a solution to the issue of cyberspace jurisdiction, which the author prefers over others.

Finally, the briefing concludes by proposing some connections which may form reasonable and acceptable bases of jurisdiction for drawing up an international convention in order to make the Internet a more rule-based regime ensuring clarity, predictability, and certainty.

The author presumes that the important questions like in the absence of statutory and international guidelines on cyber jurisdiction, how far would resort to private international law norms, as prevalent in different legal systems, be justified?

He makes us clear by answering that the inquiry has a twofold concern: the inevitability of municipal courts decisions and the inappropriateness of conflicts rules being related to cyberspace. The author believes that each state has to participate in every attempt to harmonize the rules of jurisdiction and to codify such rules into domestic legislation, even where no international harmonization is reached. He believes that this will ensure that both sides of cyber litigation will be faced in a predictable forum with certain legal consequences the prior knowledge of which would enable them to act accordingly.

Reaching harmonization is not easy. Every state is not the party to the UNCITRAL model law on e-Commerce, they still lack with the domestic provisions for the jurisdiction, and the author cannot simply encourage the parties to participate for the international harmonization.

"Cases, Materials and Text on Consumer Law"[56] by **Hans-W Micklitz, Jules Stuyck and Evelyne Terryn** answers the set of questions of jurisdictions like which court is competent? How is a writ of summons served? How can judgments be enforced outside the territory of the court that has rendered the judgment? Which law will be applicable, the law of the country of the plaintiff or that of a defendant?

They have highlighted the provisions of the Brussels I Regulation to protect the consumers. It says that a defendant domiciled in a Member State is to be sued in the courts of that Member State. Certain disputes, where one of the parties is deemed to be in a substantially weaker position and therefore in need of enhanced procedural protection, are subject to separate jurisdictional provisions in the Regulation.

Malcon N. Shaw QC's book named ***"International Law"***[57] gives an idea about the jurisdictional laws applicable in international disputes. He says that the jurisdiction concerns the power of the state to affect people, property, and circumstances and reflects the basic principles of state sovereignty, equality of states and non-interference in domestic affairs. The whole question of jurisdiction is complex, not least because of the relevance also of constitutional issues and conflicts of law rules. He says that the international law tries to set down the rules dealing with the limits of a state's exercise of governmental functions while conflict of laws will attempt to regulate in a case involving a foreign element whether the particular country has jurisdiction to determine the question, and secondly, if it has, then the rules of which country will be applied in resolving the dispute.

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[56] Hans-W Micklitz, Jules Stuyck, et.al., *Cases, Materials and Text on Consumer Law* (Oxford and Portland, Orego, 2010).
[57] Malcolm N. Shaw, *International Law* (Cambridge University Press, 5th edn., 2003).

He distinguishes the jurisdiction into legislative, executive and judicial. Legislative is referred as the supremacy of the constitutionally recognized organs of the state to make binding laws within its territory.

He describes executive jurisdiction as the capacity of the state to act within the borders of another state and describes judicial jurisdiction as the power of the courts of a particular jurisdiction to try cases in which a foreign factor is present. He agrees with the principle based on domicile and the presence of the defendant of the country to the nationality for the conflicts of jurisdiction on the civil disputes.

Aaron Schwabach's ***"Internet and the Law: Technology, Society, and Compromises"*** [58] has addressed that the advent of the internet makes multiple-jurisdiction transactions the norm rather than the exception. The author has suggested that when the territorial jurisdiction of state courts of the US is at issue, the first question that must be addressed is the reach of the state's long-arm statute. Further, he added that the problems are more likely to arise with specific jurisdiction.

C. K. Takwani's book entitled ***"Civil Procedure"*** [59] is all about the procedure which facilitates justice. Part II of the book talks about "Jurisdiction of Civil Courts" which is very much relevant for the present research study. He says that lack of jurisdiction leads to the invalid judgment which must be considered by every judge in the Civil Court. The book highlights all essential aspects of jurisdiction and the same are discussed exhaustively with case laws.

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[58] Aaron Schwabach, *Internet and the Law: Technology, Society, and Compromises* (ABC-CLIO, 2nd edn., 2014).
[59] C. K. Takwani, *Civil Procedure* (Eastern Book Company, Lucknow, 6th edn., 2012).

Amarendra Pratap Singh's "***Worldwide: Choice of Law: Problems in International Commercial Arbitration"***[60], is an article which critically analyzes the choice of law and choice of forum in international commercial arbitration. This article is reviewed on the basis that the international law on trade is applicable in some way out with the e-commerce transactions. The author has put up the issues of enforcement of the choice of laws and choice of forum on the parties residing worldwide. He highlights the important international conventions' provisions and Arbitral Institutions' Rules on the applicable law on the jurisdiction issues on cross-border trade.

Chris Reed on his book ***"Internet Law"***[61] has said that the principles for establishing applicable law and jurisdiction in cross-border transactions were established many years ago before the invention of computers and digital communication networks. He said that the conflict of laws determines these matters by deciding whether a relevant element of the transaction can be localized in the jurisdiction in question. He suggests that we have to ask where Internet transaction occurs or, more pertinently, whether each element of that transaction takes place.

Dan Jerker B. Svantesson in his article ***"An introduction to jurisdictional issues in Cyberspace"*** [62]examines the issues associated with the application of private international law to online activities. In doing so, the four interconnected elements of private international law; jurisdiction, choice of law, the courts' option of declining jurisdiction and recognition and enforcement are examined.

[60] Amarendra Pratap Singh "Worldwide: Choice of Law: Problems in International Commercial Arbitration" *Mondaq: Connecting knowledge and people*, Jan. 13 2017.
[61] Chris Reed, *Internet Law* (Universal Law Publishing Co. Pvt. Ltd., 2010).
[62] Dan Jerker B. Svantesson, "An introduction to jurisdictional issues in cyberspace" 15 *JLIS* 50-70 (2004).

He mentioned that the rules regulating jurisdictional claims are mainly location focused. In practice, the subject-matter jurisdiction criterion simply means that a plaintiff cannot, for example, turn to the family court in relation to an intellectual property dispute. A similar line of reasoning can be found, for example, in the writings of Chicago-based professor, Jack Goldsmith: A manufacturer that pollutes in one state is not immune from the antipollution laws of other states where the pollution causes harm just because it cannot predict which way the wind blows. Similarly, a cyberspace content provider cannot necessarily claim ignorance about the geographical flow of information as a defense to the application of the law of the place where the information appears.

The question of jurisdiction is important for several reasons. A party may want the dispute to be heard in its home state for their convenience but the choice of forum determines which court will adjudicate the matter, which in turn decides which choice of law rules will apply, which in turn decides the applicable law, and of course the substantive law being applied determines which party will be successful in the dispute.

Nidhi Saxena's article "***Ontology of Jurisdiction in Cyberspace: An Analysis,"*** [63] highlights the law of the jurisdiction of different countries and demands the uniform jurisdictional law to handle all misdemeanors on the internet. She adds that cybercrime increasingly breaches the national border.

Vivek Sood wrote a book called **"Cyber *Crimes, Electronic Evidence & Investigation: Legal Issues with critical analysis of The Technology (Amendment)***

[63] Nidhi Saxena, "Ontology of Jurisdiction in Cyberspace: An Analysis" 27 *IJLS* 144-152 (2010).

Act, 2008".[64] In this book, he said that since the internet is a borderless world, a separate regulatory law is required but at the same time he accepts that the law of the jurisdiction in the real world can also be applicable in the internet world. The author believes that the existing laws of our country, with some fine-tuning, can be effectively applied to the internet. He as an advocate points that the internet is likely to get more and more localized and domestic laws will exercise more control over it. He says that the virtual world is also a part of the physical geographical world that has strong lines on borders when it comes to making laws. Therefore, he practically believes that the law of the land with some modifications can be acceptable on the cyberspace.

An article called "***India: Whether Indian Parties can choose Foreign Law to settle Disputes"*** [65] by **Lomesh K. Nidhumuri** is an illustration which answers the question of whether or not Indian Parties can choose the foreign law to resolve disputes or not. The author expressed the issues of the case study *Addhar Mercantile Private Limited v. Shree Jagdamba Agrico Exports Pvt. Ltd.* where it was argued that two Indian parties cannot derogate from Indian laws, and cannot submit the foreign law to resolve disputes in a foreign territory because it was believed that this would oppose to public policy.

Gower A. Nair, and K. M. Aiswarya on **"*Emerging Trends of E-commerce & Challenges to the Consumer Protection Act, 1986"***[66] clearly mentioned about the strong requirement of protective mechanisms for e consumers. The right of physical

[64] Vivek Sood, *Cyber Crimes, Electronic Evidence & Investigation: Legal Issues with critical analysis of The Technology (Amendment) Act, 2008* (A Nabhi Publication, 1st Revised edn., 2010).
[65] Lomesh K. Nidhumuri, "India: Whether Indian Parties can choose Foreign Law to settle Disputes", *Infolex Newsalert*, Sep. 2015.
[66] Gowri A Nair, K. M. Aiswarya, Emerging Trends of E-Commerce & Challenges to the Consumer Protection Act, 1986", *Academike* 2015.

consumers and e-consumers are equal in theory but different in operation or enjoyment due to the difference in the nature and place of business or medium of business. The problem arises when the unique practical problems like a place of business, jurisdictional issues, non-availability of common dispute resolution system etc. are not provided in the present legislation and which is important to be researched.

An article ***"Cyberspace: Jurisdictional Issues of E-commerce and Consumer Protection"***[67] by **Chetak Karnatak,** highlights the various jurisdictional issues while deciding disputes in e-commerce and also the present legal framework in India governing e-commerce in cyberspace. The article also highlights how far consumers are protected in cyberspace.

Vinay Kumar Gupta's *"The Code of Civil Procedure,"* [68] says the procedural code solve the dilemma for following the substantive law or may be facing the risk of being charged with the violation of the law. He said that the jurisdiction of the court is to be determined on the basis of the allegation made in the plaint and does not depend upon the defense taken in the written statement. He further said that foreign judgments are enforceable in India on the same grounds and in the same circumstances in which they are enforceable in England under the common law. Jurisdiction of foreign courts is determined by rules of conflict of laws.[69]

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[67] Chetan Karnatak, "Cyberspace: Jurisdictional Issues of E-commerce and Consumer Protection" 3 *ANMRJ RCM* (2017).
[68] Vinay Kumar Gupta, *The Code of Civil Procedure* (LexisNexis, Butterworths Wadhwa, 14th edn., 2005).
[69] *Raj Rajendra v. Shanker Saran* AIR 1962 SC 1737.

Jyoti Rattan's article called ***"Law relating to e-commerce: international and national scenario,"***[70] said that "since the internet is a borderless world, a separate regulatory law is required. The internet, it is argued, is a separate jurisdiction. The other side argues that the internet too is part of this physical world and not divorced from it, hence, the law of jurisdiction applicable law in the real world should apply to the virtual world as well.

An Article called ***"Jurisdiction in Cyberspace: A Theory of International Spaces"***[71] by **Darrel C. Menthe** is a complete guidance for the cross-border jurisdictional issues. He has given the place to cyberspace in the international law in order to give a meaning in the cyberspace jurisprudence. He says that there are three types of territory in the international law which is called international space. Such three spaces are Antarctica, outer space, and the high seas. For jurisdictional analysis, he treated cyberspace as the fourth international space. He had described the theory of the uploader and the downloader with the help of two eminent cases, *The Schooner Exchange and The Cutting Case.* He adds that these three types of spaces that share the unusual characteristic, for jurisdictional purposes, because of the lack of any territorial jurisdiction. He considers a nationality as one of the principles for the establishment of any jurisdiction.

"Jurisdiction in B2C E-commerce Redres"[72] by **Ong Chin Lang** gives a concern for a current issue of jurisdiction which has already diminished the importance of physical location and locality.

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[70] Jyoti Rattan, "Law relating to E-Commerce: International and National Scenario with special reference to India" 1 *IJSSEI* (2015).
[71] Darrel C. Menthe, Jurisdiction in Cyberspace: A Theory of International Spaces, 4, issue 1 *MTTLR* (1998).
[72] Ong Chin Eang, Jurisdiction in B2C E-commerce Redress, *IGP.*

HYPOTHESIS

There is a conflict in the traditional principles of Jurisdiction and the modern problems of e-Commerce.

RESEARCH OBJECTIVES

Jurisdiction is a complicated legal issue that is difficult to understand in the growing e-Commerce disputes. There is no clear and convenient jurisdiction due to the lack of physical boundaries on the internet, and it leaves the parties behind with the complexities of choosing the forum and choosing the law. Therefore, the research mainly concerns for the following objectives:

1. To study the existing jurisdictional issues on e-Commerce.

2. To examine the complexities of choosing the forum and choosing the applicable laws for the judgment enforcement on e-Commerce contract.

3. To study the application of the doctrine of territoriality in the modern jurisdictional conflicts of e-Commerce.

4. To find out the present development of resolution in jurisdictional issues on e-Commerce.

5. To analyze the role played by the judiciary in tackling the jurisdictional issues on e-disputes.

RESEARCH QUESTIONS

1. What are the issues of jurisdiction in e-Commerce dispute? To what extent Indian laws can address the issues of jurisdiction?

2. How the choice of law and the choice of forum clauses in e-Commerce agreement between the parties can resolve the jurisdictional issues in e-Commerce disputes?

3. How far can the doctrine of territoriality be applied in the judgment enforcement in the jurisdictional conflicts of e-Commerce?

4. What is the present development in the resolution of conflicts of law issues in e-Commerce?

RESEARCH METHODOLOGY

The entire research is doctrinal. It is descriptive and analytical by nature. The research is based on primary and secondary sources. Relevant material from primary sources has been collected from statutory provisions of the relevant legislation and court decisions. In case of secondary sources, the material has been collected from articles, journals, research reports, policy papers, commentaries etc.

CHAPTERIZATION

1. Introduction

2. Cross border Jurisdiction: Choice of forum vis-a-vis Choice of Law

3. Legal Framework for Jurisdictional Issues in e-Commerce: Indian Scenario

4. Conflict of Laws on Jurisdictional Issues: India and USA

5. Conclusion and Suggestions

CHAPTER-II

CROSS BORDER JURISDICTION: CHOICE OF FORUM vis-a-vis CHOICE OF LAW

2.1. Introduction

The global nature of the online medium and electronic commerce virtually guarantees that choice of forum and conflicts of law issues will arise with dramatically greater frequency than ever before, simply because the consumer and the vendor will often not be in the same jurisdiction.[73] The rise in the number of inter-jurisdictional transactions means that businesses will increasingly be confronted with having to comply with conflicting regulatory requirements and/or conflicting contractual interpretations, as well as demands to appear and defend cases in the widely dispersed forum. Correspondingly, the ability of consumers to bring complaints to the convenient forum, or to be sure that they will receive adequate protections, may be diminished. The jurisdictional reach of the courts is confined to the national borders. But the online transactions make the jurisdiction of the courts worldwide and as a result, it will pose a complex and novel problem of the competent forum and applicable laws.[74]

Firstly, to exercise jurisdiction over a person a court must have personal jurisdiction over the parties to the disputes as well as over the subject matter of the dispute. Personal Jurisdiction in cyberspace is the competence of a court to determine a case

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[73] Peter P. Swire, *Of Elephants, Mice, and Piracy: the International Choice of Law and the Internet* 32 (International Law 991, 1016 1998).

[74] David R. Johnson, Susan P. Crawford, et. all, "Deferring to Contractual Law and Forum to protect Consumers (and vendors) in E-commerce", *Internet Jurisdiction, Chicago-Kent College of Law* (1999).

against a particular category of persons (natural as well as judicial). It requires a determination of whether or not the person is subject to the court in which the case is filed. Personal jurisdiction looks into an issue from the point of *'physical presence'* whether the person was resident or a non-resident.

Looking at the US approach, there is a specific jurisdiction on the other hand which refers to the power of the applicable court with respect to a particular cause of action based upon some set of *'minimum contacts'* with the forum state that relate to that cause of action. The courts have been burrowing the principles of personal jurisdiction and extending them to the cyberspace setting. The principles of jurisdiction, which were earlier applied to physical establishments, are now being successfully applied to online business establishments. A website represents a virtual business model. In order to fix the place of jurisdiction, one may have the look into the nature of the website model, whether it is business oriented or information oriented. Other key elements that have to be taken into consideration are geographical location of users, website owner, and web server. Even the terms of service agreements, disclaimers, and choice of forum or law clauses play a significant role.

The default legal position has been that a country can exercise jurisdiction only if the parties are present within its territorial limits. However, in certain situations, the need for exercising extraterritorial jurisdiction has resulted in long arm statues empowering courts to reach out and exercise jurisdiction over non-resident defendants, where defendant's contacts in the forum meet with certain statutory requirements.[75] The issue of cross-jurisdiction can be looked from two perspectives,

[75] *Cybersell, Inc. v. Cybersell, Inc.* (US App LEXIS 33871 1997), *Hanson v. Denckla* (2 L. Ed. 2d 1283 1958).

a. Prescriptive Jurisdiction and,

b. Enforcement Jurisdiction.

a. Prescriptive Jurisdiction: It describes a State's ability to define its own laws in respect of any matters it chooses. As a general rule, a State's prescriptive jurisdiction is unlimited and a State may legislate of any matter irrespective of where it occurs of the nationality of the persons involved.

b. Enforcement Jurisdiction: A State's ability to enforce those laws is necessarily dependent on the existence or prescriptive jurisdiction. However, the sovereign equality of State means that one State may not exercise its enforcement jurisdiction in a concrete sense over persons or events actually situated in State's territory irrespective of the reach of its prescriptive jurisdiction.

For example, the Information Technology Act, 2000 in India provides for prescriptive jurisdiction. It is the legislative function of the Government to enact laws and judicial function to enforce those laws. It is important to note that the principles of jurisdiction followed by a State must not exceed the limits which international law places upon its jurisdiction. Cyberspace exercises jurisdiction on the basis of the territorial principle. Application of this theory is not possible and also bristling with difficulty since internet facilitates anonymity and pseudonymity rendering identification of actors in cyberspace. Since the location of the server has to be in some country the difficulty posed by the borderlands nature of cyberspace can be surmounted by attributing the nationality of the country where the server is located to transactions and activities conducted through the server.

The issue of this nature has contributed to the complete confusion and contradictions that plague judicial decisions in the area of internet jurisdiction. Considering the lack of physical boundaries on the internet, to reach out beyond the court's geographic boundaries to haul a defendant into its court for conduct in cyberspace is difficult.

2.2. Different Approaches to Choice of Forum Provisions

2.2.1. European Approach to Choice of Forum

The European Union has been active in attempting to resolve cross-border electronic commerce issues. The E.U. Commission has issued a draft regulation, to govern jurisdictional issues surrounding cross-border consumer e-transactions.[76] This proposed regulation, termed Rome II, will create jurisdiction over online sellers in the home state of the purchaser, a concept which is at odds with the principles of the e-Commerce Directive. The International Chamber of Commerce, among others, has called on the European Union to reconsider Rome II in favor of a regulation that would make the laws of the country of origin of goods or services, the basis for settling disputes arising out of e-business transactions. Moreover, a company that sells over the internet increasingly must consider not only the jurisdictional issues discussed above but also various international legislative requirements with regard to how the contract is executed and performed. For instance, the recently enacted European Union Electronic Commerce Directive requires that any promotional offers or commercial communications be *"clearly identified as such"*, that the identity of the sender is clearly identifiable, and that the offers or communications clearly and unambiguously disclose any conditions of participation.

[76] EU for Cross-border transactions, *available at:* http://www.europa.eu.int/comm/justice_home/civil/consultation/index__en.htm (Visited on 21/97/2017).

The European approach to choice of forum in cross-border disputes is rather different from the American approach. The rules determining which country's courts have jurisdiction over a defendant are set out in a regulation issued by the Council of the European Union, known as the Brussels Regulation. This new regulation is an update of 1968 treaty among European countries, known as the Brussels Convention on Jurisdiction and the enforcement of judgments in the civil commercial matter.

The Brussels Regulation, (The Regulation on jurisdiction and the recognition of judgments in civil and commercial matters) which became effective on March 1, 2002, replaces Brussels Convention of 1968. It is applicable to all European countries except Denmark, which will continue to follow the rules of the Brussels Convention and EFTA countries (Iceland, Liechtenstein, Norway, Switzerland, and Poland), where rules of the 1988 Lugano Convention will be applicable.

Applicability of Brussels Regulation in Online Environment

The Brussels Regulation has become the established law to resolve disputes concerning jurisdiction and enforcement of judgments in civil and commercial matters. The Regulation is also applicable to resolve online commercial disputes. On the issue of jurisdiction, the Brussels Convention sets the rule that "Subject to the provisions of this Convention, persons domiciled in Contracting State shall, whatever their nationality, be sued in the courts of that state". Furthermore, a person domiciled in a Contracting State may, in another contracting state be sued: 'in matters relating to the contract, in courts for the place of performance of the obligation in question. This means that an individual can be sued where his principal residence exists. Article 60 provides that the domicile of a company or other associations (including a partnership) is where it has its statutory seat-its central administration or its principal

place or business. From the point of promotions and sale, the Convention says that the consumer may bring proceedings in his own court against a trader 'in the state of the consumer's domicile the conclusion of the contract was preceded by a, specific invitation addressed to him or by advertising while the Regulation says that the consumer may sue at home if the trader' pursues commercial activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State.

As websites are generally accessible from anywhere, thus a trade with a website might be said to be directing its activities to all EU countries, in case of a dispute, a consumer has a right under Article 15 to take legal action in his or her home court. Any judgment given there would be enforceable in the trader's own country. Art. 15 have broadened the scope of traders' liability, as they can now be sued in foreign court, i.e., for an online trader defending lawsuits at multiple locations could be both expensive and frustrating.

The European Union, through 'the Brussels Regulation (BR)',[77] has adopted a common set of rules to establish competent jurisdiction in each of the member states.[78] The court to which an e-Commerce party intends to raise a claim must ensure that it has jurisdiction to rule on the issue.[79] BR provides in art. 2 (1) a general ground to establish competent jurisdiction. The article refers to the court of

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[77] Council Regulation (EC) No. 44/2001, of 22 December 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [Official Journal of the European Communities, OJ L 12 of 16.01.2001].

[78] Art. 1. 1. "This Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal. 3. In this Regulation, the term 'Member State' shall mean Member States with the exception of Denmark." Example cases: *LTU v. Euro control* (1 CMLR 293 1997), *Netherlands State v. Ruffer* (3 CMLR 293 1981).

[79] Christopher M. V. Clarkson and Jonathan Hill, *Jaffey on the Conflict of Laws* 189 (Butterworths, 2nd edn., 2002).

the member state where the defendant is domiciled. (The definition of a company's domicile is found in article 60).[80]

As an alternative 'article 5.1 (a) (b) establishes Special Jurisdiction.'[81] Under this provision the defendant party in matters relating to a contract can be sued in the courts for the place of performance of the obligation in question:

the place of performance of the obligation in question is, in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered; in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided, on matters relating to this contract.

The first questions arise is how can a Court establish the place of the specific performance in a contract of software licensing or of a sale of software, if everything can take place on the internet, where many parties in different territories are involved?

Furthermore, Article 5.5 provides that a person domiciled in a member state may, in another member state, be sued: (5) as regards a dispute arising out of the operations of

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[80] Article 60. 1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:
(a) statutory seat, or
(b) central administration, or
(c) principal place of business.
2. For the purposes of the United Kingdom and Ireland 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place."

[81] Article 5. "A person domiciled in a Member State may, in another Member State, be sued: 1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
(b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
- In the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered.
- In the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided."

a branch, agency or another establishment, in the courts for the place in which the branch, agency or other establishment is situated.

