

CHAPTER 1

INTRODUCTION

1.1 Introduction

The term 'Private International Law' was coined by American lawyer and judge, Joseph Story, but was abandoned subsequently by common law scholars and embraced by Civil law lawyers.¹ Private International Law or the conflict of laws is that branch of legal service, which is applied when two or more sets of legal systems are in conflict with each other over a given issue. It is a set of procedural rules that determines which legal system and which jurisdiction apply to a given dispute. Its three different names – conflict of laws, private international law, and international private law – are generally interchangeable, although none of them is wholly accurate or properly descriptive. The term conflict of laws is primarily used in jurisdictions of the Common Law legal tradition, such as in the United States, England, Canada, and Australia. Private international law (*droit international privé*) is used in France, as well as in Italy, Greece, and the Spanish- and Portuguese-speaking countries. International private law (*internationals Privatrecht*) is used in Germany (as well as Austria, Liechtenstein and Switzerland), Russia and Scotland. Within the federal systems where legal conflicts among federal states require resolution, as in the United States and Australia, the term conflict of laws is preferred simply because such cases do not involve an international issue. Hence, conflict of laws is a general term to refer to disparities among laws, regardless of whether the relevant legal systems are international or inter-state. The term, however, can be misleading when it refers to resolution of conflicts between competing systems rather than "conflict" itself.²

¹ Available at : www.wikipedia.com (last visited on April 7, 2013).

² *Ibid.*

1.2 History of Private International Law

Till 12th Century there was nothing like Private International Law. It was only in 12th Century that the concept of private International Law began to emerge. The first instance of private International Law was traced to Greece³. The Greeks dealt straight forwardly with multistate problems and did not create choice of law rules. Leading solutions varied between the creation of courts for international cases, or application of local law, on the grounds that it was equally available to citizens of all states.⁴ It is the Roman law which witnessed the significant development of private International Law. No comprehensive system of private international law was developed in the Ancient Rome. Complete body of rules was developed for the Roman Citizens. The Roman Citizens were subject to *Jus Civile* and only applied where the dispute was between the citizens of the Romans. Whereas, the non-citizens were subject to a distinct body of law called the *ius-gentium/ Jus gentium* or the law of the nations. Special tribunal was created to deal with the cases of non citizens. The special officer to deal with any dispute in Rome involving a foreigner, even where the other party was a citizen of the Rome was called Peregrine praetors⁵. The Peregrine praetor did not select a jurisdiction whose rules of law should apply⁶. Instead they applied the '*Jus gentium*' based on an amalgamation of Roman and foreign law, particularly the Greek Law.⁷ The Peregrine praetors, thus, created a new substantive law for each case, which is today the field of private international law known as a "substantive" solution to the choice of law issues.⁸ Thereafter the fall of Roman Empire, the territorial law of Rome was replaced by the personal law for 6th to 10th Century. Thus a Saxon was governed by Saxon law and Sabian was governed by

³ *Ibid.*

⁴ Busalile Jack Mwimali, "Conflict of Laws, P.I (Article)" available at: www.academia.edu (last visited on May 2, 2015).

⁵ Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* 8 (LexisNexis Butterworths, Australia, 2nd edn., 2011).

⁶ Available at : www.wikipedia.com. (last visited on April 2, 2013).

⁷ *Supra* note 4.

⁸ Available at : www.wikipedia.com (last visited on April 15, 2013).

Sabian law, whereas he might go.⁹ However, the modern conflict of laws really began in the 12th Century Northern Italy.¹⁰ In this century the personal law was replaced by the Feudal law. In Feudalism there is no place for personal laws. Feudalism does not tolerate the application of any foreign law. Thus, again, there was no scope for the development of rules of private international law in these centuries.¹¹

It was 13th century which witnessed the emergence of rules of private international law. With the development of trade and commerce in the Northern Italy in the 13th Century, it was felt to refine the system of law which could adjudicate issues involving commercial transactions between traders belonging to different cities.¹² The solution to solve the problems arising between parties to trade and commerce was the rules of Roman law known as Glossators. According to this theory law can be divided into two categories; Real statute and Personal statute. The main purpose of real statute is to regulate things and the purpose of personal statute is to deal about personal matters. Real statutes were considered essentially as territorial while personal statutes were personal. The law of person would be applicable unless such personal law was opposed to the “Public Order” of the city. Bartolus was a great estscholar amongst other during this period. However, this theory was not perfect as classification of ‘real’ and ‘personal’ was not unanimous amongst cities and the definition of ‘public order’ was not clear.¹³

The reformation and rise of nationalism in the 16th Century decentralized political power in northern Europe, and municipal laws began to displace the supranational Roman and Canon Laws, Territorial law began to be widely accepted.¹⁴

⁹ Paras Diwan and Peeyushi Diwan, *Private International Law Indian and English* 54 (Deep & Deep Publications, New Delhi, 14th edn., 1998).