2.2.2. US Approach to Choice of Forum Provisions

For forty-two years since the US Supreme Court decision in *'The Bremen v. Zapata Off-Shore Company'* [82] the enforcement of forum selection agreements in international commerce has been firmly embedded in United States law. For nearly as long, arbitration clauses in international contracts, termed "a specialized kind of forum-selection clause," have been enforced by US courts with equal rigor.[83] Enforcement of international arbitration clauses has been aided in the US by the Federal Arbitration Act's adoption of the New York Convention, including federal subject matter jurisdiction to compel international arbitration and enforce international awards.[84]

In the United States, the subject matter jurisdiction deals with the court's authority to hear and decide cases in certain areas of the law. Personal jurisdiction is the court's authority over a defendant and arises only when a defendant has sufficient ties to a state that makes him answerable to that state's courts. When a connection is found between the defendant and the state, the defendant is served a summons, or notice, about the lawsuit pending against him.[85] Most states have long-arm statutes that set the state's guidelines for when its courts can assume jurisdiction over a non-resident defendant.[86] To comply with due process concerns, personal jurisdiction cannot

[82] *Bremen v. Zapata Off-Shore Co.,* (407 U.S. 1 1972).
[83] *Scherk v. Alberto-Culver Co.,* (417 U.S. 506, 519, 1974).
[84] 9 U.S. Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
[85] X.M. Frascogna JR. et. al., *The business of Internet Law* 143 (2001).
[86] *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (explaining how the long-arm statute gives courts authority to assume jurisdiction over non-residents).

violate the *'traditional notions of fair play and substantial justice.'*[87] There are two kinds of personal jurisdiction -general and specific. General jurisdiction is asserted over a non-resident defendant only if the defendant's contacts with the state are "continuous and systematic," even if the contacts are unrelated to the dispute at hand. Specific jurisdiction arises when the lawsuit is related to the defendant's contacts with the forum state. Ultimately, the question is whether the defendant's *"minimum contacts"* with the forum state can cause him to reasonably anticipate being sued in the forum state's Court. There are three tests courts have used to find whether the defendant's *minimum contacts* with the forum state reached the level to cause a specific jurisdiction to arise. A defendant may purposefully direct his activity towards a forum state,[88] purposefully avail himself of the benefits of doing business in the forum state, or deliver his products into the stream of commerce of the forum state[89] to satisfy the requisite level of contact for specific jurisdiction.

It is worth examining the decision in *Cybersell Inc. v. Cybersell Inc.*[90] which involved a service mark dispute between two corporations, one at Orlando and another at Arizona. The Court had to address the issue of whether the mere use of a website by the Florida Corporation was sufficient to grant the court, in Orlando jurisdiction. The court answered the question in negative and observed that 'it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws'.

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[87] *Ibid*

[88] *Calder v. Jones,* 465 U.S. 783 (1984).

[89] *Burger King Corp. v. Rudzewicz* 471 U.S. 462 (1985).

[90] *Cybersell v. Cybersell* 130 F. 3d 414 (1997).

A similar result was reached in the case of *Smith v. Hobby Lobby Stores Inc. v. Bato Co. Ltd.*[91] the court held that there were insufficient contacts for personal jurisdiction over the counter-defendant, where this company had no real contact with the state aside from a web page that could be accessed from the state.

The U.S. approach to choice of forum and applicable law is similar to that of Canadian laws. However, the U.S. courts tend to exercises the jurisdiction over defendants who enter into contracts with residents of the jurisdiction. 'With exceptions, they are generally unwilling to exercise jurisdiction over defendants who are the authors of passive information available to foreign users. Between these extremes, U.S. courts look to the level of interactivity between the website and the user, the commercial nature of the interaction, and whether any other non-Internet activity is present.'[92]

A growing number of cases have followed *Zippo Manufacturing Co. v. Zippo Dot Com Inc.,*[93] which developed a relatively simple active/passive test for determining jurisdiction over a web site operator.[94] Websites are categorized on a spectrum from purely passive sites that merely make information available to visitors, which do not alone provide a basis for jurisdiction, through levels of increasing interactivity to full e-Commerce sites that permit online contracts and transactions with forum residents,

[91] *Smith v. Hobby Lobby Stores, Inc.,* 968 F. Supp. 1356 (W.D. Ark. 1997).
[92] Gary W Dunn, What laws apply when transacting e-Commerce, *available at*: https://www.dunn.com/papers/paper2/ (Visited on 12/07/2017).
[93] *Zippo Manufacturing Company. v. Zippo Dot. Com. Incorporation* (W.D. Pa. 1997) (developing the active/passive test, which gave the court the power to exercise jurisdiction over an extra-jurisdictional web site operator if the web site was an interactive site, but not if it was a passive site that merely provided information).
[94] This approach has been criticized by some courts, and a few have rejected this approach in favor of the reasoning of *American Information Corp. v. American Infometrics, Inc.,* 139 F. Supp. 2d 696 (D. Md. 2001) which applied a "targeting-based" test that asks whether the defendant's actions were aimed at the forum state to determine if jurisdiction was proper.

which do suffice as a jurisdictional basis in the forum. The more interactive the site, the more likely jurisdiction is to be found.

The traditional notions of jurisdiction focus heavily on the location where the transaction in dispute took place to determine the proper jurisdiction to adjudicate the dispute. However, internet transactions are conducted over a network, and as a result, it does not conform to traditional geographic boundaries.

2.2.3. Indian Approach to Choice of Forum Provisions

According to the theory of the functional equivalence, on-line situations should be treated in the same way as the same set of circumstances would be treated in off-line situations. In other words logically whatever laws are applicable to human conduct, and transactions in the real world should also apply to conduct and transactions in cyberspace. However, this theory gives rise to difficulties when real equivalence cannot be found for every on-line situation.[95]

Under traditional legal systems the transaction between parties where both are situated in distinct territorial jurisdictions, are governed by the laws of the country which the parties agree will govern the transactions, or by the laws of the country in which the transaction is performed. These traditional notions of jurisdiction have no relevance to the activities carried out over the internet, as the internet is insensitive to location constraints. In fact, the absence of geographical limitation, that normally indicates the applicability of a different set of laws of the enforcement of a contract, could lead the incautious to believe that the laws of their home state apply to their actions, when in fact they are the inadvertent violation of the law of another state.

[95] Rakesh Kumar and Ajay Bhupen Jaiswal, *Cyber Laws* 64 (APH Publishing Corporation, New Delhi, 2011).

It is within the power of the Indian Courts to grant the injunction or anti-suit injunction[96] to a party over whom it has personal jurisdiction in an appropriate case. This is because of courts of equity exercise jurisdiction *in personam.* This power is to be used carefully as though it is directed against the person, but may cause interference in the exercise of jurisdiction by another court. Moreover, as the court have to observe the rule of country[97], which states that 'the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its law'. Keeping this in view the nature of the online commerce involving business to business (B2B) or business to consumer (B2C), it is important that the issue of the jurisdiction should be looked into from all possible sources, a. choice of forum and b. choice of law. These sources do not constitute mutually exclusive categories. In fact, they are dependent upon each other.

In fact, the parties may themselves agree beforehand that for resolution of their disputes, they would either approach any of the available courts of natural jurisdiction or to have the disputes resolved by a foreign court of their choice as a neutral forum according to the application to that court.

Jurisdiction based on choice of forum

In fact, the parties may themselves agree beforehand that for resolution of their disputes, they would either approach any of the available courts of natural jurisdiction or to have the disputes resolved by a foreign court of their choice as a neutral forum

[96] When a court restraints a party to a suit/proceeding before it from instituting or prosecuting a case in another court including a foreign court, it is called anti-suit injunction.
[97] *Hilton v. Guyot* (115 US 113, 162-164, 1995).

according to the law applicable to that court. Thus, it is open for a party for his convenience to fix the jurisdiction of any competent court to have their dispute adjudicated by that court alone. In other words, if one or more courts have the jurisdiction to try any suit, it is open for the parties to choose any of the two competent courts to decide their dispute. In case parties under their own agreement expressly agree that their dispute shall be, tried by only one of them then the parties can file the suit in that court alone to which they have so agreed.[98]

The growing global commercial activities gave rise to the practice of parties to a contract agreeing beforehand to approach for resolution of their disputes there under either any of the available courts of natural jurisdiction and thereby create an exclusive or non-exclusive jurisdiction in one of the available forms or to have the disputes resolved by a foreign court of their choice as a neutral forum according to the law applicable to that court. It is a well-settled principle[99] that by agreement the parties cannot confer jurisdiction where none exists, on a court to which CPC applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court. Thus, it is clear that the parties to a contract may agree to have their disputes resolved by a foreign court termed as a 'neutral coma' or 'court of choice' creating exclusive or non-exclusive jurisdiction in it. Significantly, in *Hakan Singh v. Gammon (India) Ltd.,*[100] the Supreme Court held that,

"Where two courts or more have under the Code of Civil Procedure jurisdiction to try a suit or proceeding, an agreement between the parties that the dispute between them

[98] *Shriram City Union Finance Corporation Ltd. v. Ram Mishra* 9 SCC 613 (2002).
[99] *Modi Entertainment Network v. W. S. G. Cricket Pvt. Ltd.* 4 SCC 341 2003.
[100] *Hakam Singh v. M/S. Gammon (India) Ltd.* SCC 286 1971.

shall be tried in one of such courts is not contrary to public policy. Such an agreement does not contravene Section 28 of the Contract Act".

In another significant judgment, the Supreme Court has rolled in *Dhannalal v. Klawatibat*[101],

"There is no wrong without a remedy. Where it is right, there is a forum for its enforcement. The plaintiff is *dominus litis,* that is, master of, or having dominion over the case. In case of conflict of jurisdiction the choice ought to lie with the plaintiff to choose the forum best suited to him unless there would be a rule of law excluding access to a forum to the plaintiff's choice or permitting recourse to a forum will be opposed to public policy or will be an abuse of the process of law".

It is very much clear from the aforesaid discussion that the forum of choice is discretionary and at the instance of the contractual parties. The parties may submit themselves to the exclusive or non-exclusive jurisdiction of either natural or neutral forum.

2.3. Different Approaches to Choice of Law Provisions

When the dispute arises between the two parties in the world of internet, the court has to carefully choose the appropriate law for such dispute because when the substantive law applies in such dispute, the result may be different. To avoid such uncertainties, the parties may agree beforehand in their contract for the choice of law.[102] The confusion and uncertainty in the current choice of law theories and the likelihood that

[101] *Dhannalal v. Klawatibat,* 6 SCC 16 (2002).

[102] Zafar Azeem, Confronting the Challenges of International Business Disputes "Business Recorder", 1st April 2017 *available at:* http://fp.brecorder.com/2017/04/20170401161635/ (Visited on 30/7/2017).

the problems created by this confusion will only create the bad situation in the context of e-Commerce. Although the problems of certainty and predictability in conflicts theory could be solved by imposing a categorical rule that either the law of the seller's country always applies or that the law of the consumer's country always applies.

In every cross-border transaction, the parties generally prefer their local laws for convenience. The parties always want to deal with the familiar laws. This rule of importance is provided by "the principle of party autonomy in such a way that parties must know what kind of obligation they will undertake by entering into the contract"[103] which is only 'possible if they have right to choose the governing law of their contract.'[104] Thus, it is necessary to provide freedom of contract to parties for a choice of law, because the applicable law impacts the enforceability and result of the contract such as contractual obligation after entering into the contract. Thus, in private international law, 'party autonomy in relation to contract is generally taken to refer to the entitlement of parties to select the law under which their contractual terms will be interpreted and the jurisdiction in which those terms will, in the event of a dispute, be enforced'.[105] The application of partial autonomy in choice of law gives parties an opportunity to negotiate the choice of law clause so parties would choose the law that is most favorable to pursue their own interest.[106]

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[103] Aytar Gokhan, "Party Autonomy, Choice of Law and Wrap Contracts", *available at:* https://www.duo.uio.no/handle/10852/34430 (Visited on: 12/12/2017). (It is a principle where a party exercises autonomy in deciding who to contract with; on what terms to contract; and how to behave in the course of performance.

[104] Reiner, Schulze, Geraint Howells,et. al., Information Rights and Obligations: A Challenge for Party Autonomy and Transactional Fairness Andre Janssen, 3 *Ashgate Publishing* (2005).

[105] Johns, Fleur. Performing Party Autonomy 2008, *available at:* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1487&context=lcp (Visited on 11/10/2017).

2.3.1. European Approach to Choice of Law Provisions

The potential of the new information technology is tremendous. E-Commerce offers great opportunities for economic growth. Unfortunately, there is great uncertainty as to what rules apply to services provided over the internet. Many of the traditional connecting factors designating the applicable law are non-existent in cyberspace. Because of the borderless nature of the cyberspace, parties to the e-contract might find themselves subject to a multiple of laws-an uncertainty that could discourage business.[107] Against this background, in April 1997 the commission issues a communication on *A European initiative in electronic commerce,*[108] which in November 1998 was followed by a proposal for a Directive on certain legal aspects of electronic commerce in the internal market.[109] After hearing the opinion of the European Parliament,[110] the Commission adopted an amended proposal in September 1999 and on 8 June 2000 the *"E-Commerce directive"* was adopted. The directive entered into force on 17 July 2000 and the Member States had until 17 January 2002 for transportation.[111] The objective of the Directive is to contribute to the development of electronic commerce by removing obstacles such as diverging national rules and legal uncertainty as to which national rules apply, thus creating the legal framework to ensure the free movement of information society services.

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[106] Party Autonomy, Choice of Law and Wrap Contracts, page 7 *available at:* https://www.duo.uio.no/bitstream/handle/10852/34430/8014.pdf?sequence=1 (Visited on 7/7/2017).

[107] Graham Pearce, Nicholas Patten, "Promoting the Information Society: The EU Directive on Electronic Commerce", (2000) *ELJ* 364; Ian Walden, "Regulating Electronic Commerce: Europe in the Global Economy" *ELR*539 (2001).

[108] A European Initiative in Electronic Commerce (1997) 157 final, 16.4.1997.

[109] COM (1998) 586 final, 18.11.1998

[110] EP Report (A4-0248/99), 6.5.1999

[111] Article 22(1) of the E-Commerce Directive.

There are basically three ways in which the effect that the article 3 has on the choice of law can be understood:[112]

a. The E-Commerce Directive establishes a choice of law rule for the law applicable to e-Commerce services,

b. The country of origin principle of the E-Commerce directive only sets out certain limitations to the application of the designated law,

c. The directive makes the rules of the home country of the service provider that is within the 'coordinated field' internationally mandatory and thus applicable irrespective of what law is applicable to the contract or tort etc.

To resolve cross-border consumer contractual disputes, the EU Member State also becomes signatories to the Rome Convention, 1980. The convention gave the parties a freedom of choice of law. A contract shall be governed by the law chosen by the parties. The choice must be expressed or verified with reasonable certainty. It further states that the mandatory rules[113] of the consumer's country of habitual residence will always apply whatever choice of law is made. These provisions are applicable to most of the commercial activities on the internet.

In the absence of choice of law the contract is to be governed by the law of the country with which it has the closest connection and it presumes that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, his habitual residence or its

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[112] Crf. Article 23(1) of the preliminary draft proposal for a Council Regulatin on the law applicable to non-contractual obligations, which actually makes the unintelligible para 2 redundant.

[113] Viktor Ievpak, "Jurisdictional Issues of E-Commerce Consumer Contracts in the case of absence of choice of court", *CEULS* (2007).

central administration. The performance constitutes the essence of the contract and is generally understood to mean the performance for which the payment is due.

The convention contains in Article 5 provisions on consumer contracts, which are similar, though not identical, to those in Article 15 of the Brussels Regulation states that, Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence: if in that country the conclusion of the country was preceded by a specific invitation addressed to him or by advertising , and the hall taken in that country all steps necessary on his part for the conclusion of the contract, or

On the other hand if his agent receives the consumer's order in that country, or if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy. It is important to note that the mandatory rules of the law cannot be limited or excluded by contractual agreement. They include the right given to consumers by national legislation.[114] Therefore, if the contract meets one of the tests in Article 5.2, the court will apply the law of the consumer's country in deciding the parties' rights and obligations under the contract, regardless of any choice of law to the contrary. It also provides non-applicability in case of contracts of carriage and contracts for the supply of services, which are to be supplied outside the consumer's country of residence.

[114] UK on distance selling (e. g. Rights to cooling off periods) and the sale of goods (e. g. The right to receive goods which are of satisfactory quality).

When it comes to e-Commerce, the same will be applicable. The parties are free to decide which law to be applied. If the parties do not make a choice, a contract will be governed by the law with which it is most closely connected. The choice of law does not necessarily have to be an express choice of law in the contract document. It is sufficient if the circumstance demonstrates with reasonable certainty that the parties had made a choice of law. Laws which are mandatory in one country cannot be displaced or avoided merely by the parties choosing to adopt the law of a different court. When a party buys goods or services as a consumer, a choice of law clause cannot be used to deprive the consumers' rights and protection which would be afforded to the consumer in the consumer's country of domicile. Article 4(2) of the Rome Convention which states that a contract which is most closely connected with the country of domicile of the party who has to affect the performance of the contract which is characteristics of the contract. For example, in a contract for the supply of professional services, the law of the service provider's country will apply. If the parties fail to make an express choice of law, it follows that an English court would first decide the parties have made an implied choice of law. Rome Convention gives good guidance to determine which country has the closest connection to a contract.[115]

2.3.2. US Approach to Choice of Law Provisions

As mentioned above, the US Constitution and states' long-arm statutes may permit court jurisdiction over out-of-state conduct, depending on the specific long-arm statute and the conduct involved. This means that many states may have concurrent jurisdiction over the same conduct. A similar situation exists in the international context. Because it is generally accepted as a matter of international law that nations

[115] Gerald Spindler, Fritjof Borner, *E-Commerce Law in Europe and the USA,* "Springer Science & Business Media", (2013).

may govern conduct of citizens of the nation taking place outside the nation, conduct by non-nationals that take place elsewhere but has significant and intended effects in the state or nation, conduct that threatens the sovereignty or security of the nation, and conduct that constitutes a universal crime such as torture and genocide, many situations may arise in which several nations' laws could govern the same conduct. To use a real-space example, let's imagine that A (an American shipping company) ships a batch of B's widgets from New York to B in Belgium, by way of France. The widgets are damaged during the French stopover and that this damage gave rise to a cause of action in tort between A and B. Assuming that A had significant enough contacts with both France and Belgium to warrant jurisdiction in both courts, B could sue A in the U.S., in France, or in Belgium, depending on which legal system would treat B more favorably. Additionally, B could sue in U.S. court but request that the court apply Belgian law to the dispute, or sue in Belgian court but request that the court apply French law or any other combination of courts and laws.[116]

Many applicable laws are not necessarily being substantively compatible. Different states and nations have different interests and each wants its laws to govern each dispute. This situation becomes extremely distressing when laws are not only inconsistent but also incompatible; for example, in some states of the U.S., it is illegal to provide or engage in Internet gambling but in Liechtenstein, such gambling is government-sponsored. Although the situation of inconsistent laws occurs with moderate frequency now (especially in the antitrust and securities fields) it is likely to become even more common as cyber-commerce becomes more prevalent. This is

[116] Betsy Rosenblatt, Principles of Jurisdiction, *available at:* https://cyber.harvard.edu/property99/domain/Betsy.html, (Visited on 27/7/2017).

because, in cyberspace, cross-border transactions are no more difficult than transactions with local parties.

When conflicts of law arise, the courts must decide which law will govern. A court need not decide a dispute according to its own law; for example, a court deciding a dispute arising out of an automobile accident in another state would be likely to apply the driving standards of the state where the dispute arose, rather than of the forum state. Several methods exist to aid the courts in the decision between laws. Historically, U.S. courts decided a dispute according to the law in the *lex loci delicti,* the "place of the wrong". In transnational cyberspace, however, the place of the wrong might be any of the nations that are online. There is no *lex loci delicti*.

2.3.3. Indian Approach to Choice of Law Provisions

Based on its assessment of the contractual obligations involved, a court will apply the choice of law rules to determine 'what law should be applied'. The two choices are, either to apply the law of the forum *(lex fori)* or to apply the law of the site of the transaction, or occurrence that gave rise to the litigation in the first place *(lex loci).* It is important to note that the modern theory of conflicts has the most intimate contact with the issues arising in the case. Ordinarily, the jurisdiction must follow upon functional lines.[117] In *National Thermal Power Corporation v. The Singer Company*[118], the Supreme Court held that,

"The expression 'proper law of a contract' refers to the legal system by which the parties to the contract intended their co-contract to be governed. If their intention is expressly stated or it can be clearly inferred from the contract itself or its surrounding

[117] *Srinder Kaur v. Harbax singh,* AIR 1984 SC 1224-1226.
[118] *Thermal Power Corporation v. The Singer Company,* AIR 998, 1992 SCR (3) 106, 1993.

circumstances, such intention determines the proper law of the contract. Where, however, the intention of the parties is not expressly stated and no inference about it can be drawn, their intention as such has no relevance about it can be drawn, their intention as such has no relevance. In that event, the courts endeavor to impute an intention by identifying the legal system with which the transaction has its closest and most real connection. The expressed intention of the parties is generally decisive in determining the proper law of the contract. The only limitation of this rule is that the intention of the parties must be expressed bona fide and it should not be opposed to public policy".[119]

In the absence of an express statement about the governing law relating to the commercial contract between the parties belonging to different countries, the inferred intent of the parties determines that law. The true intention of the parties, in the absence of an express selection, has to be discovered by applying 'sound ideas of business, convenience, and sense to the language of the contract itself'. In such case, selection of courts of a particular country as having jurisdiction in matters arising under the parties that the system of law followed by those courts is the proper law by which they intend their contract to be governed.[120] 'Simply selecting the particular place to exercise jurisdiction in the absence of any connecting factor will not be sufficient to draw a conclusion that the parties will be governed by the law of that particular place'[121]. Therefore, selection of the court having jurisdiction must be drawn from the conclusion supported by the contract essentials and surrounding circumstances.

[119] Decision given by the Supreme Court in the case of *National Thermal Power Corporation v. The Singer Company, available at:* https://indiankanoon.org/doc/633347/ (Visited on 28/7/2017).
[120] Rakesh Kumar and Ajay Bhupen Jaiswal, *Cyber Laws* 68 (APH Publishing Corporation, New Delhi, 2011).
[121] *National Thermal Power Corporation v. The Singer Company and Ors,* 1993 AIR 998, 1992 SCR (3) 106, *available at:* https://indiankanoon.org/doc/633347/ (Visited on 13/12/2017).

When the parties have not selected the proper law expressly or impliedly before the contract is concluded, the courts will assign an intention by applying the objective test to determine what the parties would have as just and reasonable persons intended as regards the applicable law had they applied their minds to the question. The judge has to determine the proper law for the parties in such circumstances by putting himself in the place of a 'reasonable man'. He has to determine the intention of the parties by asking himself how a just and reasonable person would have regarded the problem.

For this purpose the place where the contract was made, the form and object of the contract, the place of performance, the place of residence or business of the parties, reference to the Courts having jurisdiction and such other links are examined by the courts to determine the system of law with which the transaction has its closest and most real connection.

Moreover, it was held by the Supreme Court in *Satya v. Teja Singh*[122] that 'every case which comes before Indian courts must be decided in accordance with Indian laws. It is another matter that the Indian conflict of laws may require that the law of a foreign country ought to be applied in a given situation for deciding the case, which contains a foreign element. Such recognition is accorded not as an act of courtesy, but on consideration of justice. It is implicit in that process that a foreign law must not offend our public policy.'[123] It is very much clear from the aforesaid pronouncements of the Supreme Court that courts do have a judicial right to determine the choice of law by identifying the system of law with which the transaction has its closest and most real connection. There is no bar that law of a foreign country cannot be applied or an

[122] *Satya v. Teja Singh,* AIR 1975 SC 105.
[123] Vakul Sharma, *Information Technology: Law and Practice, Law and Emerging Technology, Cyber Law & E-Commerce* 392 (Universal Law Publishing Co., New Delhi, India, 3rd edn., 2011).

Indian party could not be subject to foreign jurisdiction. The emphasis is on to select proper law.

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

2.4. Conclusion

It should be noted that many internet activities are commercial and that many of these involve contractual transactions. These contracts may contain a choice of forum and choice-of-law clauses defining which court will decide and which state's law will govern any dispute arising out of the transaction. Most ISPs, for example, include the choice of law clauses in their service agreements; such clauses may greatly simplify the choice of law questions on the internet, as the choice of law clauses are, for the most part, honored as a matter of international law. Many internet activities are not commercial or even transaction-oriented; however, choice of forum and choice of law clauses may not cure the problems arising from non-transaction-oriented activities. Case law does not indicate what route courts might take in resolving true choice of law disputes arising from such activities. Choice of governing law is neither 'my law nor your law' battle of strength. Sometimes 'my law' may not be the best choice. Therefore, the key point to understand is that the choice of legal system can have a

fundamental impact but sometimes it may result out unintended consequences, even affecting the basic validity of the contract. Therefore it is vital to get informed advice and to ensure that the chosen law is reliable and effective for both parties. On the other hand, recognition of the choice of forum should be extended to the online contracts equally like the offline contracts because the concept of territory upon which the principle of jurisdiction is based should be clear enough to satisfy the parties. The creation of a choice-of-law treaty for the internet can be suggested to handle all these disputes. On the other hand, applying the traditional theories of jurisdiction based on territoriality or nationality focusing on the territorial location of the internet servers can be one possible way to curb the conflicts.

Chapter-III

LEGAL FRAMEWORK FOR JURISDICTIONAL ISSUES IN E-COMMERCE: INDIAN SCENARIO

3.1. Introduction

The boom in the internet transactions has brought a host of issues regarding jurisdiction of such transactions to the foremost. Without a doubt, one question that arises after the conclusion of e-contracts is regarding the time and the place of the formation of the contract. The traditional approach to the jurisdiction of court asks whether it has the territorial, pecuniary, or subject matter jurisdiction to entertain the case brought before it or not. With the internet, the territorial jurisdiction gets complicated largely on account of the fact that the internet is borderless.

The Indian jurisprudence with regard to jurisdiction over the internet is almost non-existent. Hence, there has been precious little by way of development of private international law rules in India.[124] Furthermore, there have been few cases in the Indian courts where the need for the Indian courts to assume jurisdiction over a foreign subject has arisen. Such jurisprudential development would, however, become essential in the future as the internet sets out to shrink borders and merge geographical and territorial restrictions on jurisdiction. India does not have a separate law for e-Commerce yet the various issues for e-Commerce like jurisdiction issues, consumer protection issues are tackled by the laws like the Code of Civil Procedure, 1908, the

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[124] Rahul Matthan, *The Relating to Computers and the Internet* 17 (LexisNexis Buttersworth, India, 1st edn., 2000).

Information Technology Act, 2000 with amendment 2008 and the Indian Contract Act, 1872. The Consumer Protection Act, 1986 is at an infant stage to protect the e-consumers in India. A conflict will arise when there is the contract between the two parties residing in two different jurisdictions. The research talks about the contract through the medium of internet. Therefore, e-contract provisions which deal with the jurisdiction in the cyberspace are required to discuss in order to understand the base of the jurisdiction. The various provisions of these Acts that deal with the jurisdiction are discussed thoroughly;

3.2. Jurisdictional Principles of the Indian Contract Act, 1872

A conflict of jurisdiction is created when there is a relationship between two parties. The relationship must be created through the internet i.e. electronic contract. It is necessary to study how the e-contract is created, performed and communicated so that the very foundation of the jurisdiction will come into the picture. Websites are nowhere and everywhere, such is said to be the nature of the internet. Many websites do not even carry the geographical addresses.[125] One doesn't even know with whom one is transacting online and where the location of that person is. When a person buys a product from any website, he is not interested where the site is located geographically.[126] The internet has led to the elimination of physical boundaries, hence, raising the question as to the jurisdiction. A world-famous view gaining ground is that the prevailing jurisdiction law is useless for the cyber world and a

[125] Vivek Sood, *Cyber Law Simplified* 186 (Tata Mcgraw Hill Publishing, 2001).
[126] *Ibid*

completely different set of rules are essential to manage jurisdictional issues over the internet which should be free from the restraints of geographical borders.[127]

We enter into a contract every day. Taking a seat on a bus, putting a coin in the slot of a weight machine, going to the restaurant and take a snack amounts to entering into the contract. In such cases, we don't even realize that we are making contact. Firstly, it is important to discuss how the e-contract will be concluded. The realm of e-contract is much bigger than the traditional mode of contract because of the developing internet transactions.

There is no hard and fast definition for e-contract. E-contract is a kind of contract formed by the negotiation of two or more individuals through the use of electronic means, such as e-mail, the interaction of an individual with an electronic agent, such as computer program, or the interaction of at least two electronic agents that are programmed to recognize the existence of a contract.

With the e-Commerce boom and the growing trend of commercial transactions being concluded by way of the internet, execution of contracts by electronic means has become quite prevalent. Like an ordinary contract, an electronic contract is also primarily governed by the codified provisions of Indian Contract Act, 1872 as applicable to contracts in general. Therefore, an electronic contract also cannot be validly executed unless it satisfies all the essentials of a valid contract, such as (a) Offer and Acceptance; (b) Lawful consideration; (c) Lawful object; (d) Free consent; (e) Parties to be competent to contract; (f) Intention of parties to create legal relationship; (g) Certainty and possibility of performance; (h) Not be expressly declared to be void; and (j) Compliance with formalities under different laws

[127] *Ibid*

governing the agreement. All other statutes applicable to an electronic contract are to be read in conjunction, and not in substitution, with the Indian Contract Act, 1872.

3.2.1. Formation of electronic contract

The steps involved in the formation of an electronic contract are communication of offer and acceptance by electronic means given under Section 3 which ascertains whether the data message was really sent by the person who is indicated as being its originator. Time and place of the dispatch and the receipt of a data message are also important elements of a contract. Therefore, in this context, if an electronic contract has been formed over a series of electronic communications where the essential elements of the contract (such as offer, acceptance, consideration etc.) are captured separately, then proper maintenance of all such electronic records and e-mails becomes essential to prove the record of the contractual arrangement between the parties.[128]

The complete communication is given under section 4 and the revocation of proposals and acceptance thereof is given under sections 5 of the Contract Act, 1872. The provisions of the communication of offer and acceptance and the revocation thereof do not make a mention whether these provisions relate to a communication made with the help of telephone and telex also. The illustrations to both the sections make it clear that these provisions relate only to communications through post rather than through telephone and telex. The case of *Bhagwan Goverdhandas Kedia v. Girdharilal*

[128] R. K. Bangia, *Contract-I* 34 (Allahabad Law Agency, Faridabad, Haryana, 6th edn., 2009).

Parshottamdas & Co.[129] gives a principle how the contract can be concluded through telephone or telex.

The respondents who entered into a contract with the appellants by long distance telephonic conversation were spoken at Ahmedabad and the acceptance was spoken by the appellants at Khamgaon. The respondents filed a suit at Ahmedabad for making the breach of the contract. The appellants raised the issue of jurisdiction and submitted that Ahmedabad Court has no jurisdiction to try the case. But the trial court found that the Ahmedabad Court had jurisdiction to try the suit. The High Court rejected the appellant's revision petition in line whereupon by special leave, he came to the Apex Court.[130]

The issue raised in this case was *'when would the contract be concluded where offer and acceptance take place by way of conversation by telephone?'*[131] The Supreme Court held that in case of telephonic conversation, the position is same as in the case where the parties are in the presence of each other, and the rule of a contract through post does not apply to such contracts. In the case of acceptance sent by post, the contract is concluded when the letter of acceptance is posted, whereas, in the case of acceptance by phone, the contract is deemed to be complete when the offeror hears the acceptance at his end rather than when the acceptor speaks the words of acceptance.[132] Each new technology creates new types of disputes, as well as opportunities for new forms of dispute resolution. The use of the e-mail once found very economical and easy to use. It is profoundly used by everyone irrespective of the volume of the business.

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[129] *Bhagwan Goverdhandas Kedia v. Girdharilal Parshottamdas & Co.,* AIR 543, 1966 SCR (1) 656.
[130] *Ibid*
[131] *Ibid*
[132] *Bhagwandas Goverdhandas Kedis* v. *Girdharilal Parshottamdas,* AIR 543, 1966 SCR (1) 656) *available at:* https://indiankanoon.org/doc/1386912/ (Visited on 12/10/2017).

The beginning of disputes is not far and it begins with the problem of the contract via e-mail. This forces Parliament to enact the law i.e., Information Technology Act, 2000 and do an amendment to some other laws too.[133] Last decade saw the advent and increasing acceptance of virtual environment. It transforms our thinking about the nature of human interaction and relationships. The creation of virtual identities, virtual locations (URLs) and virtual meeting places, such as chat sites and cybercafés etc. had increased the limits of the sovereignty of a country. The role of private international law has increased tremendously. The problem of choice of jurisdiction also changes as per cyber-virtual-territory. Internet culture develops through protocols, norms, and languages. This virtual regime has its own tools to play with such as digital signature, encrypted language, digital authentication, password oriented privacy etc.[134]

The main problem of the cyberspace is the multiple jurisdictions. When the parties to electronic contracts are from different countries, the court will apply the law of that country which has the closest and most considerable connection to the contract. This principle is called the principle of *minimum contact*. But this principle will be applicable when there is an express provision in the contract mentioning the governing law to settle the matter. The concept of this kind is introduced in order to protect the consumers which are given under section 11(2) of 'the Consumer Protection Act, 1986'.[135] It provides the rights and remedies to the consumers and

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[133] *Ibid*

[134] George, Jasper Vikas, Role of Information technology in Alternative Dispute Redressal, *available at:* http://www.naavi.org/jasper/ita_adr_march18.htm (Visited on 12/4/2017).

[135] Section 11(2) in the Consumer Protection Act, 1986 reads as:

(2) A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction,—

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or 2[carries on business or has a branch office or] personally works for gain, or

allows the court to disregard the agreement between the consumer and the seller in so far as the choice of forum and governing law are concerned.[136] The question of territorial jurisdiction is slightly more complex and can be explained by way of this case of *P.R. Transport Agency v. Union of India & others.*[137] The facts of the case are pretty straightforward.

"In this case, BCC held an e-auction for the allocation of coal. PRTA's (based on UP) bid was accepted. The acceptance letter was dispatched on 19th July 2005 by e-mail to PRTA's e-mail address. Upon receipt of acceptance, PRTA deposited full amount, in terms of the 'Terms of Allocation'. BCC, in spite of encashing the cheque deposited by PRTA, did not deliver the coal. Instead, an email was sent to PRTA stating that e-auction stood canceled on account of "some technical and unavoidable reasons". However, the real reason for the cancellation was the allocation of the Coal-mine to a higher bidder than PRTA. The higher bid could not be considered earlier due to a computational fault. Aggrieved by this letter, PRTA approached the Hon'ble High Court of Allahabad. A jurisdictional objection was raised by BCC on the premise that courts in UP have no territorial jurisdiction."[138]

"PRTA's answer to this was that, since communication of acceptance was received by PRTA at UP, the contract can be stated to have been entered-into at UP. In an action

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(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or 3[carries on business or has a branch office], or personally works for gain, provided that in such case either the permission of the District Forum is given, or the opposite parties who do not reside, or 4[carry on business or have a branch office], or personally work for gain, as the case may be, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises.

[136] Chetan Karnatak, "Cyberspace: Jurisdictional Issues of E-Commerce and Consumer Protection" 3 *ANMRJ RCM* (July, 2017).
[137] 2005 SCC OnLine All 880.
[138] Territorial Jurisdiction in case of e-contract, Rahul's IAS-The Official Blog, *available at:* https://rahulsiasblog.com/2016/11/27/territorial-jurisdiction-in-case-of-a-e-contract/comment-page-1/ (Visited on 29/10/2017).

based on breach of contract, the ‘place of contract’ is one of the determinative factors for deciding territorial jurisdiction.”[139]

The Hon’ble High Court held that the law with respect to contracts entered into via telephone is pretty clear (*Bhagwan Dass v. Girdhari Lal, 1966 AIR 543 SC)* and the contract in such cases is complete as soon as the acceptance is communicated and at the place where the same is received. This principle, however, cannot be imported in case of e-mails as an email can be accessed at any place in the world by the addressee. This absence of a static place of receipt or transmission is taken care by Section 13(3) of the IT Act, 2000, which states “…an electronic record is deemed to be received at the place where the addressee has his place of business”. Applying this categorical provision, the Hon’ble High Court ruled that since the e-mail acceptance is deemed to have been received at UP, it had the requisite territorial jurisdiction to decide the case.[140]

3.2.2. Electronic Contract Formation under UNCITRAL Model Law

The UNCITRAL Model Law in Article 11 deals with the formation and validity of the contract. It provides that an offer and acceptance, in the context of contract formation, may be expressed by means of the data message and that the formed contract shall not be denied validity or enforceability on the sole ground that the data message was used in the formation. It does not provide the time and place of contract formation. It is not intended to interfere with the law on the formation of contract but rather to promote international trade by providing increased legal certainty as to the condition of contracts by the electronic means. It intends to dispel certain uncertainties. The

[139] *Ibid*
[140] *Ibid*

commentary on the Model Law says, in certain countries, a provision along the lines of paragraph (1) may be regarded as merely stating the obvious, namely that an offer and an acceptance as any other expression of will, can be communicated by any means, including data message. However, the provision is needed in view of the remaining uncertainties in a considerable number of countries as to whether contracts can validly conclude by electronic means. Such uncertainty may stem from the fact that, in certain cases, the data message expressing offer and acceptance are generated by computers without immediate human intervention, thus raising doubts as to the expression of intent of the parties. Another reason for such uncertainties is inherent in the mode of communication and results from the presence of a paper document.

After having entered into a contract by means of a data message, the parties may perform their obligations also by means of a data message. Article 12, therefore provides that as between the parties a declaration of will or another statement shall not be denied legal effect, validity, and enforceability solely on the grounds that it is in the form of a data message. The commentary illustrates some of the contractual obligations, as notice of defective goods, an offer to pay, notice of the place where the contract would be performed, and recognition of debt. Unilateral expressions of will, as well as other notices, or statements that may be issued in the form of data message are legally enforceable. Article 12 is not to impose the use of electronic means of communication but to validate such use, subject to contrary agreements between the parties. Thus, Article 12 should not be used as a basis of imposing on the addressee the legal consequences of the message. If the use of a non-paper based method for its transmission comes as a surprise to the addressee. Since the contract is the agreement between the two parties about their relations and intentions relating to the conduct of transactions between them. Article 13 establishes a presumption that under certain

circumstances as a data message would by consideration as the message was not that of the originator. Article 14 deals with acknowledgment procedure of receipts to validate acknowledge meet by electronic means. Article 15 deals with the presumption about the time and place of dispatch and receipt of a data message.

3.3. Jurisdictional Provisions under the Code of Civil Procedure, 1908

There are three kinds of jurisdictions on the basis of which the place of suing may be determined. They are,

1. Pecuniary Jurisdictions,

2. Subject Matter Jurisdictions, and

3. Territorial Jurisdictions

The traditional principle of jurisdiction will always apply to the cyberspace jurisdiction with some modifications as for the determination of the appropriate forum in every dispute the pecuniary value; subject matter and the territorial jurisdiction are important elements to be considered.

'If the matter is brought before the court by the plaintiff for adjudication and if the court has these entire (pecuniary, territorial and Subject-matter) jurisdiction then only that court have authority to try the matters.'[141] In case, the court does not have any of the above-mentioned jurisdictions and still try the suit, it will be either termed as an irregular exercise of jurisdiction or lack of jurisdiction which may turn the decision void or voidable depending upon the situations.

[141] S. Chowdhary, "Jurisidction of Civil Court and Place of Suing" (2015) *available at:* http://www.legalservicesindia.com (Visited on 13/10/2017).

(1)Pecuniary Jurisdictions: 'The general rule of pecuniary jurisdiction is that every suit shall be instituted in the Court of the lowest grade competent to try it.'[142] The object underlying this provision is twofold.[143] The word 'competent to try' indicate the competency of the court with respect to the pecuniary Jurisdiction. It means that the courts of lowest grade that has the jurisdiction with respect to pecuniary value shall try the suit at first. Now, the biggest question is who will determine the valuation of the suit for the purpose of determining the pecuniary jurisdiction of the court? In general, it is the valuation done by the plaintiff is considered for the purpose of determining the pecuniary jurisdiction of the court, unless the court from the very face of the suit finds it incorrect. So, if the court finds that the valuation done by the plaintiff is not correct, that is either undervalued or overvalued, the court will do the valuation and direct the party to approach the appropriate forum. So, *prima facie*, it is the plaintiff's valuation in the plaint that determines the jurisdiction of the court and not the amount for which ultimately decree may be passed. Thus, if the pecuniary jurisdiction of the court of the lowest grade is, say, Rs. 10,000/¬ and the plaintiff filed a suit for accounts wherein the plaintiff valuation of the suit is well within the pecuniary jurisdiction of the court but court later finds on taking the accounts that Rs. 15,000/- are due, the court is not deprived of its jurisdiction to pass a decree for that amount.[144]

Usually, a court will accept a valuation of the plaintiff in the plaint and proceed to decide the suit on merits on that basis. That does not, however, mean that the plaintiff

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[142] *Nidhi Lal* v. *Mazhar Husain* ILR (1885) 7 All 230 at p. 234: 1885 All WN 1 (FB); *Mohan Singh* v. *Lajya Ram*, AIR 1956 Punjab 188; *Union of India* v. *Ladulal Jain,* AIR 1963 SC 1681 at p. 1683: (1964) 3 SCR 624.

[143] (a)To see that the courts of higher grades shall not be overburdened with suits; and (b)To afford convenience to the parties and witnesses who may be examined in such suits.

[144] S Choudhary, Jurisdiction of Civil Court and Place of Suing, *available at:* http://www.legalservicesindia.com/article/print.php?art_id=1780 4/8 (Visited on 19/3/2016).

in all cases is at liberty to assign any arbitrary value to the suit, and to choose the court in which he wants to file a suit. If the plaintiff deliberately undervalues or overvalues the claim for the purpose of choosing the forum, the plaint cannot be said to be correctly valued and it is the duty of the court to return it to be filed in the proper court. If it appears to the court that the valuation is falsely made in the plaint for the purpose of avoiding the jurisdiction of the proper court, the court may require the plaintiff to prove that the valuation is proper.[145] When there is an objective standard of valuation, to put a valuation on relief ignoring such objective standard might be a demonstratively arbitrary and unreasonable valuation and the court would be entitled to interface in the matter.[146] But if the court is unable to come to a finding regarding the correct valuation of the relief, the court has to accept the valuation of the plaintiff.[147]

(2)Subject matter Jurisdictions

There are different types of courts which are empowered to decide the different type of matters. There is independence of the courts. All courts are vested with the power to handle the suits within their limited area and jurisdiction. Some courts have no authority to entertain certain suits. For examples, suits for testamentary succession, divorce cases, probate proceedings, insolvency matters, etc. cannot be entertained by a Court of Civil Judge (Junior Division). This is called jurisdiction as to subject

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[145] Order 7 rule 10, *Balgonda* v. *Ramgonda* (1969) 71 Bom LR 582.

[146] *Tara Devi* v. *Sri Thakur Radha Krishna Maharaj* (1987) 4 SCC 69: AIR 1987 SC 2085; *Abdul Hamid* v. *Abdul Majid* (1988) 2 SCC 575: AIR 1988 SC 1150.

[147] *Ibid*

matter.[148] Where a court has no jurisdiction over the subject-matter of a suit, there is inherent lack of jurisdiction and a decree passed by such court is a nullity.[149]

(3)Territorial Jurisdictions

Territorial jurisdiction in e-contract is one of the necessary factors that should be considered by the court. The territory in the cyberspace is difficult to determine. The principle of territorial jurisdiction within the Code of Civil Procedure can be modified some way another and could be applied to the online transactions in India as the country does not have a separate law for the dispute. To determine the territorial jurisdiction of a court, the suits may be of four types viz.:

(a) Suits in respect of immovable property;[150]

(b) Suits for movable property;[151]

[148] It means, every court have been allotted the subject over which the court can entertain the matter, and the subject which is not within the preview of the court, that court cannot deal with that matters at all. In case, court took up the matter which is not been allotted to it, that is the matter is beyond the subject matter competency, what will be the status of the decision given by the court in such situations.

[149] C. K. Takwani, *Civil Procedure* 142 (Eastern Book Company, Lucknow, 6th edn., 2009).

[150] Sections 16 to 18 deal with the suits relating to immovable property. Clauses (a) to (e) of section 16 deal with the following five kinds of suits, viz.:

(a) Suits for recovery of immovable property,
(b) Suits for partition of immovable property,
(c) Suits for foreclosure, sale or redemption in case of mortgage of or charge upon immovable property,
(d) Suits for determination of any other right to or interest in immovable property,
(e) Suits for torts to immovable property.

These suits must be filed in the court within the local limits of whose jurisdiction the property is situated. This is clear and simple and does not create any difficulty. But what will happen if the property is situated within the jurisdiction of more than one court? Section 17 of the Code provides for this contingency. It says that where a suit is to obtain a relief respecting, or damage for torts to, immovable property situate within the jurisdiction of different courts, the suit can be filed in the court within the local limits of whose jurisdiction any portion of the property is situate provided that the suit is within the pecuniary jurisdiction of such court. These provisions intended for the benefit of suitors and to prevent a multiplicity of suits.

(c) Suits for compensation for the wrong (tort); and

(d) Other suits.

Immovable Property: These suits must be filed in the court within the local limits of whose jurisdiction the property is situated. This is clear and simple and does not create any difficulty.

However, it is not possible to say with certainty that the property is situated within the jurisdiction of the one or the other of several courts. In such a situation, one of these courts, if it is satisfied that there is such uncertainty, may after recording a statement to that effect proceed to entertain and disclose of the suit.[152]

Movable property: Section 19

It has been said, movables follow the person.[153] There is a principle that a suit for wrong to movable property may be brought at the option of the plaintiff either at the pace where the wrong is committed or where the defendant resides, carries on business or personally works for gain. Where such wrong consists of series of acts, a suit can be filed at any place where any of the acts have been committed. Similarly, where a wrongful act is committed at one place and the consequences ensue at another

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[151] Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the defendant resides, or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the said courts. For example:

(a) A, residing in Delhi, beats B in Calcutta, B may sue A either in Calcutta or in Delhi.

(b) A, residing in Delhi, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Delhi.

[152] Section 13 of the Code of Civil Procedure, 1908.

[153] *Mobilia se quuntur personam:* Common law doctrine holding that personal property held by a person is governed by the same law that governs that person, so that if a person who is legally domiciled in one jurisdiction dies with property in a second jurisdiction, that property is legally treated as though it were in the first jurisdiction.

place, a suit can be instituted at the option of the plaintiff where the action took place or consequences ensued.[154]

Compensation for wrong: Section 19 is about the compensation for wrongs.[155]

Other suits: Section 20 of the Civil Procedure Code 1908 (CPC) is larger in its ambit. It deals with jurisdictional aspects and state that a court may assume jurisdiction in a case when the cause of action arises within its sphere.[156] This section, although more relevant to domestic courts and is essentially the domestic law of a country, yet it can be interpreted so as to apply to transnational issues as well as private international law. This provision for jurisdiction based on the cause of action is wide in its ambit, therefore enabling the court to assume jurisdiction over a dispute regardless of where the principles are resident or the *situs* of the business, so long as a portion of the cause of action takes place within the local jurisdiction, while still having an implied standard set, in a way similar to the US long-arm jurisdiction provisions. In essence, this section is the equivalent of the US long arm jurisdiction provisions. It is a section that enables a court to assume jurisdiction over a dispute regardless of where the principals are resident or carrying on business so long as a portion of the "cause of action" took place within the local jurisdiction. Naturally, the definition of the term

[154] C.K. Takwani, *Civil Procedure* 140 (Eastern Book Company, Lucknow, 6th edn. 2007).

[155] A suit for compensation for wrong (tort) to a person may be instituted at the option of the plaintiff either where such wrong is committed, or where the defendant resides, carries on business or personally works for gain.

[156] Section 20, CPC 1908 reads as: Subject to the limitations aforesaid, every suit shall be instituted m Court within the local limits of whose jurisdiction— (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or (b) any of the defendants, where there are more than one, at the time of the commencement of the suit actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or (c) the cause of action, wholly or in part, arises.

“cause of action” is critical to a complete study of this section. “Cause of action” has been variously defined as follows:

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

• A cause of action is a bundle of facts which, taken with the law applicable to them, gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant, since in the absence of such an act; no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything if not proved would give the defendant a right to immediate judgment, must be a part of the cause of action.

• A cause of action requires every fact to be proved by the plaintiff. If the plaintiff comes across to support his right to the judgment and has no connection with the facts or whatever may be the defense set up by the defendant, the cause of action does not depend upon the nature of the relief prayed by the plaintiff or on the ground of defenses brought forward by the defendant. It refers to the medium upon which the plaintiff asks the court to arrive at a conclusion in his favor. ‘Burden of proof always lies with the plaintiff for determining whether an allegation forms a part of the cause of action or not. The plaintiff has to prove the same in order to support his right to the judgment of the court. However, matters that are not necessary to be proved by the plaintiff in order for the plaintiff to succeed in his claim will not form a part of the cause of action and therefore cannot confer jurisdiction on the court within whose

territorial jurisdiction it occurred. Therefore, the cause of action should be antecedent to the suit. An expectation of the performance of a contract within a particular jurisdiction cannot constitute a part of the cause of action.'[157] Therefore, in order to confer jurisdiction, there is no requirement that the whole cause of action must arise within the jurisdiction of a court. Because of the fact that a very small portion of the cause of action accrued within the jurisdiction of a court, it cannot be said that the plaintiff would not be entitled to institute the suit in that court. Even if a little branch of the cause of action is a part of it; its percentage of the whole cause of action is immaterial.[158] However, where no portion of the cause of action arises, a suit cannot be filed under Section 20(c) of the Code of Civil Procedure.[159]

Let us now examine the applicability of the Indian case law discussed above in the context of transactions on the internet. It has been held that a court in this country has jurisdiction over a non-resident foreigner, although he has not submitted to its jurisdiction, provided the cause of action had arisen wholly or in part within its jurisdiction.[160] It is thus clear that the Indian courts will assume jurisdiction over a matter, if, even a part of the cause of action of the dispute arose within the jurisdiction of the specified court. What remains to be determined is what, in the context of internet transactions, would constitute a part of the cause of action. In this, we can take a clue from the cases decided by the courts of the USA where similar ingredients (long-arm jurisdiction) had to be proved in order to determine the jurisdiction of the courts.