¹⁰ Castle and Walker, *Canadian Conflict of laws* 1-13 (LexisNexis Canada, Canada, 2005).

¹¹ *Supra* note 8.

¹² Available at : www.wikipedia.com (last visited May 1, 2013).

¹³ SM Masuin Billah, “Origin and Development of Private International law”, available at: www.academia.edu (last visited on June 15, 2013).

¹⁴ *Supra* note 4 at 9.

In the 19th Century, the German jurist Friedrich Carl Van Savigny, propagated a new theory related to private international law. According to him, the object of Private International law is to establish the co-relation of a legal relationship with some territorial law. According to him every legal relationship must belong to some law and therefore the object of private international law is to find out the ‘seat’ of every legal relationship. In the event there being a conflict between the territorial law and the law of the place to which legal relationship belongs, the latter should be applied.¹⁵

1.2.1 Development in England

The conflict of laws has been of comparatively recent origin in England. Only a few traces can be traced back in the 17th Century. It was the 18th Century when the subject of conflict of laws was highlighted and gained prominence in England and Scotland. The 19th Century rapid growth of trade and commerce between England and the Continental Europe and British territories in foreign countries accelerated the growth of conflict of law rules.¹⁶

The 18th Century was termed as the ‘embryonic’ period of private international law, a period which extended to at least the middle of the 19th century.¹⁷ In the 19th Century the rapid growth of population, world wars and development in the means of communication further accelerated the growth of conflict of law Rules in England. It has not been easy for the conflict of laws to adapt itself to the changes in 20th Century in the social and commercial life which the 20th century has witnessed. Many of the 20th century rules were first laid down in the 19th century.¹⁸

¹⁵ *Supra* note 8 at 56.

¹⁶ Lawrence Collins, *Dicey and Morris on The Conflict of Laws* 6 (Stevens & Sons Limited, London, 11th edn., 1987).

¹⁷ *Supra* Note 14.

¹⁸ *Supra* note 15.

1.2.2 Evolution of Private International Law in India

Since India comprised of many states having distinct culture and religion, there has been conflict of personal laws in India during the British Law, as different laws were applicable on the people belonging to different religion. Before independence and till the recognition of states, India was a federation between British India and Native Indian Princely states, having distinct legal systems. The judgment pronounced by the courts of princely states was considered as foreign judgments in the court system of British India. Hence, there was inter -state conflict of laws prevalent during the British period.¹⁹ Even during the British period when the Indian traders traded outside India there were cases of commercial litigation having foreign element in it before the Indian courts. Since, India was a colony to the British, it applied almost all the rules of Britishers relating to Private International Law.²⁰

However, the irony of the situation is that, each after so many years of independence, the Indian legislation has failed to enact proper legislation in the field of private international law.

1.3 Difference between Private International Law and Public International Law

The term ‘private international law’ or ‘conflict of laws’ means a body of principles and rules applicable to private parties involving trans-border cases having at least one relevant legal foreign element in it, whereas, the term ‘public international law’ is used when a case involves the regulation of sovereign relationship among different states and international organizations. The existence of different legal relationships in the world led to the development of private

¹⁹ Dr. F.E. Noronha, *Private International Law in India- Adequacy of Principles in Comparison with Common Law and Civil Law Systems* 27(Universal Law Publishing Co., Delhi, 2010).

²⁰ *Supra* note 8 at 54.

international law principles and rules, whereas, it is not so in the case of public international law.²¹

1.4 Determination of Foreign Element

A two or more set of legal systems may involve the determination of a serious question relating to 'foreign element' in a case or cases. Any case which involves the determination of a foreign element invites the application of Private International Law. A foreign element means when a case involves the application of different system of law of another country, than one's own country. For e.g. an agreement 'A' domiciled in India filed a suit for the breach of contract against 'B' domiciled in Britain for the supply of goods to 'Russia' as per the contract entered into "India". The above said case have foreign element in the form of 'B' who has domicile in Britain, but not India. Supply of goods to Russia, is a foreign country for India. Foreign element must be legally relevant; that is, it must play a role in determining the applicable law.²² It is only when this foreign element is present in a given case, then the private International law has a function to perform. The main objects of foreign element are²³ :-

1. To prescribe the conditions under which the court is competent to entertain a claim.
2. To determine for each class of case the particular municipal system of law by reference to which rights of the parties must be ascertained.
3. To specify the circumstances in which (a) a foreign judgment can be recognized as decisive of the question in dispute and (b) the right rested in the judgment creditor by a foreign judgment can be enforced by action in England.