[157] *Fertilizer Corporation of India* v. *Sanjit Kumar,* AIR 1965 Punj 107.
[158] *Munnirangappa* v. *Venkatappa,* AIR 1965 Mys 316.
[159] *Burmath Oil Co.* v. *K Tea Co.*, AIR 1973 Gau 34.
[160] *Bhagwan Shankar* v. *Rajaram,* AIR 1951 Bom 125.

The Delhi HC in the case of *World Wrestling Entertainment, Inc. v. M/S Reshma Collection and Others*[161] decided "conclusively that jurisdiction in e-Commerce cases involving trademark and copyright disputes would be determined on the basis of the place of residence where the buyer resides. The meaning of the phrase 'carries on business' as set out in Section 134(2) of the Trademarks Act, 1999 and Section 62(2) of the Copyright Act, 1957 was specifically interpreted by the court; both these sections deal with the institution of suits in case of violation of any provision of the aforementioned Acts."[162] The issue of the case was *"When a transaction takes place over the internet, where is the contract concluded?"*[163]

"The plaintiff was a company incorporated under the laws of the State of Delaware, USA. It was engaged in the business of licensing and sale of branded consumer products featuring its well- known brand called World Wrestling Entertainment (WWE) and had registered its trademarks worldwide including in India."[164] The defendant on the other hand called Reshma Collections is a company incorporated in Mumbai, India. WWE, the plaintiff sells the books and merchandise in Delhi, its goods and services are sold to customers in Delhi through the plaintiff's websites which can be accessed all over India, including Delhi.[165] On the basis of this fact, the plaintiff filed a petition before the Delhi High court seeking the permanent injunction for copyright infringement, trademark infringement, passing off etc. The plaintiff alleged that the defendants were selling the goods in Delhi using the plaintiff's logo. The Single Judge of the High Court of Delhi returned the plaint stating that the Delhi High Court does not hold the jurisdiction on the basis of the judgment laid down in

[161] *WWE v. Reshma Collection and Ors.* FAO (OS) 506/2013 & CM Nos. 17627/2013, 18606/2013.
[162] Jurisdiction in E-Commerce IP disputes *available at:* http://spicyip.com/2014/10/jurisdiction-in-e-Commerce-ip-disputes.html (Visited on 22/4/2017).
[163] *Ibid.*
[164] *Ibid*.
[165] *Ibid*

the case of Dhodha House. The court in the Dodha Case has held that in order to fulfill the condition of 'carries on a business' by the plaintiff, three conditions must be fulfilled. They were,

(a) Either the business must be carried by a special agent to the business of the principal. He should carry it in the name of principal only but not as a general agent, or,

(b) An acting agent must be an agent in the strict sense. A manager of a Joint Hindu Family cannot be regarded as an "agent within the meaning of this condition",[166] or,

(c) To constitute "carrying on business at a certain place", the essential part of the business must be performed at that place.

The Division Bench of the court proceeded to examine how far the term 'carries on the business' in the present case fulfills the conditions provided under the Dodha case. The court examined whether the plaintiff's business was being performed at Delhi or not. The court was also of the view that since the plaintiff had no agent in Delhi, whether the third condition was fulfilled in the instant case or not. To determine this issue, the court was invariably led to the issue, when a transaction takes place over the internet, where is the contract concluded?

The Court then referred the case of *Bhagwan Goverdhandas Kedia v. Girdharilal Parshottamdas & Co.*[167] which had also been referred by the Single Judge and stated in Para 21:

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[166] India: Protecting brands in a virtual world, *available at:* http://www.worldtrademarkreview.com/Magazine/Issue/55/Country-correspondents/Protecting-brands-in-a-virtual-world (Visited on 23/6/2016).

"The general rule is that the contract is complete when the offeror receives intimation that the offeree has accepted his offer. An exception to this has been carved out in respect of contracts negotiated by postal communications or telegrams. The exception being that the bargain in such cases (post or telegram) would be struck and the contract would be complete when the acceptance of the offeree is put into a course of transmission by him by posting a letter or dispatching a telegram."[168]

The question that has arisen in the case of *Bhagwan Goverdhandas Kedia* was the conclusion of the contract when offer and acceptance were made by the telephonic conversation. The Supreme Court in the said case held that the negotiations are concluded by the instantaneous communication of speech and therefore, the exception to the general rule of a contract would not be applicable in this case.

The Delhi High Court observed just as in the case of telephonic conversation, there is an instantaneous communication where transactions take place online and applying the rule of *Bhagwan Goverdhandas Kedia,* the court held that in the case of e-Commerce, contracts would be completed at the place where the acceptance is communicated.

The Court noted down that "The website of the plaintiff refers to the various goods and services. It is not an offer but an invitation to an offer, just as a menu in a restaurant. The invitation, if accepted by a customer in Delhi, becomes an offer made by the customer in Delhi for purchasing the goods advertised on the website of the plaintiff. When the contract is confirmed through the electronic medium and the payment is made to the plaintiff through its website, the plaintiff accepts the offer of

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[167] *Bhagwan Goverdhandas Kedia v. Girdharilal Parshottamdas & Co.,* AIR 1966 SC 543.

[168] Judgment on *Bhagwan Goverdhandas Kedia v. Girdharilal Parshottamdas & Co. available at:* http://www.the-laws.com/Encyclopedia/Browse/Case?CaseId=005691291000 (Visited on 10/11/2017).

the customer at Delhi. Since the transaction between the two takes place instantaneously, the acceptance by the plaintiff is instantaneously communicated to its customer through the internet at Delhi."[169]

The Court reasoned,

a. "If any contract or transaction is being concluded in Delhi between two parties, can it not be said that the essential part of the business of the plaintiff takes place in Delhi?

b. The offers are made by customers at Delhi. The offers are subject to confirmation or acceptance of the plaintiff through its website. The money would emanate or be paid from Delhi. Can it not then be considered that the plaintiff is, to a certain extent, carrying on business at Delhi?"[170]

The court believed that due to the advancements in technology and modern communication, there is a rapid growth of new models of techniques and the businesses are conducted via internet, therefore, it is possible for an entity to have a virtual presence in a place which is located at a distance from the place where it has a physical presence. The availability of transactions through the website at a particular place is virtually the same thing as a seller having shops in that place in the physical world.

Based on the above factors, the Court was of the opinion that the plaintiff could be said to carry his business in Delhi and also fulfills the condition "carrying on business" as laid down in Dhodha case. Therefore, the Delhi High Court has

[169] Supra 37
[170] Supra 159

jurisdiction to adjudicate the matter. As a result, the Court set aside the order of the Single Judge, thereby allowing the appeal in the present case.

The connotations of the term 'carries on a business' has evolved due to the growth of commercial transactions through internet. There is no physical commercial presence or territorial business interest in the form of a branch office or an exclusive dealer in this type of business. The Delhi High Court ruling will no doubt boost the e-Commerce sites. But given the burgeoning e-Commerce industry in India, perhaps the country should come up with a comprehensive law that deals with and regulates every aspect of the business that is transacted over the internet.

In the same year, another case *Christian Louboutin v. Nakul Bajaj*[171] came into a picture "where the defendant sold the plaintiff's products without permission through its website www.darveys.com, thus creating doubts as to the quality of those products in the minds of consumers. The plaintiff alleged that the defendant's activities also affected the reputation of its brand and consumer goodwill towards it, and that continued use of its name would cause its luxury brand irreparable harm. The court granted an interim injunction restraining the defendant from selling unauthorized products."[172] The Delhi High Court recently "restrained online retailer Brandworld from using the brand name L'Oreal to sell or supply any goods, on any website or in any other manner, after the cosmetics company alleged that counterfeit products

[171] *Christian Louboutin v. Nakul Bajaj* CS (OS) 2995/2014 (On 26 September, 2014 in the High Court of Delhi by HON'BLE MR. JUSTICE MANMOHAN SINGH).

[172] Ranjan Narula and Daleep Kumar, India: Protecting brands in a Virtual World, *The Trademark Review, available at:* http://www.worldtrademarkreview.com/Magazine/Issue/55/Country-correspondents/Protecting-brands-in-a-virtual-world (Visited on 2/7/2017).

bearing its trademark were being sold by the merchant on its shopping website www.ShopClues.com."[173]

The jurisdictional sphere of cyberspace assumes importance in the light of conflicting claims which are litigated in the traditional mode without a unique model of jurisprudence suitable for the resolution of myriad jurisdictional issues emanating from technological innovation. India being a developing country is developing various principles of jurisdiction from other countries. Despite conflicting sphere of jurisdiction the separate legal methods for jurisdiction has not been adopted in India to date yet the traditional principles of jurisdiction are being adapted to amenability of the jurisdiction of cyberspace-origin cases.

3.3.1. Effects of foreign judgments and its applicability on cross border jurisdictions

It is always important that the decision given by the foreign court must be recognized in the home country. It is because of the fact that the e-Commerce transaction always consists of multiple international jurisdictions and the decision given by one country must be sufficient to provide justice to another party residing in one country. The Indian procedural law also provides for the recognition and enforcement of such decisions its own as well as the enforcement of foreign decisions, since a mere assumption of jurisdiction, and passing a judgment without it being recognized and enforceable in another country would have no effect.

Sec. 13 of the CPC provides for the effect of foreign judgments on Indian courts; it also provides for their enforcement in all cases except under a few circumstances,[174]

[173] *Ibid*

in which case the courts would delve into the issues of jurisdiction of the court, the public policy, and morality of the decision to be enforced, keeping the merits of the case as off-limits.[175]

As it is clear from the section, if the foreign court did not have jurisdiction over the matter, any decree passed by such a court would not be conclusive, as far as an Indian court is concerned. In various cases, the court has stated that where there has been voluntary consent to submit to the jurisdiction of the court, the court would be recognized internationally to have competent jurisdiction over the matter and such jurisdiction would be binding.[176] This principle is grounded on the foundation that a party has taken a chance of a judgment in his favor by submitting to the jurisdiction of the court, should not be allowed to turn round when the judgment goes against him, to say that the court had no jurisdiction.[177] As a result, in the event an *ex parte* decree is passed by a court, in a matter where the person against whom the decree is passed, does not contest or even appear in court, the party cannot be said to have submitted to the jurisdiction of the court. However, using the requirements of sub-section (b) of the section, the mere fact that the decision was passed *ex parte*, does not constitute sufficient grounds for declaring that the relevant court did not have jurisdiction, as it

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[174] S. 13 CPC reads as: A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except— (a) where it has not been pronounced by a Court of competent jurisdiction, (b) where it has not been given on the merits of the case, (c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable; (d) where the proceedings on which the judgment was obtained are opposed to natural justice; (e) where it has been obtained by fraud, (f) where it sustains a claim founded on breach of any Indian Law.

[175] *Govmdan* v. *Sankaran,* AIR 1958 Ker 203, *Rajarathnam* v. *Muthuswami*, AIR 1958 203.

[176] *Narhari* v. *Pannalal*, AIR l977 SC 164, *Lalji Raja and Sons* v. *Firm Hansraj Nathuram*, AIR l97l SC 974.

[177] *O P Verma* v.*GehriLal*, AIR 1962 Raj 231.

will have to be seen whether the decision was merely passed as a formality or after a consideration of the plaintiff's case.[178]

This position of law assumes significance in relation to the judgment of foreign courts over internet-related disputes as in most such litigation; the main argument on behalf of the defendant is that the foreign court has no jurisdiction to try the matter. In the first place, it appears that a decree of a foreign court in a personal action, that was passed *in absentia* and in respect of which the defendant did not even appear before the foreign court, would not be deemed to have been passed by a court of competent jurisdiction. This apparently opens the doors for Indian defendants to avoid the consequences of foreign decisions by staying away from the forum where the proceedings are taking place. Not being present at the trial, the decisions of the court cannot be enforced against them in India. However, the courts in India have not struck to this narrow view and have at times enforced the *ex-parte* decrees of foreign courts, where the decision has arrived after a consideration of the evidence and where the proceedings have in general not taken place in a summary manner. An important aspect that the court must take into consideration is the fact that the decision of the foreign court must have been taken strictly in accordance with the principles of natural justice. It is well-settled that a mere error in procedure in a foreign court will not affect its conclusive nature under Sec.13 of CPC provided that error in procedure does not amount to a violation of natural justice under Sec. 13 (d) of CPC. There is no doubt that the nature of the violation must be substantial and not a minor violation of natural justice. So also, where the judgment of the court has been obtained by fraud, the decree is liable to be set aside. However, in these matters, it is more relevant to consider whether the court has obtained the jurisdiction by fraud, rather than to

[178] Supra 7

examine whether the decision on the merits of the case was so obtained. Finally, the last sub-section of Sec. 13 states that the foreign judgment is not conclusive if the judgment sustaining the claim is founded on a breach of Indian law. Without putting too fine a point on it, the import of this section is merely this, where a dispute is governed by Indian law, the final judgment of the foreign court should not be in violation of Indian law. Thus, where the claim is not based on Indian law and where the court has accepted the plea that the law governing the dispute is not Indian law, no objection can be taken to the judgment under Sec. 13(l) (c) on the grounds that it sustains a claim based on Indian law. In summary, the courts in India are not averse to uphold the decree of a foreign court and can, in fact, only hold the decree of a foreign court to be non-conclusive, if such a decree does not fulfill the criteria set out in Sec. 13 of the Code of Civil Procedure. Thus, in the event a decree is passed against an Indian citizen in respect of any perceived breach of the laws of another state, the decree will be upheld in India, against the Indian citizen, provided it does not suffer from any of the infirmities listed under Sec. 13. When it is a matter of primary issue of jurisdiction over the Internet, in the event a foreign court passes extra-territorial judgment over a citizen of India, the case law examined above would clearly indicate that the courts in India would have no hesitation in upholding a reasoned and sound decision of a foreign court. Indian citizens, who establish a presence on the Internet would, therefore, need to be careful to follow the principles of law, set out in international jurisdictions to avoid prosecution under those laws. It is therefore not enough to be mindful of local laws alone. Any venture on the Internet appears to be open to challenge from virtually any jurisdiction and from any country that has Internet access. This is a situation that is perhaps uncomfortable from the point of view of carrying out a business on the Internet. Commercial entities that are looking

to use the Internet as a medium through which to conduct their business would be constantly looking over their shoulders, as it were, for the first signs of litigation.[179]

3.3.2. Execution of Decrees outside India

Section 45 speaks about the execution of decrees outside India. "So much of the foregoing sections of this Part as empowers a court to send a decree for execution to another court shall be construed as empowering a court in any State to send a decree for execution to any Court established by authority of the Central Government outside India to which the State Government has, by notification, in the Official Gazette declared this section to apply".[180] In explanation, it must be clarified that the term foregoing sections relate to the sections of the Code of Civil Procedure that deal with the execution of decrees generally and apply to those places or courts to which the Code of Civil Procedure applies. It is under this section that the decrees of the Indian courts are enforced in countries which the Central Government has declared by notification under this section. In addition, there are certain countries which have entered into reciprocal agreements with the Government of India, in respect of the enforcement of their decrees in Indian courts.

By virtue of Sec. 44A of the CPC, the decrees of the Indian courts are enforceable in countries which the central government has declared by notification under the section and those which have entered into reciprocal agreements with the Government of India, in respect of the enforcement of their decrees in the Indian courts.[181] Such agreements and reciprocal relationships are of quintessence particularly in internet

[179] Supra 20
[180] Supra 40
[181] *Govmdan* v. *Sankaran,* AIR 1958 Ker 203, *Rajarathnam v. Muthuswami,* AIR 1958 203.

contracts, where the parties have an international existence, needing a mutual cooperation between countries in effecting the valid judgments of each other.

However, in case, a country that does not have a reciprocal agreement with India, then enforcement of any judgment can be done only by commencing a new action for enforcement in that court, which might often be complicated, since the foreign court may wish to re-assess the merits of the case or re-assess the Indian court's assumption of jurisdiction before giving effect to the decisions.[182] This difficulty in the recognition and enforcement of judgments in other countries exists not only for the Indian courts, but for other jurisdictions too, and mainly occurs because of the possibility of multiple jurisdictions hearing a particular matter arising over the internet, and the wide range of laws that may govern the dispute. A Uniform Code, as it exists in the United States, dealing with interstate jurisdictions providing for the jurisdictional questions and choice of law if enacted for international jurisdiction in e-contracts,[183] along the lines of the CISG (Convention on International Sales of Goods) for the sale of goods would bring in a legal certainty, solving most of the controversies and confusion regarding jurisdictional matters.

3.4. Jurisdictional Principles under Information Technology Act, 2000

The jurisdictional issues of e-contracts have, however, been addressed to an extent under the IT Act, 2000. Section 13 of the IT Act governs the provisions relating to time and place of dispatch and receipt of an electronic record and addresses the issue of deemed jurisdiction in electronic contracts.

[182] Abhishek Krishnan, "E-Contracts in Sairam Bhat (ed) Law of Business Contracts in India" *NDSPI* 210 (2009).
[183] T Ramappaa, *Legal Issues in Electronic Commerce* 65 (Macmillan India Ltd., New Delhi, 2003).

‘Section 13: Time and place of dispatch and receipt of electronic record reads as

(1) Save as otherwise agreed to between the originator and the addressee, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.

(2) Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely,

(a) if the addressee has designated a computer resource for the purpose of receiving electronic records,-

(i) receipt occurs at the time when the electronic record enters the designated computer resource; or

(ii) if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;

(b) if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

(3) Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business and is deemed to be received at the place where the addressee has his place of business.

(4) The provisions of sub-section (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub-section (3).

(5) For the purposes of this section,-

(a) if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;

(b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;

(c) 'usual place of residence', in relation to a body corporate, means the place where it is registered.'[184]

To illustrate the application of the aforesaid principles, we may refer to the case of *PR Transport Agency v. Union of India,*[185] wherein the Allahabad High Court had to decide the question of jurisdiction where the respondent had sent the letter of acceptance by e-mail to the petitioner's e-mail address. Subsequently, the respondent sent another e-mail canceling the e-auction in favor of the petitioner *"due to some technical and unavoidable reason"*. When the petitioner challenged this communication in the Allahabad High Court, the respondent raised an objection as to the *"territorial jurisdiction"* of the Court on the ground that there was not a single part of cause of action arisen within Uttar Pradesh (UP), and therefore, the Allahabad High Court (UP) had no jurisdiction to try the dispute. In the case, the principal place of business of the petitioner was in district Chandauli (UP), and the other place where

[184] IT Act, 2000 with amendment 2008.
[185] *P.R Transport Agency v. UOI,* AIR 2006 All 23, 2006 (1) AWC 504.

the petitioner carried on business was Varanasi, which is also in the State of UP. The Court, therefore, on the basis of Section 13(3) of the IT Act, held that the acceptance of the tender by e-mail would be deemed to have been received by the petitioner at Varanasi/Chandauli, which were only two places where the petitioner has his places of business. As both these places fell within the territorial jurisdiction of the Allahabad High Court, the Court assumed jurisdiction to try the dispute.

In view of the foregoing, the place of contract in an e-contract for the purposes of determining jurisdiction (i.e., the place where the cause of action arose) would be deemed to be where the originator and addressee have their place of business. However, since Section 13 of the IT Act is subject to the mutual agreement of the contracting parties with respect to the agreed place of contract, it is recommended that all parties in their electronic contracts provide for a specific clause on jurisdiction.

The Information Technology Act, 2000 specifically provides that unless otherwise provided in the Act, 'the Act also applies to any offense or contravention there under committed outside India by any person irrespective of his nationality'.[186] It is however clarified that the Act shall apply to an offense or contravention committed outside India by any person if the act or conduct constituting the offense or contravention, involves a computer, computer system or computer network, located in India.[187] The words act or conduct constituting the offense or contravention involves a computer, computer system or computer network located in India are very significant to determine the jurisdiction of the IT Act over acts committed outside India. For assuming jurisdiction over an act constituting an offense or contravention under the IT

[186] Sec. 1(2) of Information Technology Act, 2000.
[187] Sec 75 of Information Technology Act, 2000.

Act, which is committed outside India, it has to be proved that the said act involves a computer, computer system or computer network located in India.

Section 75 of the IT Act is restricted only to those offenses or contraventions provided therein in the Act. The jurisdiction over e-Commerce disputes has to be determined by the provisions of Code of Civil Procedure, 1908 in conjunction with the Contract Act, 1872. The fundamental principle of jurisdiction is the same under the IT Act and the Code of Civil Procedure, 1908, though stated differently. The basic legal principle of jurisdiction under the CPC is that every dispute shall be tried by the court within whose jurisdiction the cause of action has arisen.[188]

Due to the global access to the internet, e-Commerce generally tends to transcend or disregard geographical boundaries. These factors imply that in most cases of e-disputes there would be two or more places, one from where the seller sells or the place where the buyer resides or where the transaction takes place. This is in contrast to traditional disputes of commerce.

This basic tendency of disputes with the permissible vagueness provided by the internet makes the cyber jurisdiction almost invisible. Thus, in terms of practical application of the law of jurisdiction over e-Commerce disputes, in most cases, the place of jurisdiction shall be the place where the cause of action has arisen. There is a valid point in the criticism that such a law assuming extraterritorial jurisdiction passed by the legislature is not enforceable in the real world. It is contrary to the principles of international law to assume jurisdiction over citizens of another country, and so, it is likely to lead to the conflict of the jurisdiction of different courts situated in different

[188] Supra 23

national jurisdictions. It is also important to note that there are differences between national legislation, laws, legal processes and procedures.

In such circumstances, all other proceedings with respect to that dispute shall be discontinued. Where two or more courts have jurisdiction over the same dispute, the choice of the court for an institution of the case lies with the complainant. He will obviously choose the forum, which is most convenient for him and most inconvenient for the defendant.

Further compounding the problem is the issue that a particular act in one national jurisdiction is legal and not barred by law but the same activity is illegal and barred by law, prevailing in another national jurisdiction. Another ground of criticism has been that Section 1 does not lay down the parameters of how such a provision would be enforceable in practical terms across transnational boundaries and jurisdictions.

The existing international law pertaining to the sovereignty of a nation also details that a sovereign nation can make laws affecting people who reside within its territorial boundaries. However, the birth of internet has seen geography become history and transactions taking place over networks are transnational in nature, thereby complicating the entire issue of jurisdiction. This becomes all the more evident from the emerging principles from various judgments relating to Jurisdiction over the Internet. From the beginning of the Internet, the issue of jurisdiction has continued to challenge legal minds, societies, and nations in the context of the peculiarly inherent character of the Internet. Section 1(2) and Section 75 of the IT Act, 2000 provide for extra-territorial jurisdiction of the Indian courts, which, however, seem implausible to be implanted. The courts in India at present have not been uniform in following the US trend of asserting jurisdiction on the basis of active accessibility of the site. So far,

in various internet domain names related cases, the Delhi High Court has assumed jurisdiction merely on the basis of accessibility of the internet.

3.5. E-consumer Protection Issues

In view of the new method of conducting business through internet, it is very important to know about the challenges of the e-consumers in India. There is no specific consumer protection law that regulates online transactions and works as a protector of the consumers in the area of e-Commerce. Therefore, the Consumer Protection Act 1986 ("CPA") regulates the relationship between consumers and service or goods providers. When there is a deficiency in service or defect on goods or any kind of fraud, the service/goods provider shall be liable under the Act. There are certain situations where the CPA does not apply. The Act does not apply when the service is rendered free of charge. If real sales are taking place on the cyberspace the users/buyers will be considered as 'consumers' under the CPA and its provision will apply to the sale of products by the online platform. In order to charge with liability, it depends upon who is actually selling the goods or rendering services over the cyberspace.

For customers, there is no distance limit using e-Commerce right now.[189] E-Commerce being a global and trans-border in nature, efforts have been made at the national and international level to ensure the protection to the e-Commerce consumers.[190] The development of electronic commerce poses a number of legal and consumer challenges. In India, we are seeing a convergence of new technologies and the deregulation of the financial sector. At a time of great change, consumers need to

[189] Vishalcnlu, "Consumer Protection in the age of e-Commerce", *Law Articles- India's most Authentice Free Legal Source Online,* Sep. 06, 2013.
[190] Hina Kausar, "E-Commerce and Rights of consumers", Manupatra, p. 5.

be protected, and the law is struggling to keep up.[191] E-Commerce is not just about using network-based technologies to conduct business. It is about moving organizations to fully electronic environment through a change in their work procedures, re-engineering their business processes, integrating them with their business partners beyond their traditional boundaries. Electronic Commerce has brought a veritable revolution in the way businesses are conducted. There is a paradigm shift from paper-based transactions to fully electronic organizations. Networking and messaging over networks is the key to the new scenario in which there is the globalization of organizations, and of markets. Information and Communication Technology (ICT) has brought a new industrial revolution. It is the internet which has helped realize globalization of markets seamlessly. A business connected to the internet is immediately global in reach and connectivity with no additional cost. One-third of all the business transactions conducted electronically will be done through commerce on the internet. Consumers are accustomed to laws to protect their interests, and they are accustomed to having the laws when they do business from home with distant companies, like mail-order sales.

The word 'consumer' is a comprehensive expression. It extends from person to person who buys any commodity to consume either as an eatable or otherwise from a shop, business house, corporation, store, and fair price shop to the use of private or public services.[192] Black's Law Dictionary explains it as 'one who consumes'. Oxford Dictionary[193] defines a consumer as a 'purchaser of goods and services'.[194] Every human being is a consumer whether he buys any goods or hires any services. Anyone

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[191] Supra 26

[192] *Lucknow Development Authority* v. *MK Gupta* (1993) 6 JT 307, (1994) 1 SCC 243, (1994) 10 CPR 569 (SC)

[193] Catherine Soanes, Angus Stevenson, *Concise Oxford English Dictionary,* (Oxford University Press, 11th edn. Revised, 2008).

[194] *M/s Larsen & Toubro Ltd* v. *M/s Pophale Nursing Home & Anor* (1993) 1 CLT 38 (1992) II CPJ 366.

who buys goods and avail services for his/her use for consideration is a consumer. Any user of such goods and services with the permission of the buyer is also a consumer.[195] The Consumer Protection Act, 1986 was enacted to provide simpler and quicker access to consumer grievances. The Act for the first time introduced the concept of 'consumer' and conferred express additional rights on him. It is interesting to note that the Act does not seek to protect every consumer within the literal meaning of the term. The protection is meant for the person who fits the definition of 'consumer' given by the Act.

The Consumer Protection Act, 1986 provides means to protect consumers from getting cheated or harassed by suppliers. The question that arises is how can a consumer seek protection? The answer is that the Act has provided a machinery whereby consumers can file their complaints which will be entertained by the consumer forums with special powers so that action can be taken against erring suppliers and a reasonable compensation may be awarded to the consumer for the hardships he has undergone. Furthermore, 'an aggrieved consumer need not necessarily be represented by an advocate.'[196]

According to the Consumer Protection Act, 1986, the consumer right is referred to as 'right to be protected against marketing of goods and services which are hazardous to life and property'.[197] Consumer Protection Act in India was set up by Parliament of India in lieu of protecting the interest of Indian consumers. With the implementation of this Act, there arose the need for establishing a Consumer council and several other authorities who would work towards setting the disputes of the consumers and any

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[195] Balakrishna V. Eradi *Consumer Protection Jurisprudence* 54 (LexisNexis, Butterworths, 2004).
[196] *Ibid* p. 41
[197] *Ibid*

other connected matters. With the advancement in technology and more practice of electronic transactions, there was need of settling of proper standard policies and laws is linked to the electronic transactions done by the consumer and there were several disputed cases lodged that led to the establishment of E-Commerce Consumer Act. This Act refers to electronic trade done using the electronic technology that is majorly completed using the internet services. The establishment of e-Commerce is a new way of implementing transactions that implement the fast. Few of the issues that are linked to e-Commerce are privacy, access, security, terms and conditions, dispute resolution, fees, fraud, jurisdiction definition. The Consumer act must be beneficial to all the three different sections that include Government, business, and the consumers.

The right of physical consumers and e-consumers are equal in theory but different in operation or enjoyment due to the difference in the nature and place of business or medium of business. Few unique practical problems like a place of business, jurisdictional issues, non-availability of common dispute resolution system etc., certainly require special measures that are not provided in the existing consumer legislation. Considering these aspects strong protective mechanisms are required to be set up. Moreover, beside the government's responsibility to protect e-consumers, we being consumers/customers and internet users are also responsible for keeping our e-Commerce healthy and safe so that e-business can be more reliable in the future. In general, the rights of a consumer as provided by domestic legislation like Sec. 6 of Consumer Protection Act, 1986 are also available to electronic consumers because no

special condition has been laid down in most of the consumer laws regarding applicability or non-applicability of electronic transactions.[198]

The rights of the consumers are well defined in the established law that is defined by different agencies like the Government, the established consumer courts and other voluntary groups that work hand in hand in the safeguard of the consumers. These agencies work in accordance with Consumer Protection Act in India. These consumer protection laws have been designed for the safety and transparency of the information of the consumers in the market. These laws also help in any kind of fraud that could happen in any type of business. Both the consumer protection laws and e-Commerce consumer protection act have also been designed in the interest of the consumer.

3.6. The Consumer Protection Bill, 2015

Union Cabinet had approved Consumer Protection Bill, 2015 in order to deal with the growing concern over the safety of consumer products and services. The new bill seeks to replace Consumer Protection Act, 1986 in order to deal with consumer protection and safety. The bill also incorporates e-Commerce. It aims at simplifying the consumer dispute resolution process along with enhancing the pecuniary jurisdiction of the consumer grievance redressal agencies. The new bill is currently pending before the Parliament.

3.6.1. Key features of the Bill

- Central Consumer Protection Authority (CCPA): the Bill makes an establishment of CCPA as a chief regulatory authority with more powers in order to protect the

[198] A. Gowri Nair and K. M. Aiswarya, "Emerging Trends of E- Commerce & Challenges to the Consumer protection Act, 1986", *CUSAT* (2015).

rights of consumers in the area of e-Commerce and to enforce them correctly. The powers to recall products and initiate action suit against defaulting companies including e-tailers for refunds and return of products will be vested upon the CCPA.

- Liability of products: the power is vested upon the CCPA to take immediate action against defaulting manufacturers or service providers if any product or services cause personal injury, death or damage to property of a consumer.

- Alternative Dispute Mechanism: For the speedy disposal of cases, a provision related to 'mediation' has been proposed which will act as an alternative dispute solution outside of the court.

- Rigorous Penalties: The Bill adds stringent penalty provisions including life imprisonment in certain cases.

- Establishment of circuit bench: For speedy disposal of complaints consumers can file complaints electronically circuit bench along with traditional mechanism of filing complaints in consumer courts that have jurisdiction over the place of residence.

- Provisions of cooling-off: Once the contract is made, it's final and binding on all the parties. The provision of cooling-off gives a consumer a facility of returning the goods within a specified time. 'Reasonable length of time' in the old Act does not make a clear provision about what creates reasonable. This has given the power to the businesses to set their own reasonable time. The Bill has mentioned the cooling-off period of 30 days within which period the consumers could return their goods and get back their fund.

3.6.2. Rationality behind introducing new Bill

Technology is facilitating the easing mode of providing goods and services. With a single click of a mouse, a transaction is made or a contract is concluded. The reason behind flourishing of the e-Commerce sector is easy accessibility and numerous facilities, unlike offline businesses. E-Commerce is customers friendly. They interact with the customers politely with the queries and make this environment very attractive. In India, we are seeing a convergence of new technologies and we have seen a large number of consumers being engaged in the e-Commerce. Therefore, a time has come that these consumers need to be protected. The Consumer Protection Act, 1986 fails to address the issues faced by the e-consumers. The Act is struggling to keep updated with the recent development of modern technology because the Act came into force before the proliferation of the internet. Most of the marketing strategies like multi-level marketing, telemarketing, direct selling, and e-tailing are being found misleading the consumers. The consumers cannot do anything except leaving the matter behind. The consumers are facing the new challenges not only with the fraud over the goods and services but also with issues of privacy and jurisdiction. The concern for consumer protection has resulted in the rapid increase of the internet and the worldwide users of it.

The Consumer Protection Act, 1986 amended thrice earlier in 1991, 1993 and 2002 but was not capable to deal with the changing scenario of consumer protection effectively.[199] The growing complexities of the business scenario are created due to the multiple of consumers and vendors providing goods and services electronically residing in two different jurisdictions. A difficulty of this kind has not been handled

[199] The Consumer Protection Bill, 2015, *available at:* http://www.gktoday.in/blog/consumer-protection-bill-2015/ (Visited on 6/7/2017).

by the Consumer Protection Act, 1986. Some commentators keep their approaches of enacting the separate law for e-consumers in India because of the fact that many e-Commerce companies in India are engaged in malpractices and evading taxes. They believe that it leads to the loss of revenues for the government and at the same time exposing deceitful unidentified business.

India is experiencing a forceful growth in its e-Commerce sector. Countries like US and EU already have the separate law for the protection of e-consumers. The e-consumers in India are deprived of their rights and protection. Due to the shortcomings in the present Act, the e-consumers in India face a variety of coercion while transacting online. The consumers generally purchase the goods or services through debit or credit cards where there is a possibility of fraud. On the other hand, they do not have the ability to test the products or services that they buy from the online companies. In this regard, a protection and ample of measures are required. Any regulation in this area will create a lot of complexities for both the consumers and businesses. A regulatory authority may charge a lot of costs for any kind of intervention and class action in any matter brought before them by the consumers. As e-Commerce is growing rapidly, it is likely to grow more; the proposed bill is required for consideration in order to carve out all the difficulties created in the e-Commerce business. If the proposed legislation addresses the specific problems growing rapidly and strong enough to drag the solutions for the growing challenges, then the Bill shouldn't be late by making it law.

The consumer protection law rests on the foundations of contract law, a law of sale of goods and law of torts. These laws were existed and settled for the long time ago. A consumer law needs these foundations and principles in order to cope up with the

changing environment of the society; otherwise, it may lead to unclear and conflicting situations. But the Consumer Protection Act, 1986 did not pay any heed to this. The bill was a comprehensive framework to protect the rights of the e-consumers in India.

Consumer protection issues in the context of e-Commerce have gained a considerable amount of attention both from academics and policy-makers. Furthermore, governments,[200] as well as intergovernmental organizations,[201] have discussed the issues involved and developed various frameworks. Some of those instruments deal with e-Commerce consumer issues specifically,[202] while others address consumer protection more generally. Despite this attention, a review of existing legal frameworks shows that they have failed e-consumer needs. It has emerged within public policy frameworks dominated by commitments to economic progress, to freedom of corporations to do business as they choose, and to protect the interest of the consumers whose rights have been infringed in the traditional mode. It is not able to protect the consumers form infringement of their rights in electronic modes. Even those frameworks that have begun from the consumer perspective have been significantly become frozen in time due to technological advancement, or by a lack of will lawmaking authority to make the existing law a dynamic one so that it can cover protective issues of both sots of violations of consumer rights which is really far-reaching in its present shape and provisions. In India, we have lots of fragmented laws to cope up the challenges mentioned in the foregoing paragraphs apart from Consumer Protection Act, 1986. But we need a consolidated law to deal with all above-mentioned situations so that the electronic consumers' right can be protected properly.

[200] A best practice model for e-consumer protection, *available at*: http://www.sciencedirect.com/science/article/pii/S0267364909001915#fn2 (Visited on 4/5/2017).
[201] *Ibid*
[202] *Ibid*

3.7. Conclusion

The internet is harmonizing the general environment in which electronic communications of all kinds take place. Thus, the electronic transaction environment is moving closer and closer to the individual. As more and more kinds of consumer transactions migrate to the internet, a number of issues become magnified that are fundamental to the creation of trust in electronic commerce as a way of doing business.[203] The internet explosion has generated many jurisdictional disputes, putting the responsibility on the courts to determine how to apply historical concepts regarding personal jurisdiction to the boundary-less world of the internet. Jurisdiction is complicated by the nature of claims arising out space activity. Injuries inflicted electronically will not normally have physical manifestations.[204] India is currently in the midst of an e-Commerce revolution. The e-Commerce trends are in perfect accordance with the sweeping changes in the global market. But still, there is a widespread concern on the inconvenience that has been caused due to its advent. The internet geometrically multiplies the number of transactions that implicate more than one state. The cases to date suggest some workable standards by which to measure jurisdiction. As of yet, there is not true consistency in the decisions, but that is nothing new for the law of the jurisdiction.

[203] S. B Verma, R. K. Shrivastava, et. al., *Dynamics of Electronic Commerce* 80 (Deep and Deep Publications Pvt. Ltd. 2007).
[204] Allan R. Stein, "The unexceptional problem of jurisdiction" 1180 *ABA 32* (1998).

CHAPTER-IV

CONFLICT OF LAWS ON JURISDICTIONAL ISSUES: INDIA AND U.S.A.

4.1. Introduction

Since e-Commerce has become one of the integral parts of the human civilization and growing trade due to the advent of the internet, the numbers of legal issues that may arise in e-Commerce business are many as well. The consumers have discovered the possibilities and advantages in doing business online which results in several difficulties compared to traditional commerce. Even if a transaction or a contract is planned well, still it is possible to face some disputes. Jurisdiction is one of the foremost difficulties for the expanding e-Commerce. The reason that jurisdiction has always become one of the issues is its borderless nature. E-Commerce is expected to go beyond boundaries which have no concept of locality in a geographical sense. Hence, there is the birth of a dispute. The questions of the appropriate forum and applicable laws always leave the courts a complicated task all over the globe. When the different jurisdictions become the question, providing redress to the parties residing in different jurisdictions will be a difficult task. Before the question of whose jurisdiction to apply is answered, there is another question that has to be considered 'Where online activity takes place?' or 'Where did it occur?' It has always been complicated to know in which country the transaction has occurred. There is an idea that the e-Commerce business and consumer now reside in a borderless world. In order for a court to have authority over the case and decide its outcome, that court must have jurisdiction. Various legal principles apply to determine whether a court

has jurisdiction, including the location of the parties, the type of matter, the amount in controversy, and the location of dispute. There are still doubts about location or establishment of any redress mechanisms, and yet only a few regions have corresponding laws. In fact, the biggest challenge to the law is to keep pace with technology.[205] When the comparative study is done between the jurisdictional complications on e-Commerce of different nations, the similarities prevail more. Although the developing countries like India lack behind with particular e-Commerce laws that deal with the complications that come across with expanding e-business yet it is always one step forward for dealing the same.

Talking about the USA, till now the courts have developed its *'sliding scale test'* to *'effect scale test'* for cyberspace jurisdiction but the complications and difficulties of these tests are on another side as well.

The effective development of technology makes a cyberspace unclear and confusing. In order to identify the jurisdiction of one party in cyberspace and in the real world the party must have some connection in that state where the matter is brought before. The environment of this kind is similar to the physical environment. Applying the traditional principles will surely create a chaos and confusion between the parties and the traditional methods used by the courts will be inappropriate to identify the jurisdiction. The courts in the whole world apply the substantial laws to make a clarification on the question of jurisdiction, therefore, leading to unidentified challenges for determining the specific jurisdiction in the cyber world.

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[205] Rakesh Kumar and Ajay Bhupen Jaiswal, *Cyber Laws* 188 (APH Publishing Corporation, New Delhi, 2011).

For understanding the real picture of cyberspace jurisdiction several points need to be understood. This includes analysis of situation when the person posts any information in the cyberspace. Does that person is required to obey the rules of every states and nation from which the website is accessed? Another situation may arise when the information on the internet is accessed from any part of the world, does any court within which jurisdiction the information has been accessed has personal jurisdiction over the operator of the website?[206] These situations lead to numerous court decisions and commentary over the past several years. Mostly domestic laws of the nation are different from each other with their own extraterritorial principles. The country relies on its own developed principle and while extending the rules of jurisdiction beyond its borders. These principles as a medium to determine jurisdiction has always been proved and remained as uncertain because the nature of internet does not recognize the jurisdiction boundaries. This leads to a fundamental problem with enforcing every country's jurisdictional laws over the other country via internet.

Due to the development in the internet jurisdiction has become much more complicated area than before. The question of jurisdiction of the courts over the items published on the internet or e-contract made by the virtual parties leads to a variety approaches of different courts worldwide.

The frontier idea that the law does not apply in cyberspace is wrong. So far, the laws of traditional jurisdiction with certain modifications are applied to decide the puzzling nature of the internet jurisdiction. The reason behind being puzzling is the application of two different jurisdictional rules to the same affair. When the nature of the internet

[206] Julia Alpert Gladstone, *Determing Jurisdiction in Cyberspace: The Zippo Test or the Effects Test*? 143 (Informing Science, June 2003).

is difficult to understand, the physical and virtual jurisdictions which are identified on these two foundations are unclear as well but the internet users remain in the physical jurisdictions and are subject to laws independent of their presence on the internet.

4.2. Jurisdictional Conflicts: US Approach

The internet can be seen as multi-jurisdictional because of the ease of accessing a website from any corner of the world. It can even be viewed as a-jurisdictional in the sense that from the user's perspective state and national borders are essentially transparent.[207] For courts determining jurisdiction, however, this situation is more problematic. The court in *Zippo Manufacturing Co. v. Zippo Dot Com Inc.* said there is a global revolution looming on the horizon, and the development of the law in dealing with the allowable scope of personal jurisdiction based on internet use is in its infancy.

The developing law of jurisdiction must address the possible laws for any event occurred in the cyberspace. The jurisdictional law must be clear enough to identify the following possible laws in order to render judgment,

a. Whether the laws of the state of any country where the website is located or,

b. The laws of the state of any country where the service provider is located, or,

c. The laws of the country where the user is located, or,

d. The laws of that state from where the website has been accessed, or,

[207] David Post, "Anarchy, State, and the Internet: An Essay on Law-Making in Cyberspace" J. Online L. art. 3 (1994).

e. Perhaps all of these laws or maybe not.

'The developing law of jurisdiction must address whether a particular event in cyberspace is controlled by the laws of the state of country where the website is located, or by the laws of the state or country where the internet service provider is located, or by the laws of the state or country where the user is located, or perhaps by all of these laws.'[208] A number of commentators have voiced the notion that cyberspace should be treated as a separate jurisdiction.[209] In practice, this view has not been supported by the courts or addressed by the lawmakers.

In determining whether jurisdiction exists over a defendant, the U.S. Federal courts apply the law of the forum state, subject to the limits of the Due Process Clause of the Fourteenth Amendment.[210] Under Due Process, in order for the court to exercise personal jurisdiction, it must be shown that the defendant had purposefully established *'minimum contact'* with the forum state such that the maintenance of the suit did not offend the traditional notions of fair play and substantial justice.[211] The credit to establish such ground rules for establishing personal jurisdiction for the non-resident was given by the US Supreme Court judgment in *International Shoe Co. v. the State of Washington, Office of Unemployment Compensation and Placement et al.*[212]

It should be noted though, that the *minimum contacts* test has been heavily criticized by US legal commentators. For example, E. F. Scoles noted that "the whole enterprise

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[208] G.R Ferrera, *Cyber Law: Text and Cases* 4 (Ohio).

[209] David R. Johnson and David, *Post Law and Borders —The Rise of Law in Cyberspace* 48 (Stanford L.Rev. 1357(2001), 1367 (May 1996).

[210] U.S.C. Const. Amendment. XIV (The 'due process of law' as given in the US Constitution limits the powers of the courts to exercise traditional notions of fair play and substantial justice. The US Constitution provides that "……no state shall…..deprive any person of life, liberty or property without due process of law.")

[211] Darby v. Compagnie Nationale Air France, 769 F. Supp. 1255, 1262 (S.D.N.Y.1991) (quoting International Shoe Co. v. Washington, 326 U.S. 316 (1945).

[212] 326 U.S. 310 66 S. Ct. 154; 90 L. Ed. 95; 1945 U.S. LEXIS 1447; 161 A.L.R. 1057

of judicially-supervised jurisdictional law carries with it uncertainty".[213] This criticism has been particularly noticeable in cases involving internet activity both in terms of torts and contracts.[214] US courts have traditionally been reluctant to view the mere availability of a website as *minimum contacts.*[215] There must be some kind of additional element. Over the last years, some courts have struggled to apply traditional analysis in internet cases, while others have adopted completely new and specialized tests.[216] For a long time, legal commentators have lamented the uncertainty and asked for the Supreme Court guidance.[217] Recently, however, in June 2011, the Supreme Court delivered its judgment in *Nicastro*[218] concerning personal jurisdiction. Even though the case did not specifically deal with internet activity, the findings of the Court are likely to have great influence on the area of internet jurisdiction. Without delving into the details, the case involved a products-liability suit in a State court in New Jersey against J. McIntyre Machinery, Ltd, a company incorporated and operating in the UK. The plaintiff (Mr. Nicastro) injured his hand when using a shearing machine that the defendant had manufactured in the UK. After the machine had been manufactured, it was sold through the defendant's exclusive US distributor established in Ohio, and shipped to the plaintiff's employer, Mr. Curcio in New Jersey, where the accident occurred. The main issue was whether the contacts between the defendant and the forum amounted to *"minimum contacts"* and thus

[213] E.F. Scoles, et al., *Conflict of Laws,* 293. (2004).
[214] Case note: X, X., Personal Jurisdiction Minimum Contacts Analysis, Ninth Circuit Holds that Single Sale on eBay Does Not Provide Sufficient Minimum Contacts with Buyer's State – *Boschetto v. Hansing,* 539 F.3d 1011 (9th Cir. 2008), 122 *HLR* 1014 - 1021 (2009). ("The resulting picture of internet personal jurisdiction is muddled and confused").
[215] F. Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* 6 (2010).
[216] Internet-specific tests under Personal Jurisdiction in US.
[217] C.D. Floyd, Baradaran S. Robison S., "Toward a Unified Test of Personal Jurisdiction in an Era of Widely Diffused Wrongs: The Relevance of Purpose and Effects" 81 *ILJ* 605 – 61 (2006).

[218] *McIntyre Machinery Ltd. v. Nicastro* 131 S. Ct. 2780 (2011), *available at:* http://www.supremecourt.gov/opinions/10pdf/09 - 1343.pdf (Visited on 7/6/2017).

allowed for the exercise of jurisdiction. It was noted, inter alia, that the US distributor agreed to sell the defendant's machines in the United States and that officials of the defendant attended trade shows in several States but not in New Jersey. In addition, the defendant had no office in New Jersey, neither paid taxes nor owned property there, and it had never advertised in the State.[219]

The Supreme Court did not manage to produce a majority opinion but the plurality opinion endorsed the stream-of-commerce theory mentioned above and held that the defendant never engaged in any activities in New Jersey that revealed an intent to invoke or benefit from the protection of the State's laws. Therefore, New Jersey was without power to adjudge the company's rights and liabilities and its exercise of jurisdiction would violate due process. The plurality emphasized that the principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. As mentioned above, the plurality abstained from developing an internet-specific solution. Instead, it adopted a rule of rather broad applicability. Nonetheless, *Nicastro* will most likely have far-reaching implications on the topic of internet jurisdiction,[220] mostly due to the fact that it is the first Supreme Court decision in roughly two decades to address the issue of personal jurisdiction.[221]

At the beginning, the cases dealing with jurisdiction in cyberspace in the U.S. resulted in inconsistencies and it became a failure to appreciate the technological realities of the new medium. One of such example was a judgment given by the Connecticut

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[219] *Ibid*

[220] The purposeful availment test is used to decide jurisdiction for all types of claims.

[221] For a detailed analysis of the case, see case note: X, X ., Personal Jurisdiction – Stream – of - Commerce Doctrine: J. McIntyre Machinery, Ltd. v. Nicastro , Harvard Law Review, vol. 125, 2011, pp. 311-321. For a critical review, see Morrison, A.B., The Impacts of McIntyre on Minimum Contacts, The George Washington Law Review Arguendo, vol. 80, 2011, pp. 1-12, p. 11 (" Personal jurisdiction involving activities conducted through the Internet was murky before Nicastro , but it will now be in a state of hopeless confusion.").

federal court in 1996 in the case of *Inset Systems, Inc. v. Instruction Set, Inc.,*[222] 'Inset Systems sued Instruction Set ("ISI") in Connecticut (Inset's home) for trademark infringement, even though ISI had no assets in Connecticut and was not physically transacting business there. The federal district court determined that it had specific personal jurisdiction over ISI in Connecticut, basing its determination on ISI's use of a toll- free telephone number and the fact that there were at the time 10,000 Internet users in Connecticut, all of whom had the ability to access ISI's website. It found the advertising to be a solicitation of a sufficiently repetitive nature to satisfy the requirements of Connecticut's long-arm statute, which confers jurisdiction over foreign corporations on a claim arising out of any business in Connecticut, Inset. The court also held that the minimum contact test of the due process clause of the Fourteenth Amendment was satisfied, reasoning that defendant had purposefully "availed" himself of the privilege of doing business in Connecticut in "directing" advertising and its phone number to the state, simply because subscribers could access the website. The Inset court failed to appreciate adequately that any website can be accessed worldwide by anyone at any time. Moreover, it failed to give weight to the lack of evidence that any Connecticut residents actually had accessed the site or made a toll-free call to ISI. Under the court's line of reasoning, any website would be subject to jurisdiction everywhere just by virtue of being on the internet.'[223] The concept that a passive website triggers jurisdiction over an alleged trademark infringer when it is accessible from the forum was subsequently rejected by the Southern District of New York in *'Bensusan Restaurant Co. v. King'*[224] it was held that the

[222] 937 F. Supp. 161 (D. Conn. 1996)

[223] Supra 181 *available at:* http://euro.ecom.cmu.edu/program/law/08732/Jurisdiction/GladstoneDeterminingJurisdiction.pdf (Visited on 12/8/2017).