²¹ *Supra* note 9 at 1.5.

²² *Ibid* at 1.1.

²³ James Fawcett and Jannen M. Carruthers, *Cheshire, North and Fawcett: Private International Law* 4 (Oxford University Press, UK, 14th edn., 2008).

There are numerous cases where a foreign element may be present, in such cases the court should look beyond the limits of their internal law, lest the relevant rule of the internal system to which the case most appropriately belongs should happen to be in conflict with that of the forum.²⁴ It is necessary to recognize the foreign law in case where there is a foreign element because the application of local law of the forum before which the case is brought for the trial may lead to gross injustice due to its being in conflict with the foreign law.

1.5 Scope of Private International Law/ Conflict of Law

After it is proved that a case involves ‘foreign element’ then the conflict exists in three areas, when a domestic court is called upon to decide the case having foreign element before it, namely; (a) choice of Jurisdiction – whether the forum court has the power to resolve the dispute at hand (b) Choice of law –the law of which country is to be applied to resolve the dispute, and (c) Recognition and Enforcement of foreign judgments – the ability to recognize and enforce a judgment from an external forum within the jurisdiction of the forum before which judgment is brought for recognition and enforcement.

1. Choice of jurisdiction: In a suit involving foreign element, the question whether a particular court has jurisdiction to try the case often arises. The question of jurisdiction may arise before a court in two circumstances: (a) when a suit is filed before the court the question arises whether the court has jurisdiction, (b) when the question before the court is of recognition of a foreign judgment or its enforcement, the court may be called upon to determine whether the foreign court that rendered the judgment was a court of competent jurisdiction. It is the first question namely ‘whether the court has jurisdiction’ on which the research thesis is based.

It must be noted that question of jurisdiction and question of choice of law are two different things. It may happen that question of jurisdiction is decided in favour of one system of law and question of choice of law in favour of another system. For

²⁴ *Supra* note 22 at 5.

e.g. in a suit for damages for breach of contract an Indian court may hold that it has jurisdiction to adjudicate upon the matter, but then it may come to the conclusion that to the various aspect of the contract the law of some foreign country or countries applies.²⁵

2. Choice of law- The choice of law question only arises if a court in the forum has jurisdiction to determine a case and does not consider that it should decline to exercise that jurisdiction²⁶. Choice of law in an integral part of all legal system, it is a practical necessity, because no reasonably developed system of justice could function with a principle of strict territoriality of law, under which, every individual and every corporation that visited took up residence, or undertook transactions in a country would find that all rights and obligations, without exception were subject to the law of that country as far as that country courts were concerned. Hence, if the individuals entered into a contract that they had made under another law, if it was different from the local law, could be invalidated just because the dispute ended up before a local court. So, the choice of law rules are applied as they are consonant with the demand for justice, which demand that rights and obligations should be determined by reference to a law other than that of the forum for the free movement of people and property from one country to another.²⁷. The other reason for applying the law of other forum is to give respect to the law of another state on the basis of principle of comity. By deferring to the law of a foreign state, the state promotes international harmony by accommodating the views of a foreign sovereign in the expectation of receiving reciprocal treatment.²⁸

3. Recognition and enforcement of foreign judgment -Recognition and enforcement of foreign judgment is one of the three parts of conflict of laws besides jurisdiction and choice of law. It is the last question that arises to be ascertained

²⁵ *Supra* note 8 at 40.

²⁶ *Supra* note 4 at 193.

²⁷ Nicholas Rafferty, Joost Blom, et.al., *Private International law in Common law Canada-cases, text and materials* 511(Emond Montgomery Publications, Toronto, Canada, 3rd edn., 2010).

²⁸ *Id.* at 9.

whether a country is bound to give effect and recognize the law of another country? The question calls for the determination of the concept of the state 'sovereignty'. There are many countries in the world, each having its own unequal legal system. A state is Supreme within its own territory. The term 'sovereignty' refers to supreme authority within the state, which implies the independence all rounds, within and without the borders of the country. A sovereign state is free to not to oblige and to regret the law of another state in its own state. However, it is not possible in today's modern and globalized world to adopt this rigid attitude. Today, trade is not restricted between one country and the other, but between one country and nations of the world. Millions of agreement, transactions and contract are made every day by the nations, having different legal systems. So, in such situation if a foreign court gives a judgment in a dispute brought before it, the judgment should be given effect and should be recognized in other forum courts of the state because the reason is obvious, if the other court will not give effect to the foreign judgment, its judgment will also not be given effect by that foreign court whose judgment it has refused to enforce. Also, it is in interest of justice and international co-operation that the foreign judgments should be recognized and enforced in the other forum court, provided they do not override the laws of the forum court. Today, each and every country of the world has enacted statutory law dealing with the recognition and enforcement of foreign law. Certain parameters have been laid down in these statutes which ensure that whether the foreign judgment is conclusive or not. For example the Indian Civil Procedure code under section 13, 14 and 44A, lay down certain provisions relating to the recognition of foreign judgment in India. Section 13 of the Act states that a foreign judgment is conclusive in India; (1) when it is given by a court of competent jurisdiction in foreign country, (2) the judgment is given on merits, (3) it is given on the correct view of Indian law, (4) it is not opposed to natural justice and (5) the judgment is not obtained by fraud or in breach of Indian law. Similarly, other countries have their own common law or statutory Rules which provide for the recognition and enforcement of foreign judgment in those countries.

To give more certainty to the recognition and enforcement judgment, the European Union states have enacted praise worthy conventions and regulations which are enforced throughout European Union and other member countries, which provide for the Enforcement and Recognition of foreign judgment given by one member state in other member state in a hassle free manner. Hence, the common law Rules and statutory rules on foreign judgment are left for only those countries who are outside the scope of these conventions and regulations.

1.6 Private International Law and Issue of Jurisdiction in Commercial Contracts

Jurisdiction is the competency of the court to hear a case according to its own rules of competency. The rules of jurisdiction in Private International Law therefore indicate when, according to the law of the place concerned, a court can hear and determine particular multi-state cases.²⁹ The administration of justice in civilized states is entrusted to the courts of law. Where the facts and conditions upon which the judicial action is founded in a particular case may properly be the subject of action also by the courts of another state, a conflict of jurisdiction is presented, to be regulated by the rules of private international law. Such conflict may result where one of the parties is domiciled within or is a national of a foreign state; or where the transaction took place in whole or in a part within a foreign state; or where judicial action is sought in the local state with reference to rights or interest in property in a foreign state.³⁰ In such case conflict of jurisdictional interest is inevitable between the nations. Since each individual state has its own approach and system of solving the issues arising under international litigation, there is bound to happen disagreements between the courts of each individual states regarding the right to assert jurisdiction over the given dispute and the way that dispute is going to be resolved.

²⁹ *Supra* note 4 at 31.

³⁰ Arthur K. Kuhn, *Comparative Commentaries on Private International Law or Conflict of laws* 76 (The Macmillan Company, UK, 1937).

It is not every case having foreign element in it, shall be tried by a court of the foreign land according to the wishes of one of the parties to the contract. There is a limit to the assumption of jurisdiction by the courts as well. Where the action does not have any kind of connection with the forum and the cause of action totally arose outside the jurisdiction of the court and the parties are also not having any kind of connection with the forum or the connection is tenuous, then in such case, the court before which such dispute is brought shall refrain from exercising the jurisdiction. There should always be some kind of connections with forum court, either of the parties or of the cause of action.

The term ‘Commercial contracts’ in a broadest possible sense, includes not only trade transactions for the supply or exchange of goods or services but also other types of economic transactions such as investment and concession agreements; contracts for professional services etc.³¹ Today enormous business transactions are conducted throughout the world involving billions of rupees trade due to the intensification of commercial transactions between the countries. Hence, commercial litigation is inevitable between parties belonging to different countries in the growing commercial business relationships. So, the first question that comes in mind is which court has the jurisdiction to try the dispute between the parties.

The technical term given to a claim against a person is known as actions in personam or personal actions. Claims brought in relation to torts, contracts equitable suits for specific performance, property rights are example of personal actions. An action in personam may be defined positively as an action brought against a person to compel him to do a particular thing e.g. payment of damages for the breach of contract, or to compel him not to do something, e.g., cases involving injunction against a person or persons.³² Actions in Personam are to be distinguished from the actions in ‘Rem’. where an action seeks to affect the rights or interest of all persons in

³¹ (UNIDROIT Principles of International Commercial Contract, Preamble, Principle No. 2) available at: www.unidroit.org (last visited on August 12, 2013).