[224] The plaintiff, operator of the New York jazz club known as, The Blue Note, complained that the defendant had infringed on its rights by using its trademark. Defendant, owner and operator of a

defendant's simple creation of a website, that was available to any user who can find it on internet was not an act of purposeful availment of the benefits of the state of New York. Creating a Web site was similar to placing a product into the stream of commerce. The Web site's effect may be felt nationally or even internationally, but this without more, was not enough to establish an act was that purposefully directed towards the forum state. Based on these rulings the Court held that an exercise of personal jurisdiction would violate the protections of the Due Process Clause.[225]

In an early Sixth Circuit decision involving combined trademark and copyright claims, the Sixth Circuit found extensive contacts warranting jurisdiction. *Compuserve Inc. v. Patterson*[226] is a case where a computer information and network service were involved. There was an agreement between the CompuServe Inc. and Richard Patterson in which Patterson could store, transmit and advertise shareware files through CompuServe. 3 years later of such agreement CompuServe started software marketing similar to that of Patterson's similar names. Patterson informed that CompuServe has infringed his common law trademarks. Therefore, Patterson demanded $1,000,000 for settling the claim. CompuServe sought a declaratory judgment in the Ohio District Court and said that it had not infringed on the subscriber's common law trademarks or engaged in any kind of unfair competition.

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small club called, The Blue Note, in Columbia, Missouri, had created a Web page, which allowed users to order tickets to attend the club's shows. The court had to decide whether the creation of a Web site in Missouri containing a telephone number was an offer to sell to citizens in New York. The defendant argued the court lacked personal jurisdiction under New York's long-arm statute. He defended all he had done was set up a web site in Missouri aimed at Missouri residents. Furthermore, any tickets sold over the Internet to users had to be picked up either at ticket outlets in Columbia, Missouri, or at the club on the night of the show. The court agreed finding that it took several affirmative steps to obtain access to the Web site and use the information there. The court also ruled that there was no proof that the defendant had directed any infringing activity at New York. The court held that merely because someone can access information on the Internet about an allegedly infringing product, it is not equivalent to a person selling, advertising, promoting or otherwise attempting to target that product in New York.

[225] Benususan, 937 F.Supp. at 301.

[226] 89 F.3d 1257 (6th Cir 1996).

Patterson responded that the Ohio Court does not have personal jurisdiction over the fact that he never visited Ohio and restrict the court to grant its jurisdiction. The federal district court had dismissed the case for lack of personal jurisdiction. CompuServe appealed.

The Court noted the questionable grounds for exercising personal jurisdiction of Ohio court when Patterson has entered into a contract with Ohio Company. Patterson had not only entered into a written contract with the CompuServe which provided for application of Ohio law but had also "purposefully perpetuated the relationship" via repeated communications with CompuServe's system in Ohio. The court then considered that the Ohio court had personal jurisdiction under Ohio's long-arm statute.

The first overall analytical framework for testing specific personal jurisdiction based on the level of internet activity was generated in the case of *Zippo Mfg. Co. v. Zippo Dot Com. Inc.* ("Zippo") by a Pennsylvania federal district court in the year 1997. Zippo created a "continuum," or "sliding scale", for measuring websites, which fall into one of three general categories: '(1) passive, (2) interactive or (3) integral to the defendant's business.'[227] The court found the jurisdiction and held that the likelihood

[227] The "passive" website is analogous to an advertisement in Time magazine; it posts information generally available to any viewer, who has no on-site means to respond to the site. Courts ordinarily would not be expected to exercise personal jurisdiction based solely on a passive Internet website because to do so would not be consistent with traditional personal jurisdiction law. An "integral" website is at the other end of the continuum: it is used actively by the operator to conduct transactions with persons in the forum state, receiving on- line orders and pushing confirmation or other messages directly to specific customers. In such cases, traditional analysis supports personal jurisdiction. The middle category is the "interactive" website, which falls between passive and integral. It allows a forum-state viewer to communicate information back to the site, by toll- free telephone number, regular mail or even e- mail. Under *Zippo*, exercise of jurisdiction in the "interactive" context is determined by examining the level of interactivity and the commercial nature of the site. Because in *Zippo* a non-resident California defendant operated an integral website that had commercial contacts with some 3,000 Pennsylvania residents and Internet service providers, the court had no difficulty finding a high level of interactivity and hence jurisdiction.

of personal jurisdiction being found can be constitutionally based on an entity's presence on the internet. The court held that the extent of an entity's presence, in the manner of sliding scale, was directly proportionate to the nature and quality of the commercial activity conducted over the internet.

The court established that any passive website making only information available to interested users in the cyberspace is not sufficient grounds for determining jurisdiction. A website that entered into contracts and knowingly and repeatedly transmitted computer files would be properly subject to personal jurisdiction. In cases dealing with the middle ground, where interactive websites exchanged information with a user, the determination of the jurisdiction should be based on the commercial nature of exchange and the level of interactivity.

In the case of *Cybersell, Inc. v. Cybersell*[228], Inc., the Ninth Circuit was in sharp contrast with the Connecticut federal court's decision given in the Inset case. The court applied the *'minimum contact principle'* and held that the purposeful availment test of the *minimum contact* in the present case is not fulfilled. The court took guidance from the six circuit decision, namely *CompuServe, Inc. v. Patterson* and *Bensusan Restaurant Corp. v. King.* Then the court ruled that the defendant's action did not amount to purposeful availment and does not subject to personal jurisdiction.

'The Ninth Circuit also used the Zippo-type analysis and called the defendant's website essentially passive. It also concluded that the Florida defendant had

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[228] *Cybersell, Inc. v. Cybersell, Inc.* 130 F. 3d 414 (The plaintiff in Cybersell was an Arizona corporation that advertised its commercial services over the Internet. The defendant was a Florida corporation offering web page construction services over the Internet. The Arizona plaintiff alleged that the Florida trademark infringer should be subject to personal jurisdiction of the Federal court in Arizona because a website which advertises a product or service is necessarily intended for use on a worldwide basis).

conducted no commercial activity over the internet in Arizona. Even though anyone could access defendant's home page and thereby learn about its services, the court found that this fact alone was not enough to find that the Florida defendant had deliberately directed it's merchandising efforts toward Arizona residents. Accordingly, the activities of the defendant over the internet were insufficient to establish "purposeful availment" In so ruling, the court observed that, if all that was needed for jurisdiction was access in the forum to an infringing web page, every complaint arising out of alleged trademark infringement on the internet would automatically result in personal jurisdiction wherever the plaintiff's principal place of business is located, Cybersell. The court then rejected the application of the effects test. It saw the passive website as different from a publication with a large California audience. It also distinguished between the effects in the plaintiff's residence when the plaintiff is a corporation which does not suffer harm in a particular geographic location in the same sense that an individual does and an intentional defamation of a specific, real individual and the infringement of a trademark owned by a corporation, Cybersell.'[229]

After *Zippo* and *Cybersell,* the courts became increasingly unwilling to grant jurisdiction merely on the basis of the number of people in the forum jurisdiction who can access a passive website, even where accessibility is accompanied by other means of communicating with the site operator or by a few other contacts with the forum. Indeed, the Connecticut Superior Court, without even a reference to the Connecticut federal court's opinion in *Inset,* ruled in 2000 that specific jurisdiction could not be based on the mere accessibility within Connecticut of a website operated from Georgia. When the Connecticut federal district again considered jurisdiction based on

[229] Supra 181

a website in 2001, it wholly disregarded its own opinion in Inset, stating that "most courts follow the lead of *Zippo*". After the Ninth Circuit's implied endorsement of the *Zippo* model in Cybersell, five other federal circuits elected to recognize or adopt that model. The Fifth Circuit did so in *Mink v. AAAA Devel. LLC,*[230] finding that a printable mail-in form, a toll- free call-in number, and a posted email address were not enough to impose specific jurisdiction in Texas over a Vermont website operator. Because orders were not taken through the website, it was deemed to be nothing more than a *"passive advertisement."* In the same year, the Tenth Circuit used the *Zippo* analysis in holding that a *"passive"* website was insufficient for an exercise of jurisdiction in Utah over a British bank, *Soma Medical Intern v. Standard Chartered Bank.*[231]

The sliding-scale nature of *Zippo* becomes vulnerable to subjective results when applied. Sometimes the question as to whether to place a site in the "interactive" or "integral" category may turn more on a court's perception than on real differences in the manner in which the user employs the internet. For example, a judge in the Southern District of New York, while acknowledging that plaintiffs' allegations that defendants' mobile telephone and two-way e-mail services were used in New York to be "factually unsupported," nevertheless found the mere availability of the defendant's website in New York made it "intuitively apparent" that defendant's services were used by New York residents, thereby establishing a basis for jurisdiction as an interactive site, *Cable News Network, L.P. v. GoSMS.com, Inc.*[232].

[230] 1909 F.3d 333 (5th Cir 1999)
[231] 196 F.3d 1292 (10th Cir 1999).
[232] 2000 WL 1678039 (S.D.N.Y.) *available at:*
https://www.wired.com/images_blogs/threatlevel/2011/03/southam.pdf. (Visited on 12/8/2017).

In effect, this was the judicial transposition of a passive website into a highly interactive website.

Basically, U.S. courts have solved the internet cases into the same jurisdictional rules that they have the use for non-internet cases, with the result that U.S. courts lean toward limiting jurisdiction regulating only sites that intentionally direct themselves into the U.S. in some way. When the questions of applicable laws come, the many applicable laws will not necessarily be substantively compatible. Different states and nations will have different interests and each wants its laws to govern each dispute. This situation becomes extremely complicated when laws are not only inconsistent, but also incompatible; for example, in some states of the U.S., it is illegal to provide or engage in internet gambling, but in Liechtenstein, such gambling is government-sponsored. Although the situation of inconsistent laws occurs with moderate frequency now (especially in the antitrust and securities fields) it is likely to become even more common as electronic commerce becomes more prevalent.

When conflicts of law arise, the courts must decide which law will govern. A court need not decide a dispute according to its own law; for example, a court deciding a dispute arising out of an automobile accident in another state would be likely to apply the driving standards of the state where the dispute arose, rather than of the forum state. Several methods exist to aid courts in the decision between laws. Historically, U.S. courts decided a dispute according to the law in the *lex loci delicti,* the “place of the wrong.” In transnational cyberspace, however, the place of the wrong might be any of the nations that are online. There is no *lex loci delicti.* This is a reason why there is a conflict in e-Commerce jurisdiction.

4.3. Jurisdictional Conflicts: Indian Approach

Before the Information Technology Act, 2000 came into force; the e-Commerce jurisdiction in India was almost non-existent. The act was a result of the UNCITRAL model law on e-Commerce. When the legislators realized that the certain provisions of the Act were not sufficient to deal with the up growing jurisdictional issues in e-Commerce, there was an amendment in 2008. Information technology is recognized as the fastest medium of communication in the world today and its development is leading towards the unexpected challenges which make difficult for the courts for adjudication.

For the first time when the case of *WWE v. Reshma Collection* came before the Delhi High Court for the conflicting jurisdiction in e-world, the court reviewed various cases regarding the traditional principles of jurisdiction. Maybe the case for the first time in India referring the various provisions of different Acts became successful for determining jurisdiction at the age of the internet.

It's not that the Indian courts have not decided the matters with regard to jurisdiction but the cases with regard to the jurisdiction in e-Commerce are at an early stage. India's first case of cyber defamation *SMC Pneumatics (India) Pvt. Ltd v. Jogesh Kwatra*[233] gives a framework of jurisdictional issues. The Delhi High Court assumed jurisdiction over a matter where a corporate reputation was defamed through e-mails. The court passed an injunction which restrained the employee from sending, publishing and transmitting e-mails which are defamatory or derogatory to the plaintiffs.

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[233] *SMC Pneumatics (India) Pvt. Ltd v. Jogesh Kwatra* CS (OS) No. 1279/2001.

Sections 13 and 20 of the Civil Procedure Code, 1908 is interpreted in different forms and has been applied to the jurisdictional issues on e-Commerce world. The problem in e-Commerce is not only the two different parties residing in two different countries but also the laws which govern such parties. There was a case of *Casio India Co. Ltd. v. Ashita Tele Systems Pvt. Ltd.*[234] before the Delhi High Court which helps to understand the term jurisdiction on e-Commerce. The plaintiff has requested the Court for passing-off action where the defendant was carrying business from Bombay. The defendant had managed to get a registration of domain name and defendant no. 2 was the Registrar with whom the domain name had been registered.

The plaintiff, on the other hand, claimed to be a 100% subsidiary of Casio Computer Ltd., Japan (Casio Japan), which was the registered owner of the trademark 'Casio' in India used for a large number of electronic and other products. He had registered a large number of domain names in India like 'CasioIndiaCompany.com', 'CasioIndia.org', 'CasioIndia.net', etc. Defendant No. 1 had obtained the above domain names during the time when it held a distributorship agreement with the plaintiff. The learned single Judge held that "once access to the impugned domain name website could be had from anywhere else, the jurisdiction in such matters cannot be confined to the territorial limits of the residence of the defendant."[235] According to the learned single judge, "since a mere likelihood of deception, whereby an average person is likely to be deceived or confused was sufficient to entertain an action for passing off, it was not at all required to be proved that any actual deception

[234] *Casio India Co. Ltd. v. Ashita Tele Systems Pvt. Ltd.* 2003 (3) RAJ 506.
[235] *Ibid* (decision) *available at:* https://indiankanoon.org/doc/418389/ (Visited on 22/10/2017).

took place at Delhi. Accordingly, the fact that the website of Defendant No. 1 can be accessed from Delhi is sufficient to invoke the territorial jurisdiction of this Court".[236]

Other Cases are *Dodha House v. S. K. Maingi* and *Patel Field Marshal Industries and Ors. v. P.M. Diesal Limited (2006) (SCC 41).* There were two civil appeals before the Hon'ble Supreme Court.

In the 1st Civil Appeal, the plaintiff filed a suit against the respondent stating that the respondent had infringed the plaintiff's copyright, trademarks, and common law rights under the Copyright Act, 1957 and the Trademark Act, 1958.

Both the plaintiff and the defendant carried the similar business at different places. The plaintiff's place of business was Ghaziabad whereas the defendant's place of business was Kotkapura in the district of Faridkot. The plaintiff believing that the defendant has infringed his trademark, stood before the District court of Ghaziabad for an order of injunction and to retrain the defendant from continuing his business. The Additional District Judge passed an order of injunction on the basis of similarity of the work, label, and wrapper of the defendant's goods which are likely to cause confusion to the buyers. The court held that the marks are identical to each other and deceptive as well. The respondent filed an appeal before the High Court of Allahabad. The Court held that the Ghaziabad Court had no territorial jurisdiction to try the suit and held that the name 'Dodha' is a name of sweets which can manufacture by many

[236] Justice Muralidhar of the Delhi High Court has discussed the Law relating to Jurisdiction of Courts while dealing with a Passing Off action involving the use of universally accessible web site.

traders not only by a plaintiff. Against the said order, the appellant approached the Supreme Court.[237]

In the 2nd Civil Appeal, the appellant appeared before the Delhi High Court for infringement of the good name trademark 'Field Marshall' whose label was registered under the Copyright Act, 1957. The plaintiff and the appellant carry on business in Diesel engines at Rajkot. In the suit, it was assumed that goods manufactured by the Appellants with the plaintiff's trademarks are being sold in Delhi and the jurisdiction of the Delhi High Court is also attracted in view of Section 62(2) of the Copyright Act. The Single Judge held that the Court does not have any territorial jurisdiction to adjudicate the matter. The respondent preferred an appeal before the Division Bench. The said appeal was allowed. Against the order of the Division, Bench Respondent preferred an appeal before the Supreme Court. Thus, in both the impugned orders, there were contradictory views. The question before the court was whether the causes of action provided under the Copyright, Act 1957 and Trademark Act, 1958 would be maintainable in the same court or not just because it has the jurisdiction. The court after reviewing the sections 16-20 of the CPC, 1908 gave the contrary views,

- To determine if the jurisdiction of the District Court under the Copyright Act, 1957 and Trade Merchandise and marks Act, 1958, a case must be instituted within the respective jurisdiction where the whole or a part of the cause of action must arise.

- Sub-section (2) of Section 62 of the 1957 Act provides for an additional forum. Admittedly, no such additional forum had been created in terms of the provisions of the 1958 Act. The Parliament while enacting the Trade and Merchandise Marks Act in

[237] *Dodha House v. S. K. Maingi available at:* https://indiankanoon.org/search/?formInput=dhodha%20house&pagenum=8 (Visited on 22/11/2017).

the year 1958 was aware of the provisions of the 1957 Act. It still did not choose to make a similar provision therein. However, the Parliament while enacting the Trade Marks Act, 1999 provided for such an additional forum by enacting sub-section (2) of Section 134 of the Trade Marks Act. The court shall not, it is well well-settled, readily presume the existence of jurisdiction of a court which was not conferred by the statute. "We are not concerned in this case with the maintainability of a composite suit both under the 1957 Act and the 1958 Act. Indisputably, if such a situation arises, the same would be permissible; but the same may not be relevant for the purpose of determining the question of a forum where such suit can be instituted."[238]

There is a conflict of jurisdiction given under the Trade and Merchandise Mark Act 1958 and Copyright Act, 1957. In order to be settled down the problem of jurisdiction, there has to be the nexus of both the laws with Order II Rule 3 of Code of Civil Procedure, 1908 as it provides that the plaintiff may unite in the same suit several causes of action. 'Thereby, a cause of action for infringement of Copyright and a cause of action for infringement of Trade Mark or a cause of action of passing off are different. Even if one cause of action has no nexus with another, Order II Rule 3 of CPC may apply.'[239] Nonetheless, by reason of the application of Order II Rule 3 of the Code of Civil Procedure Code *ipso facto* would not confer jurisdiction upon a court which had none so as to enable it to consider infringement of trademark under the Copyright Act, 1957 as also the Trade and Merchandise Marks Act, 1958.

A cause of action will arise only when a registered trademark is used and not when an application is filed for registration of the trademark. A suit may lie where an

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[238] The Copyright Act, 1957.

[239] *Dodha House v. S. K. Maingi available at:* https://indiankanoon.org/doc/1001948/ (Visited on: 12/10/2017).

infringement of trademark or copyright takes place but a cause of action for filing the suit would not arise within the jurisdiction of the court only because an advertisement has been issued in the Trade Marks Journal or any other journal, notifying the factum of filing of such an application.[240] In the event, the averments in the plaint disclose a cause of action under the Copyright Act, indisputably, the same would survive but if the cause of action disclosed is confined only to infringement of Trade and Merchandise Act, or of passing off an action, the suit would not be maintainable. For our purpose, the question as to whether the defendant had been selling its products in Delhi or not is wholly irrelevant. It is possible that the goods manufactured by the plaintiff are available in the market of Delhi or they are sold in Delhi but that by itself would not mean that the plaintiff carries on any business in Delhi. For the purpose of attracting the jurisdiction of a court in terms of Section 62 (2) of the Copyright Act, 1957, the conditions precedent specified therein must be fulfilled, the requisites wherefore are that the plaintiff must actually and voluntarily reside to carry on business or personally work for gain.

For the purpose of invoking the jurisdiction of a court only because two causes of action joined in terms of the provisions of the Code of Civil Procedure, the same would not mean that thereby the jurisdiction can be conferred upon a court which had jurisdiction to try only the suit in respect of one cause of action and not the other. Recourse to the additional forum, however, in a given case, may be taken if both the causes of action arising within the jurisdiction of the court which otherwise had the necessary jurisdiction to decide all the issues.

[240] *Dodha House v. S. K. Maingi, available at:* https://indiankanoon.org/docfragment/1001948/?formInput=dhodhjudgments (Visited on 22/3/2017).

The Supreme Court went ahead and also explained the scope of the expression 'carries on the business' as provided in Section 62(2) of the Copyright Act, 1957.[241]

The present case is very relevant as cause of action of passing off is combined with the cause of action for infringement of trademark and/or infringement of Copyright and this case makes it clear that despite permissibility of joint causes of action

[241] "The expression 'carries on business' and the expression 'personally works for gain' connotes two different meanings. For the purpose of carrying on business only presence of a man at a place is not necessary. Such business may be carried at a place through an agent or a manager or through a servant. The owner may not event visit that place. The phrase 'carries on business" at a certain place would, therefore, mean having an interest in a business at that place, a voice in what is done, a share in the gain or loss and some control there over. The expression is much wider than what the expression in normal parlance connotes, because of the ambit of a civil action within the meaning of section 9 of the Code. But it is necessary that the following three conditions should be satisfied, namely:-

"(1) The agent must be a special agent who attends exclusively to the business of the principal and carries it on in the name of the principal and not a general agent who does business for any one that pays him. Thus, a trader in the Mufassil who habitually sends grain to Madras for sale by a firm of commission agents who have an independent business of selling goods for others on commission, cannot be said to "carry on business" in Madras. So a firm in England, carrying on business in the name of A.B. & Co., which employs upon the usual terms a Bombay firm carrying on business in the name of C.D. & Co., to act as the English firm's commission agents in Bombay, does not "carry on business" in Bombay so as to render itself liable to be sued in Bombay.

(2) The person acting as agent must be an agent in the strict sense of the term. The manager of a joint Hindu family is not an "agent" within the meaning of this condition.

(3) To constitute "carrying on business" at a certain place, the essential part of the business must take place in that place. Therefore, a retail dealer who sells goods in the Mufassil cannot be said to "carry on business" in Bombay merely because he has an agent in Bombay to import and purchase his stock for him. He cannot be said to carry on business in Bombay unless his agent made sales there on his behalf. A Calcutta firm that employs an agent at Amritsar who has no power to receive money or to enter into contracts, but only collects orders which are forwarded to and dealt with in Calcutta, cannot be said to do business in Amritsar. But a Bombay firm that has a branch office at Amritsar, where orders are received subject to confirmation by the head office at Bombay, and where money is paid and disbursed, is carrying on business at Amritsar and is liable to be sued at Amritsar. Similarly a Life Assurance Company which carries on business in Bombay and employs an agent at Madras who acts merely as a Post Office forwarding proposals and sending moneys cannot be said to do business in Madras. Where a contract of insurance was made at place A and the insurance amount was also payable there, a suit filed at place B where the insurance Co. had a branch office was held not maintainable. Where the plaintiff instituted a suit at Kozhikode alleging that its account with the defendant Bank at its Calcutta branch had been wrongly debited and it was claimed that that court had jurisdiction as the defendant had a branch there, it was held that the existence of a branch was not part of the cause of action and that the Kozhikode Court therefore had no jurisdiction. But when a company through incorporated outside India gets itself registered in India and does business in a place in India through its agent authorized to accept insurance proposals, and to pay claims, and to do other business incidental to the work of agency, the company carries on business at the place of business in India.

A corporation in view of Explanation appended to Section 20 of the Code would be deemed to be carrying on business inter alia at a place where it has a subordinate office. Only because, its goods are being sold at a place would thus evidently not mean that it carries a business at that place."

allowed by Code of Civil Procedure, 1908, a Court will not have jurisdiction for a cause of action which has not arisen in its territorial jurisdiction. Further, the case explains the scope of 'carries on a business' which not only forms part of Section 62(2) of the Copyright Act, 1957 but also Section 134 (2) of the Trade Marks Act, 1999. The case is therefore equally applicable in the e-Commerce jurisdiction as the cause of action is an essential element to determine the jurisdiction even in the borderless world. The Dodha case is significant not only because it provided the general rule for jurisdiction but because it also provided various significant interpretations regarding carries on business and cause of action which were required in the conflicting jurisdiction.

Another case is *India TV Independent News Service Pvt. Limited v. India Broadcast Live & Ors*[242].

In this case, the court adopted a different approach than the previous case laws. The plaintiff ran a Hindi news channel 'INDIA TV' launched in March 2004. The plaintiff claimed that they have adopted the trademark 'INDIA TV' since 1st December 2002 and for proving they had applied for registration of the mark. The relevant applications had been published in the trademarks journal.[243] Apart from that, the plaintiff had also the presence on the internet as he owned the domain name which was registered on 18.11.2003. This domain name was used to make available the live viewing of news channel on the said website. While browsing on the net plaintiff came across a similar website named as which was owned by Defendants 1 & 2. The defendant's website contained the words 'INDIA TV' which were visible

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[242] *India TV Independent News Service Pvt. Limited v. India Broadcast Live & Ors.* 2007(35)PTC 177(Del.)