³² *Supra* note 15 at 264 .

the world in a thing, the court exercise its power directly over the thing even through it might not have personal jurisdiction over the interested persons. The court's jurisdiction is said to be jurisdiction in 'rem' and it is based on power over the thing.³³

Actions in personam are initiated by the service of process/ writ/ commencement document/ originating process or summons on the defendant. A court is entitled to assume jurisdiction over a defendant if he is served properly and personally with the process/ writ/ commencement document/ originating process or summons within or outside the territory of a court. Service of process on the defendant is mandatory whether he is within the jurisdiction of the court serving the process or outside the territory of the court. Under all the jurisdiction of the countries, jurisdiction over the defendant can be established either under the common law rules or under the statutory. Under the common law rules, jurisdiction over the defendant can be asserted by a court on the basis of his presence within the territory of the court, domicile status or his submission to the jurisdiction of that court. The statutory rules of jurisdiction have not only codified the common law jurisdictional but have also provided additional grounds for assuming jurisdiction over a foreign defendant. However there is difference in the basis of jurisdiction, between the jurisdictions of the world which justify the assumption of jurisdiction over an out of province defendant or foreign defendant. E.g. in Canada, the courts are entitled to assume jurisdiction over an out of province or foreign defendant only if there is real and substantial connection between the forum court and the parties or the matter. Whereas under the Australian law, if a defendant has domicile in the forum court he could be served outside Australia, there is no other need for the action to have any connection with the forum in order to establish jurisdiction.³⁴

In the International commercial contracts, the parties generally agrees on the forum in which they will commence proceedings in case of disputes, but in absence

³³ *Supra* note 9 at 10-1.

³⁴ *Supra* note 4 at 57.

of such an agreement, then a common law tradition is that, it is the plaintiff who not only choose the forum but also accesses the regular court as a matter of right. Once the plaintiff initiates the proceedings in compliance with the procedural rules, the court then decides on the question of whether it has appropriate jurisdiction to decide the case or not? In conflict of laws situation, the court is not concerned with whether it was a jurisdiction over the dispute or not? But, whether the jurisdiction claim is appropriate or inappropriate the court applies a number of factors to reach to the conclusion. The appropriateness or inappropriateness of the foreign forum is described as 'forum convenience' which means the forum is convenient forum for the trial of the case and 'forum non convenience' which means that the selected forum is not convenient for the trial of the case. The doctrine of 'forum non conveniens' owes its origin to Scotland and from there it travelled throughout the world in different times and concepts. The Scots rule on the doctrine of 'forum non convenience' is that the court may decline jurisdiction after giving consideration to the interest of the parties and the requirements of justice, on the ground that the case cannot be suitably tried in the Scottish court nor full justice be done there, but only is another court³⁵ The application and interpretation of the doctrine differ from country to country. The English courts reformulated the Scottish Doctrine, which is now followed in almost all the countries except for a few e.g. Australia. The doctrine is often applied when a stay is sought by the defendant on the ground that the forum selected by the plaintiff is not a convenient forum for the trial of the case. The doctrine is also helpful in discouraging forum shopping in the case where the plaintiff institutes or sues the defendant in the forum which has tenuous connection with the claim. Forum shopping occurs when the plaintiff tries to institute the suit in a court which best suits his claim, when two or more forums are available to him to file his suit and he deliberately selects that forum which not improves his chances of success but also provides him higher award. However, in such cases defendants are also not rendered completely defenseless. A reverse forum shopping may occur, when the defendant approaches

³⁵

Supra note 15 at 392.

the forum court to reject the jurisdiction and to transfer the case to a more convenient forum. The exercise or refusal to exercise jurisdiction when an application is made under the doctrine is wholly discretionary. The court take into account number of factors before refusing or allowing the stay of proceedings based on the application of forum non convenience. This doctrine is usually applied in the international cases, involving foreign element, but in the country like Canada comprising of many provinces, the courts apply the doctrine in inter provincial cases too. In India the doctrine is applied on in International cases, it has no application in domestic cases, which are governed by the code of Civil Procedure, 1908.³⁶

Once the court has rendered the judgment, the underlying jurisdictional foundation of the court's judgment play a significant role when its recognition and enforcement is sought in another country by one of the parties. The problem of recognition and enforcement of foreign judgment arises only, if the court where the enforcement of the judgment is sought, finds that the court of origin based its jurisdiction on excessive grounds or that is there is no or weak link between the dispute and the forum/ court, then it becomes difficult to recognize and enforce judgment in another state.

1.7 International Conventions or Regulations on Jurisdictional Issues among Nations

At the International level numerous efforts has been made by the states to provide uniform rules in the field of Private International Law, particularly in the field of contracts. These efforts are mostly from the countries of Europe. In Europe, the most important convention relating to the unification of jurisdictional rules and recognition and enforcement of foreign judgment is the Brussels Convention of 1968 and the Lugano Convention 1988 on Jurisdiction and the Recognition and Enforcement of judgments in Civil and Commercial matters. Now both the conventions have been replaced by Brussels Recast Regulation and Lugano Convention of 2007. The other

³⁶ *Horlicks Ltd. and another v. Heinz India (Pvt.) Ltd*, 2010(7) R.C.R.(Civil) 2176 .

important convention relating to jurisdictional issues is the Convention on the Service Abroad of Judicial and Extra- Judicial Documents in Civil or Commercial Matter of 1965, the aim of which is to ensure that judicial and Extra Judicial document to be served abroad is brought to the notice of the court of the addressee in sufficient time. The convention dealing with uniform choice of law Rules is the Rome Convention on the Law Applicable to contractual obligations, 1980, which aim to unify the conflict of law rules on the choice of law aspect in the contracts. This convention is now replaced by Rome 1 Regulation, 2009. Recently, on 1st October 2015. Convention on Choice of Courts Agreement has been entered into force for enhancing judicial co-operation through enhanced uniform rules on jurisdiction in Civil or Commercial matters by giving effect to the exclusive choice of court agreements between parties to commercial transactions that governs the recognition and enforcement of judgments resulting from proceedings based on such agreements. Hence, through all these conventions the western countries are proving their seriousness towards unifying the Rules on Private International Law.

1.8 Terms Used

1. Lex fori- means the law of the forum
2. Lex domicilii- means the law of the domicile
3. Lex loci contractus- means the law of the place where the contract is made.
4. Lex loci solutionis- means the law of the place where the contract is to be performed.
5. Lex causae- means the system of law that the conflict of laws rules indicates is applicable to any given question.
6. Forum conveniens or non conveniens- refers to the doctrine by which the court may exercise its discretion to decline to decide a matter because there is a clearly more appropriate forum elsewhere for the pursuit of the action and for securing the ends of justice.

7. Jus civile- according to the roman jurists, it means the law of the Romans for the Romans and by the Romans³⁷.
8. Jus gentium- It means the body of law applicable to all races and their people of the empire.

1.9 Research Methodology

The research work will primarily be Doctrinal, Descriptive and Analytical. It will involve ascertainment of private international law relating to commercial contracts as well as analysis of the existing of the existing state of things relating to it. For conceptual structuring and development, it is planned to use historical method of research. Doctrinal and Comparative research will form part for most of the research work as the study will be related to laws of four common law countries which will involve comparison of laws of four countries and the testing of those laws to the present day scenario.

The study of literature would include books, journals, case laws, research article etc.

1.10 Research Hypothesis

The research hypothesis of the thesis is that the jurisdictional rules of four countries are expected to make the international litigation easier and less burdensome given the vast of amount of transnational commercial transactions entered into by the private parties belonging to these nations everyday and there exist common jurisdictional rules between these four countries.

1.11 Objectives of the Research Work

The objectives of the research work are:-

1. To analyze the efficacy of Private International Law regarding commercial contracts in changing business environment.

³⁷ Prof. S.N Dhyani, *Jurisprudence & Indian Legal Theory* 31 (Central Law Agency, Allahabad, 2010).

2. To find out whether the jurisdictional rules are flexible enough to meet the requirements of the transnational commercial contracts.
3. To find out what best India could inculcate in its own jurisdictional rules by analyzing the jurisdictional rules of the three common law countries i.e. England, Canada and Australia.

1.12 The Area of Study for the Research Work

The area of the study for the research work of the researcher will be Private International Law in General and international commercial contract in particular. The International commercial contracts will be of general nature. The scope of researcher's research will be primarily focused on the Jurisdictional rules arising out of regular commercial contracts. The researcher will analyze and compare each jurisdictional rule applicable on parties, individuals, partnerships and corporate entities. This will include comparative study of the jurisdictional rules of four common law countries which are India, England, Australia and Canada. Rules of special jurisdiction relating to contractual matters shall be the center of research. Only regular commercial contracts will be covered for research. Contracts relating to consumer, employment, insurance, e-contracts or matters relating to tort, anti-trust etc. will be kept outside the research area. Also, claims concerning insolvency, immovable property, family matter etc. will be excluded.

The Jurisdiction rules covered by Hague Convention on Choice of courts agreements or the Jurisdiction based on the consent or will not be covered. Similarly, jurisdiction related to counter-claims, lis-pendesis, multiple defendants or class actions etc. will also be excluded.

1.13 Review of Literature

The present researcher has gone through various books on the subject of private international law or conflict of laws to gather the past and present status of knowledge on the developments taking place in the field of jurisdictional rules among

different nations. It is a matter of general understanding that whenever a new research beings it is never being in isolation. One has to have the knowledge of topic beforehand before proceeding on further research which could only be gathered from the books, articles, newspaper already written on the topic. So, even the researcher has extensively studied various books on the topic before coming at the conclusion. Hence, the following are some of the important books in the view of the researcher for which the researcher has written the review of literature.