[243] *Ibid available at:* https://indiankanoon.org/doc/1043775/ (Visited on 24/08/2017).

prominently. The plaintiff filed a passing off action against defendant in the Delhi High Court to avert Defendant No. 2 from using the domain name. While the suit was pending before the Delhi High Court, Defendant No. 1 proceeded with an action instituted by it in the Arizona District Court in the USA, where the defendants were located, against the plaintiff seeking a declaration of non-infringement of the plaintiff's mark by Defendant No. 1. The plaintiff approached the Delhi High Court stating that the defendant had suppressed the fact of having filed the aforesaid action in Arizona and prayed for an injunction against the defendant from proceeding with the said action in the Arizona courts particularly since the suit in the Delhi High Court was a prior action. In resisting the said application, defendant No. 1 took the stand that the Delhi High Court was not a court of competent jurisdiction as it was not the appropriate forum. Inasmuch as the defendants did not reside or work for gain in India, it was only the District Court in Arizona that was the appropriate forum to decide the dispute.

It was argued before the court that in order to attain personal jurisdiction, i.e., jurisdiction over the person in contrast to the jurisdiction of a court over a defendant's property or his interest therein, there should be a long arm statute on the basis of which the court could exercise jurisdiction over any individual located outside the state. As regards the internet, it was argued that it was not enough to establish that there was a passive website. The court referred to the purposeful availment test and the three factors highlighted in *Cybersell Inc. v. Cybersell Inc*.[244] The learned single Judge then noticed that India did not have a long arm statute to grant jurisdiction to non-resident defendants. Therefore, it had to be examined on the basis of the principles of *Minimum Contact:*

[244] 130 F. 3d 414 (9th Cir. 1997).

a. ‘whether the defendant’s activities have a sufficient connection or closest connection with the forum state (India); or,

b. Whether the cause of action arises out of the defendant’s activities within the forum, or,

c. Whether the exercise of jurisdiction would be reasonable.’[245]

‘The principle to determine the jurisdiction requires a website to be accessible in a particular place.’[246] Contrarily, the court in the present case observed that accessing the website in a particular place does not give sufficient jurisdiction to the courts of that particular place to exercise personal jurisdiction over the owners of the website. But where the website is not merely ‘passive’ but is interactive permits the browsers not only to access the contents thereof but also subscribe to the services provided by the owners/operators, the position would be different. However, it was held in the case of *Cybersell Inc.* even where a website is interactive, the level of interactivity would be relevant and limited interactivity may also not be sufficient for a court to exercise jurisdiction. When the registration of domain name by the defendant had the effect of injuring the plaintiff’s mark in California, it can be held that the court had jurisdiction. This concept was observed in the case of *Panavision International LP*. Again in the case of CompuServe case, it was found that the defendant had contacted Ohio to sell his computer software’s on the Plaintiff’s Ohio-based systems and sent his goods to Ohio further for their ultimate sale and thus those courts had jurisdiction.

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[245] *India TV Independent News v. India Broadcast Live LIs and Ors.* MIPR 2007 (2), 2007 (35) PTC 177 Del, *available at:* https://indiankanoon.org/doc/1043775/ (Visited on 24/11/2017).
[246] *Ibid*

The website ‘indiatvlive.com’ of Defendant No. 1 is not wholly of a ‘passive’ character. It has a specific section for a subscription to its services and the options which are provided on the website itself for the countries whose residents can subscribe to the services including India. The services provided by Defendant No. 1 can thus be subscribed and availed of in Delhi (India) i.e. within the jurisdiction of this court. The Court after refereeing to the interactive and passive websites the learned Single Judge concluded that India TV that “Defendant No. 1 intended to target expatriate Indians as well as Indians within the country.”[247] Furthermore, the stand taken by Defendant No. 1 in its written statement was that it had a global presence including a presence in India. It claimed to be the first IPTV delivery system for Indian content from India. The website of Defendant No. 1 was launched in India as well as in Los Angeles. It was accordingly held that Defendant No. 1 Company has sufficient connection with India. As regards the ‘effects’ test, it was held that since the plaintiff channel was an Indian news channel intended for Indian audiences, any damage alleged to have been caused or alleged to be likely to rise to the goodwill, reputation, etc. of the plaintiff would be in India. However, the alleged damage that may have arisen or may be likely to rise to the plaintiff would be as a consequence of the fact that the impugned website is accessible in India and the services provided can be availed of in India. Consequently, it was held that “the Defendant is carrying on activities within the jurisdiction of this court and has sufficient contacts with the jurisdiction of the court and the claim of the Plaintiff has arisen as a consequence of the activities of Defendant No. 1 within the jurisdiction of this court.”[248]

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[247] Decision rendered by the Single Judge, Delhi High Court, *available at:* https://indiankanoon.org/doc/1043775/ (Visited on 22/10/2017).
[248] Gurujit Singh, “Conflict of laws of copyright in cyberspace: A Comparative study of USA, European Countries, Japan and Indian Law”, *available at:* http://hdl.handle.net/10603/13638 (Visited on 13/4/2016).

There is a recent ruling by the Division Bench of the Delhi High Court which dealt with the question of ascertaining jurisdiction of a forum where a suit for passing off or alternatively trademark infringement by a universally accessible website was initiated in the case of *Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy & Anr.*[249] Neither the defendant nor the plaintiff had any presence in Delhi, the place where the matter was perused. Interpreting section 20 (c) of the Civil Procedure Code, 1908 ("CPC"), the Court laid down basic principles for ascertaining the jurisdiction of a court, where the website is accessible from all over the globe, including from the place where the forum was situated.[250]

The plaintiff had maintained the websites named *'www.banyantree.com'* and *'www.banyantreespa.com'* since 1996 and claimed that the use of the word mark 'Banyan Tree' and the banyan tree device had acquired a secondary meaning through its long-term use. They, therefore, claimed that the defendant's use of the same amounted to passing off. Since the plaintiff had no registered trademark in the word phrase or its device and it was an action of passing off. As in a case of the Copyright Act, 1957, under section 134(2) of the Trademarks Act, 1999, the action for infringement can be filed where the plaintiff resides, works for gain or carries on business. But passing off action does not get the benefit of this provision. In such cases, the governing provision of law was section 20 (c) of the CPC, which allows the jurisdiction of a matter to be filed with a court within the territorial precincts of which the cause of action of the matter arose or the defendant resides, works for gain or carries on business. In this regard, the Court concerned itself with the factors which would grant it the jurisdiction over the defendant.

[249] CS (OS) 894/2008 (High Court of Delhi, 23rd November 2009) (India).
[250] *Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy & Anr. available at:* https://www.scribd.com/doc/83270405/Banyan-Tree-Case-Study (Visited on 26/08/2017).

The Court framed the following questions for this purpose:

1. For the purposes of a passing off action or an infringement action where the plaintiff is not carrying on business within the jurisdiction of a court, in what circumstances can it be said that the hosting of a universally accessible website by the defendants lends jurisdiction to such court where such suit is filed?

2. In a passing off or infringement action, where the defendant is sought to be sued on the basis that its website is accessible in the forum state, what is the extent of the burden on the Plaintiff to prima facie establish that the forum court has jurisdiction to entertain the suit?

3. Whether it is permissible for the plaintiff to establish such prima facie case through "trap orders" or "trap transactions" i.e. a transaction engineered by the Plaintiff itself, particularly when it is not otherwise shown that the defendant intended to specifically target customers in the forum state? [251]

The case went into a survey of the position of law as prevails in various common law jurisdictions. The Court referred to various judgments from the USA, the UK, Canada and other countries where the question of exercising jurisdiction over a matter due to a cause of action arising from a website was concerned. The Court did not decide the matter on facts but held that a mere passive website, accessible from a territory would not grant courts in that jurisdiction to take cognizance of the matter. The Court surveyed case laws of many common law jurisdictions, relevant to the question of ascertaining jurisdiction and held that the mere access to the defendant's website in Delhi would not enable the Court to exercise jurisdiction.

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[251] Facts of Banyan Case, *available at:* www.nishithdesai.com. (Visited on 12/12/2017).

There is a well-accepted position of common law jurisdictions that when the passive website does not have the intention to target the audiences outside the state where the host of the website is located, the said forum cannot be vested with the jurisdiction.[252] A passive website, with no intention to specifically target audiences outside the State where the host of the website is located, cannot vest the forum court with jurisdiction and the same was a well-accepted position in common law jurisdictions.

4.4. United Nation Commission on International Trade Law (UNCITRAL)

UNCITRAL is a core legal body of the United Nations in the field of international trade law. It has a universal membership specializing in commercial law reform worldwide for over 50 years. UNCITRAL's business is the modernization and harmonization of rules on international business. International Trade was growing faster by crossing national boundaries and therefore in order to cooperate with the national and regional laws of every country, a global set of the standard was required which would remove all the obstacles and barriers and make a trade business possible.

UNCITRAL was created with a mandate to progressive harmonization and the unification of the law of international trade law. 'It is a guide for individual countries for preparing their own national legislative response.'[253] The main purpose of the UNCITRAL is to formulate modern, fair, and harmonized rules on commercial transactions. These include:

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[252] The above cases establish that plaintiffs invoking jurisdiction of courts under the jurisdiction clause under CPC, are required to satisfy the test of commercial activity carried on by the defendant in the forum and would need to show that it directed its activities to enter into commercial transactions with parties in the forum. The same test is increasingly gaining significance in matters where no long arm statute is available and litigants are required to stay mindful of it.

[253] United Nations Conference on Trade and Development: Information Economy Report 2006, The Development Perspective, *available at:* http://unctad.org/en/Docs/sdteecb20061ch8_en.pdf (Visited on 21/11/2017).

- ‘Conventions, model laws and rules which are acceptable worldwide
- Legal and legislative guides and recommendations of great practical value
- Updated information on case law and enactments of uniform commercial law
- Technical assistance in law reform projects
- Regional and national seminars on the uniform commercial law.’[254]

4.4.1. Model Law on E-Commerce (1996)

The decision by UNCITRAL to formulate model legislation on electronic commerce was taken in response to the fact that in a number of countries the existing legislation governing communication and storage of information is inadequate or outdated because it does not contemplate the use of electronic commerce, therefore, the purpose of the Model Law is to offer all the national legislators a set of internationally acceptable rules as to how a number of such legal obstacles may be removed, and how a more secure legal environment may be created for what has become known as “electronic commerce”. The Model Law also help to remedy disadvantages that stem from the fact that inadequate legislation at the national level creates obstacles to international trade, a significant amount of which is linked to the use of modern communication techniques. Disparities and uncertainties among national legal regimes governing the use of such communication techniques may limit the flow of businesses in international markets.

[254] United Nation Commission on International Trade Law, *available at:* http://www.uncitral.org/ (Visited on 3/10/2017).

For the first time, a Model Law on E-commerce (MLEC) was adopted in 1996 by United Nations Commission on International Trade and Law (UNCITRAL). It was further adopted by General Assembly of United Nations by passing a resolution on 30th January 1997. Significantly, MLEC was first legislative text to adopt the fundamental principles of non-discrimination, technological neutrality and functional equivalence that are widely regarded as the founding elements of modern electronic commerce law. The main objective of the Model Law was to have uniformity at international level regarding law relating to e-Commerce and to provide equal treatment to paper-based and electronic information. India was also a signatory to the Model Law on the basis of which Information Technology Act, 2000 came into force. Due to the new and different type of activities in e-Commerce, various legal aspects have come up. These legal disputes and case laws are attracting the attention of industries and governments around the world.

The internet by its nature is international, yet there is no uniform legal framework for commercial transactions harmonized for the global marketplace. As a result, the parties subject to an international contract will face the jurisdiction issues and conflicts of law issues arise from the coverage of the different legal system. The contractual provision of different nations creates a complication for not only e-Commerce companies but also the parties located in different corners of the globe. The provisions for jurisdictional conflicts are not provided in the Model law which will create the difficulties and as a result, it will lead the complication to determine the location of the server/person in the e-contract transaction. Yet, the Model law helped the nations to unify their laws and formulated harmonized regulations.

4.4.2. Model Law on Electronic Signature (2001)

'On the success of the Model Law as a precedent for national law reform, UNCITRAL adopted a Model Law on Electronic Signatures in 2001[255] which builds on the signature provision in the 1996 Model Law. From a legal and security perspective, signatures provide two of such techniques are seen as critical to the widespread adoption of electronic commerce, particularly in terms of meeting the requirements of Governments and regulatory authorities. The 2001 Model Law addresses an issue raised in the 1996 Model Law concerning the reliability of an electronic signature. Article 7 of the 1996 Model Law states that an electronic signature shall satisfy a requirement for a signature where it meets two criteria: first, that the signature technique identifies the signatory and indicates his or her approval of the message content, which reflects the basic functions of a signature; and second, that the method used was as reliable as was appropriate for the purpose, which reflects the security functionality of a signature. The 2001 Model Law addresses the issue of reliability by laying down certain criteria that, if met by a particular form of electronic signature, would be presumed to be reliable for the purposes of Article 7. The 2001 Model Law also places behavioral obligations upon the signatory and the relying party, as well as a third-party certification service provider (CSP). As such, the 2001 Model follows the stance taken in the European Union Directive on Electronic Signatures in 1999,[256] remaining technology-neutral in the establishment of trust and security in an electronic commerce environment.'[257]

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[255] Official Records of the General Assembly, 56th Session Resolution A/60/80 *available at:* http://www/uncitral.org in English, French, Arabic, Chinese, Russian and Spanish (Visited on 12/11/2017).
[256] Directive 1999/93/EC "on a community framework for electronic signature" *OJL* 13/12 (2000).
[257] UNCITRAL Information Economy Report 2006: The Development Perspective, United Nations, *available at:* http://unctad.org/en/Docs/sdteecb20061ch8_en.pdf (Visited on 17/9/2017).

Subject matters in the field of electronic commerce are very board. Dealing with the variety of issues, international organizations are making efforts to harmonize them through the heart and base of electronic contracting and electronic signatures. Electronic signatures are considered as one of the important element for signing the electronic contract. UNCITRAL has been urged to update legal issues on the international use of electronic authentication and signature methods because the existing instruments which were promulgated a long time ago need to be better equipped to deal with the current development of the information society. The UNCITRAL Model Law on Electronic Signatures has been adopted after 5 years of the enactment of the Model law on e-Commerce. Accordingly, India enacted Information Technology (Amendment) Act, 2008. It is because of the fact that the Model Law on E-Commerce completely could not sort out the conflicts that have been raised from the use of the internet. There were technical obstacles in the formation of cross-border contracts through the electronic medium. With the aim of enhancing legal certainty and commercial predictability in cross-border electronic commercial contracts it addresses issues such as the validity of electronic communication, the location of parties, the time and place of dispatch and receipt of electronic communication, the use of automated message systems for contract formation and the availability of contract terms and errors in electronic communications. The provisions in the Model Law on Electronic Signature stipulate the progress of the harmonization of national laws.[258] Though the Model law does not contain any provision for the jurisdiction yet the general provisions are valuable for analyzing parties' location in cyberspace and are thus helpful for determining internet jurisdiction and choice of law.

[258] Faye Fangfei Wang, Law *of Electronic Commercial Transactions: Contemporary Issues in the EU, US and China* (Library of Congress Cataloging in Publication Data, 2010).

The United Nation Convention on Electronic Contracts provides an interpretation of connecting facts such as the time and place of dispatch and receipt of data messages or electronic communication and the location of the parties. It refers to the location of the parties as well as the place of the business, the closest relationship to the relevant contract, the underlying transaction or the principal place of business or habitual residence.

4.4.3. UNCITRAL Electronic Contract Convention

Soon after 4 years enactment of Model Law on Electronic Signature, the Convention on the Use of Electronic Communications in International Contracts (CUECIC) was approved by the United Nations Commission on International Trade Law (UNCITRAL) in July 2005. It is an enabling treaty whose effect is to remove those formal obstacles by establishing equivalence electronic and written forms. "The convention is intended to strengthen harmonization of rules regarding electronic commerce and to foster uniformity in the domestic enactment of UNCITRAL. It also updates and contemplates certain provisions of those model laws in the light of recent practice. And it also provides those countries that have not yet adopted provisions on electronic commerce with modern, uniform and carefully drafted legislation."[259] It was obvious that there were conflicts between the domestic law permitting electronic contracts and other pre-existing treaties requiring physical documents.[260] These divergences and the limited applicability of domestic legislation to parties in foreign

[259] The UN Convention on the Use of Electronic Communication in International Contracts, *Trade Facilitation Implementation Guide,* UNECE, *available at:* http://tfig.unece.org/contents/convention-use-e-communication.htm (Visited on 17/9/2017).
[260] Philip M. Nichols, "Electronic Uncertainty Within the International Trade Regime" 15 *AMU INT'LLR* 1379, 1405 (2000).

locations led the United Nations in 1998 to recommend an international convention on electronic commerce based on pre-existing MLEC principles.[261]

UNCITRAL has adopted the Model Law on Electronic Commerce (MLEC) in 1996 as a concept for domestic legislation of U.N. member states.[262] The domestic legislation of nations is different from MLEC principles and from that of laws of the e-Commerce particularly regarding authentication of electronic signatures.[263] The principles of technological neutrality, national source neutrality, and party autonomy in the choice of applicable contract law and rules[264] were not included in the previous treaties and domestic legislation. Therefore, the convention on electronic contracts aimed at equalizing the legal consequences of electronic and physical communications used under these pre-existing conventions.[265] In addition, as John Gregory states, "The rules of the MLEC were done as a model law at the time it was adopted because the people were tentative about its solutions. Now they have proved valid and workable and deserve more legal force behind them."[266] Although the UNCITRAL Convention on Contracts for the International Sale of Goods (CISG) does not require physical writings for contracts to be governed by it (subject to party

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[261] U.N. Convention on International Trade Law, Working Group on Electronic Commerce, Note by the Secretariat, Proposal by the United States of America, U.N. Doc. A/ CN.9/WG.IV/WP.77 (May 25, 1998), *available at*: http://www.uncitral.org (last visited Apr. 8, 2005)
(The market appears unlikely to settle on one universal authentication mechanism or model of implementation in the near future. Parties appear headed toward a choice between different types of authentication regimes, depending on the nature of the transaction and upon the prior relationship, if any, among the parties to the transaction. For example, a large company may choose one authentication method for the electronic system used to procure goods from suppliers, but a different method for on-line purchases by its customers).
[262] Supra 44
[263] John D. Gregory, "The Proposed UNCITRAL Convention on Electronic Contracts", 59 *Bus. L.* 313, 317 (2003).
[264] Christopher T. Poggi, "Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation" 41 *VA. J. INT'L L.* 224, 272 (2000).
[265] "In favor of preparing e-contracts convention, it was said that a convention could contribute to the legislative arsenal of means of increasing legal certainty or commercial predictability in electronic business transactions-alongside the MLEC and other instruments." Id.
[266] *Ibid*

declarations otherwise), its provisions did not contemplate and therefore do not provide for electronic communications.[267] The Model Law on E-Commerce has influenced many nations with respect to legislative drafting and proposals. Recent enactments and uniform laws now circulating in Canada and the United States were heavily influenced by the Model Law, and drafting committees from the two countries are exchanging ideas on the subjects. For the first time, India adopted cyber laws. In the European Union, the Electronic Commerce Directive and the Electronic Signatures Directive were also influenced greatly by the Model Law and Draft Rules.[268]

The convention applies to all the electronic communications exchanged between the parties whose places of business are in different states when at least one party has its place of business in a contracting state under At. 1. On the basis of this article, the jurisdictional conflicts can be decided with the help of other articles. Art. 10 talks about the time and place of dispatch and receipt of electronic communications and it can be read with Art. 1 in order to clarify the concrete confusion of jurisdiction on the e-Commerce transactions. The provision for choice of the parties is also recognized by the Convention.

Recognizing the split in legislative attitudes in the e-Commerce world, UNCITRAL has created the Model Law on a technology-neutral and functional equivalency basis but left it broad enough to be adapted to specific rules by individual states. Unfortunately, this creates an atmosphere of uncertainty because there is to prevent states from adopting rules which exclude equivalent methods or even identical

[267] *Ibid*, page No. 318.
[268] Christopher T. Poggi, "Electronic Commerce Legislation: An Analysis of European and American Approaches to Contract Formation", (2000) 41 Va. J. Int'l L. 224, at 227.

methods if foreign.[269] It has been also commented that the Model Law threatens the party autonomy in the choice of electronic transaction models and creates an incoherent set of electronic signature regulations that manage to be both too vague and too prescriptive at the same time. The Model Law on Electronic Signature has come into force after being adopted by the largest e-Commerce nations like North America, Europe, and Asia but before many developing countries have done so. Yet the Model Law does little to bridge the gap among laws already on the books. Instead, in important ways, it charts a course that differs from all of the electronic signature laws that have been adopted so far. As a result, the Model Law has the potential to confuse international practice in this important field and to relegate developing countries that adopt it to a backwater of electronic commerce. The resulting confusion could significantly hinder the ability to use electronic signatures on a global basis. In short, e-Commerce companies are likely to see this Model Law as a step backward for the use of electronic signatures and, consequently, for their ability to engage in global electronic commerce.

The UNCITRAL Model Law was drafted as guidance for all the national legislators to frame their own national legislation response towards the international trade. Therefore, it cannot be considered as an international treaty upon which the legislators and the policymakers could rely for all the solutions. The National legislators and policymakers are not required to adopt the UNCITRAL Model Law in its entirety or reject in its entirety but they may modify it to meet the concrete needs or concerns according to the national environment.

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[269] Richard Horning, "Symposium Presentation: Legal Recognition of Digital Signatures - A Global Status Report", (2000) 22:2 Hastings Comm. & Ent. L.J. 191, at 199 regarding the German system.

4.4.4. Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Private International Law)

Generally, under Private International Law jurisdiction and applicable laws are determined by each country's internal private international law rules.[270] Traditionally, private international law designates jurisdiction based on the existence of various objective connecting factors between a particular country and a dispute.[271] With the beginning of e-Commerce, it has become increasingly difficult to apply traditional connecting factors of private international law where commercial activities take place such as the place of delivery of products and so forth which often require the determination of the location.[272] Internet transactions do not obey the rules of traditional boundaries and they are carried out online, over a network and as a result, the location of activities has also, to some extent, lost much of its importance in the e-world.[273] One of the main challenges in contemporary private international law is how to handle such legal obstacles that arise from ever-developing technology.[274] In the context of e-Commerce, the conflicting interests between sellers and buyers create a jurisdictional problem; sellers do not want to litigate in foreign countries while buyers prefer to seek solutions near home.[275] From a business point of view, the scenario of being hauled into court in a foreign jurisdiction is not pleasant. In most

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[270] P. Lindskoug, *Domsrätt och lagval vid elektronisk handel*, 24 (2004).

[271] According to Briggs, connecting factors generally fall into two broad categories; firstly, those which define the law by looking at the personal connection to a country such as nationality or residence, and secondly, those which define the law in relation to the state of affairs. See Briggs, A, *The Conflict of Laws,* 2008, pp. 20-28.

[272] Sven Lindblom, "Internet Jurisdiction over B2C Contracts under the Brussels I Regulation after the CJEU's Decision in Joined Cases: Pammer and Alpenhof" (2012).

[273] M. Bogdan, "Jurisdiktions- och lagvalsfrågor på Internet" 4 *NYJ* 7-26 (1999).

[274] F., Wang, "Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China, pp. 7-8 (2010).

[275] *Ibid* p. 19.

cases, however, the parties can avoid much of this uncertainty by inserting a choice of jurisdiction clause into the contract. By doing so, a party limits much of its potential exposure to foreign courts and litigation. It also increases foreseeability for both contracting parties.[276] E-Commerce involves multiple jurisdictions and the laws of that jurisdiction are different. Conflicts of law problems arise in the three areas that are related to the power of the deciding court to make a decision and the decision itself.

Here, the jurisdictional conflict being adopted because of the borderless nature of the internet makes the courts use a number of approaches to determine which law should be applied considering a variety of factors. Despite the variety of approaches, most courts apply the traditional theory and it gave a pave to complications in the area of the internet.

However, the private international law is the body of law that seeks to resolve certain questions that result from the presence of a foreign element in legal relationships even in the case of e-Commerce. Private International Law concerns relations across different legal jurisdictions between persons and sometimes also companies, corporations, and other legal activities. Under Private International Law, there is a conflict of laws on jurisdictional issues. It is concerned with civil and commercial laws rather than criminal and administrative matters. These laws can be divided into three areas-

(i) The jurisdiction of the court, its competence to hear and decide a case,

(ii) The law governing a relationship, the rules applicable for deciding a case,

[276] Supra 33.

(iii) The recognition and enforcement of judgments rendered by foreign courts.