Helene Van Lith in her book entitled '*International Jurisdiction and Commercial Litigation-Uniform Rules for Contract Disputes*'³⁸ has put tremendous efforts to provide an up to date and comparative study of jurisdictional rules prevalent in the jurisdictions of Europe, Continental Europe, England and United States. The work on the part of the author is extensive in the sense that she has started from the basic introduction of the subject to covering the most complex jurisdictional regimes of different nation , laying down contrasting approach of the various nations to international jurisdiction, assessing the probable bases for establishing international jurisdiction in contract disputes, laying down the correction mechanisms in order to rectify the undesired outcomes of jurisdictional rules and finally concluding all the chapters by identifying acceptable and non acceptable basis of jurisdiction among the nations. The authors has been successful in identifying the general as well special grounds of jurisdictions regarding contractual disputes from the jurisdictional rules of different nations on the basis of her extensive, descriptive and analytical study of jurisdictional rules of these very nations.

Nicholas Rafferty's edited book titled '*Private International law in Common law Canada-cases, text and materials*'³⁹ in the view of the researcher is a book solely

³⁸ Helene van Lith, *International Jurisdiction and Commercial Litigation-Uniform Rules for Contract Dispute* (T.M.C. Asser Press, Netherland, 2009).

³⁹ Nicholas Rafferty; Josst Blom; et.al, *Private International law in Common law Canada-cases, text and materials* (Emond Montgomery Publications, Toronto, Canada, 3rd edn.,2010).

for the purpose of providing case law knowledge to the readers, but with an added effort of providing notes to the readers extracted out of the case laws. Before going through the book it is imperative for one to have pre-hand knowledge of the law provisions prevalent in the various provinces of the Canada then only one will be able to understand what the authors have tried to narrate in the book. Hence the book is not for the beginners. The relevant chapter in the book named ‘Jurisdiction in Personam’ straight way starts with the case laws without providing any introduction, law or the grounds justifying assumption of jurisdiction in the actions in personam. In short, the book to major extent incorporates extracts from case laws and statutes which a person with substantial knowledge would only understand. Since, the researcher has gone through all the statutes and legal provisions relating to private international law prevalent in Canada, this book provided good line of case laws for the research purposes.

Book named ‘*Private International Law in Australia*⁴⁰’ by Reid Mortenson, Richard Garnett and Mary Keyes is a complete and comprehensive book on subject of private international law prevailing in Australia. The book starts with the introduction to the subject of private international law and goes on to cover all the fields of law falling under the arena of private international law in Australia. All the chapters are concluded by giving concluding remarks at the end of each chapter. The chapter on Jurisdiction titled ‘Jurisdiction and Judgment’ covers detail of the common law prevailing in all the provinces and territories of Australia, statutory jurisdictional rules of commonwealth, interstate statutory jurisdictional law and cases on commercial dispute falling under private international law. The chapter also covers all the latest developments, principles and the methods which are being applied by the Australian courts in resolving cross boarder litigation. The book is a complete guide for the research purpose.

⁴⁰

Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis Butterworths, Australia, 2nd edn., 2011).

Martin Davies, Andrew Bell and Paul Le Gay Brereton's book , '*Nygh's Conflict of Laws in Australia*' ⁴¹ is a authoritative and comprehensive book on private international law as compared to other books on the subject covering the jurisdiction of Australia. The important feature of the book is that it has an expanded horizon for each topic. Each and every topic of the subject is covered from basic to its legislative and procedural aspect. The relevant chapter on jurisdiction covers all the procedural provisions of all the states and territories on private international law relating to commercial disputes, but the one drawback of the book is that it does not cover the federal act namely the Trans-Tasman Proceedings Act, 2010 which is an important legislation covering number of provisions relating to conflict of laws issues connected with New Zealand.

The book '*Private International Law in India-Adequacy of Principles in Comparison with Common Law and Civil Law Systems*' by Dr. F.E Noronha is a book meant only for the purpose of taking an overview of what topics can be covered under the subject Indian private international law. Stress is given on the topics of history and introduction to private international law, which can be easily found in other books. The topics which require in depth and vast coverage are summed up in small paragraphs without giving an adherence to its introduction, common law history, legislative position and latest developments. The only plus point of this book is that it is able to cover some good case laws. The author has attempted to make a comparison with other jurisdiction but has stopped one stop short of the desired result. The relevant chapter for research 'Choice of Jurisdiction' covers only a few topics countable on finger tips. No relevant provisions of India law dealing with jurisdiction are covered. Hence, in short the book was of little help to the researcher for the purpose of research.

⁴¹ Martin Davies, Andrew Bell and Paul Le Gay Brereton, *Nygh's Conflict of Laws in Australia* (Reed International Books Australia Pty Limited trading as LexisNexis, Australia, 8th edn., 2010).