When there are multiple jurisdictions, it is obvious that the court shall face the issue of circumstances that which court will set aside its own law to apply the law of another jurisdiction. The power of the court to decide the matter is very important otherwise the judgment will be irrelevant. Therefore, the court also faces the issue of whether the court has the power to render the decision over the parties or to settle the disputes itself. Once the dispute is decided, whether the decision so gave will be recognized by the other parties residing in different countries or not is a matter of confusion which may lead to disputes. While the internet has undoubtedly opened up new worlds of interaction and cooperation across borders, there is an increase of transnational activity which creates confusion more than the physical world.[277] As with the choice of law, the doctrine of recognition of judgments encourages courts to consider the multistate nature of the legal issue they are addressing, rather than simply assuming that the question must be resolved through the application of forum law. Conflict of laws in jurisdiction arises whenever the situation out of which a dispute arise has contacts with more than one law district when more than one set of laws appears to be of relevance. With the advent of the internet, cross-border relationships have intensified raising more complex questions of jurisdictions and applicable laws in Private International Law. A special characteristic of internet-based transactions is a matter of debate in Private International Law. The Hague Conference on Private International Law has been the worldwide leader on internet jurisdiction issues. The conference aimed at facilitating the lives of the citizens, private and commercial, in

[277] Paul Schiff Berman, "Choice of Law and jurisdiction on the internet", Current Debates in the Conflicts of Laws (2004).

cross-border relationships and transactions.[278] The Convention concerns over the negotiations for a new treaty that seeks to strengthen the global enforcement of private judgments and injunctive relief in commercial litigation. While the convention would clearly have some benefits, in terms of stricter enforcement of civil judgments, it would also greatly undermine national sovereignty and inflict far-reaching and profound harm on the public in a wide range of issues. The treaty is called the Hague Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters and is being negotiated under the little known Hague Conference on Private International Law.

The general framework for the convention is that the countries agree to follow the set of rules regarding jurisdiction for cross-border litigation once they sign the convention. "All civil and commercial litigation comes under this convention. So long as these jurisdiction rules are followed, every country agrees to enforce nearly all of the member country judgments and injunctive orders, subject only to a narrow exception for judgments that are manifestly incompatible with public policy, or to specific treaty exceptions, such as the one for certain antitrust claims. A judgment in one country is enforced in all Hague convention member countries, even if the country has no connection to a particular dispute. There are no requirements to harmonize national laws on any topic, except for jurisdiction rules, and save the narrow Article 28(f) public policy exception, there are no restrictions on the types of national laws that to be enforced. All 'business to business' choice of forum contracts are enforced under the convention. This is true even for non-negotiated mass-market contracts. Under the most recent drafts of the convention, many consumer

[278] Paras Diwan and Peeyushi Diwan, *Private International Law: Indian and English* (Deep and Deep Publications, New Delhi, 4th Revised and Enlarged edn.1998).

transactions, such as the purchase of a work-related airline ticket from a website, the sale of software to a school or the sale of a book to a library, is defined as a business to business transaction, which means that vendors of goods or services or publishers can eliminate the right to sue or be sued in the country where a person lives and often engage in extensive forum shopping for the rules most favorable to the seller or publisher."[279] The principle behind this convention is to increase the effective enforcement of decisions of courts around the world where the parties are operating out of different jurisdictions.

The internet issues deserve special attention. The treaty gives nearly every member country jurisdiction over anything that is published on or distributed over the internet. If the treaty (as written) is widely adopted, it will cripple the internet. The reason is fairly straightforward. The Hague framework begins with the notion that there will not be harmonization of substantive law, only harmonization of rules regarding jurisdiction and enforcement of laws. So it is a fundamental part of the Hague treaty that laws that are very different from each other will be enforced, across borders.

For example, 'under the treaty, different national laws concerning libel or slander will give rise to judgments and injunctions, also different national laws regarding copyright, patents, trademarks, trade secrets, unsolicited email, unfair competition, comparative advertising, parallel imports of goods, and countless other items. As a consequence, people will find that activities that are legal where they live are considered illegal in a different country and that under the treaty, the foreign country

[279] What you should know about the Hague Conference on Private International Law's Proposed Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *available at:* http://www.cptech.org/ecom/jurisdiction/whatyoushouldknow.html (Visited on 12/7/2017).

will likely have jurisdiction, and their laws will be enforceable in all Hague member countries.'[280]

4.5. Conclusion

The e-Commerce through the internet is the relatively new way of business. We have not yet understood its legal implications precisely. The international jurisdiction which is a part of e-Commerce poses fundamental challenges to the sovereignty of every country's legislative and jurisdictional powers. The legal issues like conflicts of law will block the roads to the effective global reach of e-Commerce models. When we look at the meteoric rise of e-Commerce, legal disputes in the e-Commerce sphere are already cropping up time a dozen. These disputes are unique unlike traditional businesses which are permanently established in a particular geographical region. E-Commerce businesses enjoy a virtual/online presence and this inevitably leads to questions of jurisdiction being pondered by the Court. There are several ways that the infrastructure of the internet has made it difficult to establish the geographic location of the internet user. Discussing the approaches used by the US courts and Indian courts for settling of conflicts, it can be concluded that though they refer the different theories but the courts of both countries try to settle the disputes identifying the location of the server and the location of the parties. Due to the absence of the uniform law, the countries have enacted their own rules for dealing the matter of e-Commerce. Most of the countries follow the principles governing traditional contracts and commerce when applied to the e-Commerce; the courts face the problem of these principles as current technology has converted the nature of the problem of the commercial transaction. E-Commerce may be much more complex than any other

[280] *Ibid*

business. There are more than two sets of rules. In international commerce, there are hundreds of sets of rules. That is, as e-Commerce touches every country around the world, the laws from these countries are potentially involved in an e-Commerce dispute. These laws are fluid, changing to adapt changes in business and society. Even operating solely within the United States, there are fifty different state statutory complications. The common law varies state to state. There is the possibility of federal law applicable to a given dispute in the U.S.

The lack of a tangible physical location of the internet has added an even more complex element to the rules and dispute resolution of cross-border commerce. The regulations imposed on online businesses and contracts by nations around the world have become a major point of contention in e-Commerce's evolution. The pace of regulation is not uniform, so accounting for the disparities between technological and regulatory systems of various nations can be quite difficult. As people and transactions became more mobile, it became difficult to determine the current location of the parties, therefore, the thorny conflicts of jurisdiction are on rise. The very phrase *"cyberspace"*[281] suggests the displacement of the molecular world. Indeed, cyberspace evokes a sense that the real action is not occurring in physical space, but in some ethereal fifth dimension.[282] So, therefore, there are many unanswered questions of jurisdictional rules in the internet transaction.

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[281] The term 'cyberspace' is generally credited to science fiction author William Gibson in his novel Neuromancer.

[282] Because events on the Net occur everywhere but nowhere in particular, are engaged in by online personae who are both "real" (possessing reputations and capable of performing services and deploying intellectual assets) and "intangible" (not necessarily or traceably tied to any particular person in the physical sense), and concern "things" (messages, databases, standing relationships) that are not necessarily separated from one another by any physical boundaries, no physical jurisdiction has a more compelling claim than any other to subject these events exclusively to its laws.

CHAPTER-V

CONCLUSION AND SUGGESTIONS

The internet is redefining the way that business is done worldwide without any question. There is need to conduct business around the world in such a manner that it does not subject them to fragmentation. Cyberspace is a new human and technological environment where inconsistent laws and multiple jurisdictions increase risk and might discourage the people from entering into the marketplace. E-Commerce gives an environment where people from different countries, cultures, languages of all ages are engaged in business activities, involving businesses supplying and demanding information. Today, the economy is involving a new business environment in which money, goods, services, and information are exchanged electronically. The central problem of the e-Commerce is jurisdiction. The term *'jurisdiction'* has lead to complexities because of the fact that it has invited various viewpoints for its resolution including significant changes in the existing legal framework. It affects the very foundation of the framework of the substantive and procedural laws of every country. The e-environment does not simply knock down the locality but also reduce the importance of physical location which may lead complications because of differences in laws. It goes beyond the physical boundary to facilitate businesses to consumers of different countries where the buyer and the seller become the complete stranger. The jurisdictional laws binding over these strangers are completely different. Hence, the territorial jurisdiction on e-Commerce becomes problematic. In case of any dispute involving a worldwide market like e-Commerce there are multiple laws which are applicable for the assessment of the principle on territoriality. In this regard, it is a great challenge to mold and precisely apply the existing legal

framework for the better protection of e-consumers worldwide. This poses a need for uniform consumer law applicable on e-consumers worldwide because to exercise jurisdiction over a person a court must have personal jurisdiction over the parties to the disputes as well as over the subject matter of the dispute. The law of contract also permits the parties to enter into the agreement as per their own terms and conditions with the provision to choose the forum for dispute resolution.

Choosing the forum and choice of law provisions in the e-contract has created uncertainty and misunderstanding among the parties entering into the contract from different nations. The issue of cross-jurisdiction can be looked from two perspectives i.e. (a) Prescriptive Jurisdiction and, (b) Enforcement Jurisdiction. Prescriptive jurisdiction is about the power where the State may legislate of any matter irrespective of where it occurs of the nationality of the persons involved while Enforcement Jurisdiction is the ability of the State to enforce those laws which are necessarily dependent on the existence or prescriptive jurisdiction. Here it is worth to mention that the principle of *'minimum contact'* evolved by the US Court is not only applicable in the US but the other countries are also relying on it for solving the jurisdictional disputes.

While in India the only law for the e-Commerce is IT Act, 2000 with an amendment in the year 2008. Application of the traditional principles of jurisdiction in the e-Commerce disputes is complicated due to the reason that the e-Commerce is different from that of the traditional commerce. Approaches for the choice of forum and choice of law may differ from country to country. When the question of the settlement of dispute arises, the applicability of such provisions will create confusion among the parties and difficulty for the courts. The parties want their laws to be applied for

convenience but convenience is not the answer for the problems created due to the jurisdictional issues of e-Commerce. In the absence of the uniform law, different tools and techniques are being used by the countries for settling the e-disputes.

European Union initiatives to handle the jurisdictional issues on e-Commerce are much appreciable in this regard and can be used as guiding principles for other nations. The commission is active in settling down the choice of law and choice of forum disputes through the ‘Rome Convention’ and ‘Brussels Regulation II’. The E.U. Commission has issued a draft regulation, to govern jurisdictional issues surrounding cross-border consumer e-transactions. Article 15 of the Brussels Regulation gives a consumer a right to file and bring an action in his/ her home country. The judgment under this article is enforceable in trader’s country. This section has widened the scope of the e-consumers. The place where the defendant is domiciled is considered as the court of the member state according to Art. 2. (1) by creating a competent jurisdiction.

The US approach is different from that of the European approach. The U.S. courts are willing to exercise jurisdiction over defendants who enter into contracts with residents of the jurisdiction. Private International Law in India is referred to decide the choice of law provisions. Further, it attempts to regulate the extent to which State’s enforcement jurisdiction impinges or conflicts with others. The rules of the conflict of laws are expressed in terms of judicial concepts or categories and localizing elements or connecting factors. In order to identify the place where the e-contract was made, the place of performance, the place of residence or business of the parties, the form and object of the contract, reference to the courts having jurisdiction and such other links should be examined by the courts to determine the legal system with which the

transaction has its closest and most real connection. This principle is called *'minimum contact'* which was followed by the Indian judiciary in some cases. When there are multiple parties involving in one e-transaction, the aggrieved party can bring an action to a jurisdiction where the defendant has his closest connection and that closest place may be more than one. For this reason, the applicability of this principle leads to criticism in the field of e-Commerce.

The legal framework for the jurisdiction of e-Commerce is different from each country. The USA may be the first to hold and lead the electronic business worldwide but India is leading towards e-business today at the higher marketplace. E-business companies like Flipkart, Snapdeal, Amazon has spread its services every corner of the country. In 2013, the e-retail segment was worth US$2.3 billion. According to Google India, there were 35 million online shoppers in India in 2014 and was expected to cross 100 million marks by end of the year 2016.[283] A dispute between the parties is obvious on such businesses and for that reason; there is a requirement of the legal principles governing such disputes. Information Technology Act, 2000 with amendment 2008 is the only authority to deal with the matters related to e-disputes. Section 3, 4, 5 and 28 of the Indian Contract Act, 1872 and section 13 and 20 of the Civil Procedure Code, 1908 are also applied to certain cases but these sections resulted into interpretations numerous times. The Indian procedural law also recognizes the foreign decisions which are required for the enforcement of a judgment by the foreign court in respect of multiple jurisdictions. Though the Indian Judicial system has interpreted the various cases to provide the remedies to each party suffering from the complicated jurisdiction issues in e-Commerce, perhaps the case of

[283] "Online shoppers in India to cross 100 million by 2016: Study", *The Times of India* (Visited on 4/11/2017).

WWE v. Reshma Collection is the first case in the Indian history where the Delhi High Court gave the judgment calculating all the internet factors that make jurisdiction as an identifiable place in the cyberspace. The growing global commercial activities gave rise to the practice of parties to a contract agreeing beforehand to approach for resolution of their disputes there under either any of the available courts of natural jurisdiction and thereby create an exclusive or non-exclusive jurisdiction in one of the available forms or to have the disputes resolved foreign court of their choice as a neutral forum according to the law applicable to that court. It is well settled principle in the case *Modi Entertainment Network v. W.S.G. Cricket Pvt. Ltd.* that the parties cannot confer jurisdiction by an agreement where the parties do not exist in that jurisdiction, on a court to which CPC applies, but this principle does not apply when the parties agree to submit to the exclusive or non-exclusive jurisdiction of a foreign court to any court in India. Thus, it is clear that with the provision of 'neutral coma' or 'choice of forum', the parties to a contract may agree to resolve their disputes by the foreign court creating exclusive jurisdiction or non-exclusive jurisdiction over it. The case of *Hakan Singh v. Gammon (India) Ltd.* is an illustration of it. Consumer protection issues on e-Commerce sill lack behind. The bill to protect the e-consumers was being discussed but never came into picture. As the internet is expanding with its advent the transactions are taking place with great flow and as a result, the jurisdiction over activities on the internet has become a battleground for the struggle to establish rule of law in the information society.

Highlighting the different approaches used the US courts and the Indian courts for the conflicts of e-Commerce jurisdiction, 'location of the server' and 'location of the parties' are two important factors used by both countries. Domestic principles and different laws of two countries are quite difficult to understand. The US Supreme

Court formulated two broad principles of jurisdiction in the case of *Pennoyer v. Neff* that (a) every state possesses exclusive jurisdiction within its territory, and (b) no state can exercise jurisdiction over persons 'without its territory'. Thus, the state had jurisdiction over persons located in the forum state or jurisdiction over property located in the forum state. Also, the principle of *'minimum contact'* which was outlined by the court in the case of *International Shoe v. Washington* becomes important to be discussed here. In this case, the court ruled that the resident of the state may be sued in that state if the party has *'certain minimum contacts'* with such that the maintenance of the suit does not offend the traditional notions of fair play and substantial justice. Due process clause of 14th Amendment Act of US Constitution is being followed by the US federal courts. To exercise the personal jurisdiction under due process clause, it is required that the defendant must have established *'minimum contact'* principle with the forum state. Still, there were uncertainties on the internet activities. The guidance by the Supreme Court in the case of *'Niscastro'* produced the rules regarding the personal jurisdiction in the internet activities. Subsequently, the case of *'Zippo Mfg. Co. v. Zippo Dot Com. Inc.'* categories the three tests i.e. passive, interactive or integral part of the defendant's business to determine the websites which were required for the verification of jurisdiction on the cyberspace. Gradually, many cases came into picture in the internet periphery, thereby various principles developed as a new solution for the conflict of jurisdiction, as a result, these old principles became vulnerable and it was replaced by the new one. Historically, the US courts have solved the jurisdictional cases of the internet with the same jurisdictional set of laws that they have used for non-internet cases. With the development of modern laws and technology, the courts limited these traditional rules and confined the jurisdictional area where the developed principles were applied.

On the other hand, India is on the threshold of IT revolution in which e-Commerce is the focus. E-Commerce, a new trade is creating a problem for the regulators and the policymakers. Due to the absence of the specific domestic legal framework in the e-Commerce, the judicial determination of those issues is difficult to handle. Like USA, the Indian courts also referred the traditional rules of jurisdiction for resolving the e-Commerce issues before the year 2000 till the enactment of Information Technology Act, 2000. Indian Information Technology Act, 2000 is based on the principles of UNCITRAL Model Law on e-Commerce 1996. In the year 2001 the first case *'SMC Pneumatics (India) Pvt. Ltd v. Jogesh Kwatra'* on Information Technology Act, 2000 which was a case of cyber defamation, determined the issues of internet jurisdiction.

The Act contains the principles of extra-territorial jurisdiction under section 75 of Information Technology Act, 2000. These principles are well applicable in the case of cross-border e-transaction. The territorial jurisdiction under the Code of Civil Procedure, 1908 was interpreted by the courts in order to get the concrete solution from the conflicts arisen from the internet jurisdiction. The phrase *'carries on the business'* under Section 20 of the Code became complicated when applying to the e-transaction because the nature of the business is borderless. Hence, it became difficult for the courts to locate the place of business in the e-Commerce environment. The case of *WWE v. Reshma Collection* is an illustration of it.

After 8 years of enactment of the IT Act, 2000, the amendment was made on 2008 because the laws were inadequate to handle the issues emerging out of rapid and fast advancement of information and communication technology. The laws were framed before the proliferation of information communication and technology, therefore the issues of extraterritorial jurisdiction could not be taken care by the Act. It is to be

noted that the domestic laws are made by the legislators on account of the nature of the business that takes place within the respective jurisdiction. These domestic principles may not be enough to understand the nature of business occurred outside that jurisdiction and as a result, the conflicts between the two parties arise. For that reason, India not only amended the laws but also became a part of Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Private International Law). The three main problems of Private International Law i.e. choosing the forum, choice of law and judgment enforcement became difficult because of the diversity of laws of each country and the parties want their laws to be applicable for their expediency.

Electronic Commerce is a business activity which is done using the electronic medium. It has started in the early 1990s. It may be explained as a way of conducting business by using computer and telecommunication technology for exchange of goods and services. However, imposing the traditional common law principles of jurisdiction to the borderless world of internet transactions has proved to be very challenging for the courts and has resulted in the application of different tests and the principles. The internet is insensitive to geographic location and is designed to ignore rather than document geographic location. Information travels through many different paths which makes it difficult to trace.

Suggestions

The increasing novelty, complexities, and costs of conflicting jurisdictional questions affecting online commerce are barrier to its efficient growth. One cannot ignore the requirement of appropriate changes in the law. Failure to do so would lead to new

complex legal issues. The current situation is in need, therefore, of immediate improvement.

The tackling of this issue necessitates an approach directed to three different separate aspects:

(a) International Aspect

(b) National Aspect

(c) Consumer Protection Aspect

(a) International Aspect

1. Firstly, it is to be borne in mind that e-Commerce is possible only with the activities of two parties in the cyberspace. The meeting of these two parties leading to a contract may produce uncertainties when every provision is not being discussed between them before the conclusion of a contract. Therefore, considering e-contract as the very foundation for every e-Commerce businesses has given birth to challenges in terms of choosing the forum and choosing the law. The complexities created by the choice of forum and choice of law in the electronic contract for deciding the jurisdiction can be solved by making clear provisions in the e-contract so that parties entering into an agreement shall be aware of every provision binding to them. For that reason, the party willing to provide for services or goods through internet should go beyond the formal legal reasoning of the rules binding over the parties of different nations by relying on the precedents, legal principles and statutes. As a result, the

parties to the contract will be clear about the rules and forward the matter of dispute directly to the respective forum rather being confused with the applicable laws.

2. The fundamental difficulty in coping with legal relationships involving foreign elements flows from the fact that the legal systems of more than one country may reasonably be found to have a connection with them. The application of the laws of one system, rather than the other, in most cases, will lead to different situations and uncertain results. One solution to this problem may be the selection of one particular legal system which will govern the legal relationship between the two parties but that must be based on the certain criteria which should be adequate to give relief to both the parties.

3. On the other hand, defending lawsuits at multiple locations could be both expensive and frustrating. The solutions should not prove to be the counterproductive opening path for further conflicts and confusions. There is no uniformity in the laws since countries tend to apply their own domestic laws on jurisdiction, recognition and enforcement, and determination of the applicable law. Nevertheless, one possible suggestion would be to come with an international convention for the recognition, enforcement, and determination of the substantive laws of e-Commerce jurisdiction that would solve various problems relating to e-jurisdiction at a practical level which would also afford a holistic basis for the development of substantive and procedural aspects of e-Commerce jurisdiction.

4. It can be proposed that the legal framework supporting commercial transactions on the internet should be governed by consistent principles across the state, national, and international borders that lead to predictable results regardless of the jurisdiction in which a particular buyer or seller resides. This is possible only when there will be a

uniform law regulating this new environment and which will promote the certainty and public trust that is needed for progress in this area.

5. Internet being one of the most significant areas in the field of information technology requires more than the mere adjustment in the law governing it. The solutions extended by the legislation and the evolving court decisions are insufficient to address the current concerns. Complex legal issues like jurisdictional issues that call for appropriate solutions require the right approach of the judiciary, treaty draftsmen, and legislators in order to modify existing rules to fit this new environment.

(b) National Aspect

6. Talking about the Indian jurisprudence with regard to e-jurisdiction, there are two aspects of jurisdiction-one is the question of jurisdiction of the national courts and second is the issue of governing law on the internet transactions. These perspectives are absent in the legislation of India. Therefore, there is a dire need for amendment of various provisions of the Information Technology Act, 2000. When the issue of jurisdiction becomes a question within a country, the Act with some provisions deals the problems but when the issue is of international character comes, the Act with section 75 is not well equipped to deal the same. The present section provides that the Act can be applied to any person irrespective of their nationality if the offence is committed in contravention to any computer network located in India but these cannot be meant that the Act has the power to bring the parties to the Indian jurisdiction or they can go beyond the territory to apply the law. Therefore, the solution can be the

amendment of this section which should add ‘power to bring the parties and power to go beyond the territory’ to give a concrete solution to the parties to e-Commerce.

7. Section 20 of CPC, 1908 which talks about the ‘cause of action’ has been used by the Indian courts in e-Commerce jurisdictions many times. The term ‘cause of action’ in the e-Commerce has been resulted into inconsistencies thereby allowing the courts for interpretations. It is to be noted to the fact that ‘cause of action’ is one of the essential elements to determine the jurisdiction both in the physical and virtual world. The complication of these provisions would be settled down if the ‘cause of action’ provision would be inserted in the Information Technology Act, 2000 by describing all the essential factors that constitute ‘cause of action’ in e-Commerce.

(c) Consumer Protection Aspect

8. The consumer perspective have been significantly frozen in time due to technological advancement, therefore the current business of e-Commerce should adopt the consumer's protection practices according to the requirements of a virtual market so that it can cover protective issues of both sets of violations of consumer rights which is really far-reaching in its present shape and provisions. Every country should adopt the law for the protection of consumer rights in the field of e-Commerce. In order to eradicate evil practices, every country should participate in various treaties and conventions of consumer protection in e-Commerce.

9. In India, the Consumer Protection Act 1986 has its role to play for the protection of e-consumers because it is the only governing consumer law in the country but its provisions are limited that the Act does not even define the term ‘e-consumer’ in the

definition part of the Act. The shortcoming in the present Act will be solved by introducing right from the beginning the term ‘e-consumer’ to ‘rights of e-consumers’ including ‘jurisdiction provision’ in the e-Commerce world.

Other Suggestions-

10. The Internet is one of the unpredictable medium of communication that every man should know about it before its use. A man requires technology to live but he may not be aware of the circumstances that may arise in the internet world. A very efficient measure should be taken in order to avoid the future complications by conducting sensitization programmes in schools because students of that age are very active and fast on clicking on every link available at the cyber world without any consequences. With a single click, the service can be allotted and the service provider will not accept the exceptions of being minor if any disputes arise between them. It is therefore not only sensitization programme but a subject of Information Technology in high school should take into account in order to make technology friendly.

The thesis has addressed the entire form of legal issues that arise in the context of e-Commerce jurisdiction-from breaking down its small forms to a few archetypes, to complications in national and international jurisdictions. The study has shown that the jurisdictional issue in e-Commerce is complicated because no universal law exists to settle the disputes and also the traditional principles of jurisdiction are not well enough to settle the modern problems of e-Commerce. Hence, the hypothesis of the research has been proved. For that reason, the legislators should have to be aware of the new challenges thrown up by the cyberspace. There should be long-lasting and

independent rules in the cyberspace formulated through international agreement and harmonization in the field of e-Commerce jurisdiction. An independent set of rules ignoring geographical factors is likely to be workable in this framework.

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