The widely read book of Paras Diwan and Peeyusdhi Diwan on '*Private International Law- Indian and English*'⁴² is a precious piece of work by the authors on the subject of private international law prevalent in India. The book intrinsically makes comparison of Indian and English law on Private International Law. As far as the position related to Indian law is concerned all the cases, statutory provisions and the common law position are covered, but, the book lack further expansion on the concept of stay of proceedings and the principle of forum non convenience. The book is not an up-to -date version as far as Indian law is concerned. It covers the Indian law upto the year 1992 and the English law upto December 1991. Whatever is covered till this period is remarkable. But, many things have changed after this period. English law has undergone drastic change after this period. The country has become party to new conventions on private international law and jurisdictional issues. The whole body of civil procedures rules dealing with private international law has under gone change. India has also ratified new conventions on jurisdictional issues and many latest case laws clarifying India's position on private international law have been decided by the Indian judiciary. The chapter titled 'Jurisdiction of courts' covers the common law principles of both Indian and English law on basic jurisdiction rules. But as the chapter proceeds further the outdated English model begins which is of no use for the researcher. As far Indian law is concerned, because not much has been changed in the civil procedure rules dealing with the Indian private international law, the chapter provides useful knowledge. The only drawback of the book is that no new edition has come so far which could provide the latest position of both the countries on the subject.

Janet Walker's book on Conflict of law in Canada named '*Castle and Walker: Canadian Conflict of Laws*'⁴³ is an up-to-date, comprehensive, authoritative book providing practical as well as theoretical knowledge on Canadian conflict of laws.

⁴² Paras Diwan and Peeyushi Deewan, *Private International Law- Indian and English* (Deep and Deep Publications, New Delhi, 4th edn., 1998).

⁴³ Janet Walker, *Castle and Walker: Canadian Conflict of laws* (LexisNexis Canada, Canada, 6th edn., 2005).

The book provides a wide range of cases to the extent that the footnotes run into number of pages which show how much in dept research has been under taken by the author. The endeavor of the Canadian courts in implementing and refining the principles articulated in cases laws relating to private international law are clearly delineated in a magnificent way. The chapter of jurisdiction titled ‘The basis of Judicial Jurisdiction’ focuses not only on the contemporary issues but also exhibit the new and recent developments at the international level taking place in commercial laws. The book is excellent source of knowledge both for the academic as well as research purposes.

V.C Govindaraj’s book titled, ‘*The Conflict of laws in India- Inter Territorial and Inter-Personal Conflict*’⁴⁴ on conflict of laws in India is a book published only for the name sake. It is a book written in hush. No precise introduction, case laws or legislative position is given on any topic. The book lack precision on the topic of International Jurisdiction and Indian law on International commercial disputes. The book does not solve the purpose for what it was thought to serve.

The book, ‘*Private International Law in India*’⁴⁵ by K.B. Agrawal and Vandana Singh on the status of Private International Law in India provides ready knowledge on the law prevailing on private international subject in India covering not only domestic and international aspect but also connection with other laws. The book is more in the form of commentary providing concise and clear knowledge of law to the readers. The topic on Jurisdiction is divided into two chapters National Jurisdiction and International jurisdiction. The chapter on National jurisdiction starts with general introduction to covering rules of forum which includes pecuniary jurisdiction and rules on nature of suit and ending up with the topic on submission to jurisdiction. The second chapter on jurisdiction titled ‘International Jurisdiction’ is one of finest and précised work done by the two authors. No other book covering private international subject on Indian law has gone so minutely to present the real

⁴⁴ V.C Govindaraj, *The Conflict of laws in India- Inter Territorial and Inter-Personal Conflict* (Oxford University Press, New Delhi, 2011).

⁴⁵ K.B. Agrawal and Vandana Singh, *Private International Law in India* (Kluwer Law International, Netherlands, 2010).

picture of Indian law on International aspect. The chapter covers the topics such as statutory forum, choice of forum agreement, procedural requirements covering sub topics such as against whom action may not be filed and who may file a suit, international service of summons, rules of evidence and temporary relief. The book proves to be a valuable and sourceful guide for practitioners, academicians, research scholars and students.

1.14 Plan of Study

In order to have a systematic study of research thesis, the researcher has divided the thesis into seven chapters. Chapter one will include general introduction of the topic and concepts used in the whole thesis. In chapter two, an overview of international position on the topic will be covered. Chapter three, four, five and six will cover common law and statutory rules of private international law relating to different juristic entities of Australia, England, Canada and India will be covered. The last chapter, chapter seven will be of conclusion and suggestions.

