
AN ANALYSIS OF THE BRUSSELS I CONVENTION AND THE LUGANO CONVENTION AS INTEGRAL ASPECTS OF HARMONIZATION AND UNIFICATION OF PRIVATE INTERNATIONAL LAW

Mathy V Kutty, Law Graduate, Symbiosis Law School, Pune

INTRODUCTION

Private international laws derive their force from domestic legislations. Hence, in a conflict of laws situation, there arises complexity due to such territorial nature of intellectual property rights and the nature of remedies granted in protection of the same. The said difficulties shall be discussed in infringement scenarios with examples of case law. The nature of private international law is that it transcends national boundaries and is derived from each state's domestic law¹. It is safe to say that there is no single system of harmonization or unification although in the recent years, there has been progress through the introduction and amendments of various instruments such as Brussels I Recast Regulation, Lugano Convention, Hague Convention on Recognition and Enforcement of Foreign Judgements among others². In this context, the author shall specifically address the role played by two significant conventions in the process of harmonization. This is the Brussels I Recast Regulations and the Lugano Convention.

The most important element of private international law in recent years is predictability or legal certainty. This concept entails that the legal rules and regulations are to provide clear and consistent guidelines for individuals and commercial entities that are engaged in cross-border activities. It ensures smooth interoperability, legal certainty, and the seamless functioning of international commerce³. Harmonisation and unification is certainly one of the ways to achieve this. Unification refers to the method of prescribing certain standards for states to adopt with

¹ Elliott E. Cheatham and Harold G. Maier, Private International Law and Its Sources, 22 Vanderbilt Law Review 27 (1968) Available at: <https://scholarship.law.vanderbilt.edu/vlr/vol22/iss1/9>.

² Trevor C Hartley, Basic Principles of Jurisdiction in Private International Law: The European Union, the United States and England, 1 ICLQ (2010).

³ Henry J. Steiner, THE DEVELOPMENT OF PRIVATE INTERNATIONAL LAW BY INTERNATIONAL ORGANIZATIONS, 59 Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969) 38-52 (1965), <http://www.jstor.org/stable/25657643> (accessed Sept. 6, 2023).

respect to private international law, in a horizontal manner. Harmonisation is a concept slightly different from unification in that it is a top-down model that results in the adopting of evolved common and accepted principles or standards into domestic law. This aims to prevent conflicts in the choice of law. There are primarily three steps of harmonisation required. These are synonymous to the steps related to adjudication of private international law disputes i.e., the jurisdiction of a forum to entertain a dispute, choice of law for different aspects of the dispute, and lastly, the recognition and enforcement of judgements.

Harmonization takes place in both national and international levels. In the international context, it requires states to work together to discuss on common principles that forms text as conventions and the national context indicates the ratification and adoption of the said conventions into the national legal systems of the said state. This process leads to harmonisation of principles and thus, better predictability.

REVIEW OF LITERATURE

1. **“Private International Law and Its Sources”** – In their paper, *Cheatham* and *Maier* elaborate upon the definition of private international law and the different sources of private international law. They elaborate upon the domestic development of private international law in the context of the United States and attempt to put forth a case-by-case progress of development.
2. **“Basic Principles of Jurisdiction in Private International Law”** – In his paper, *Hartley* attempts to comparatively analyse the basic principles of jurisdiction in connection with private international law. He elaborates upon concepts such as jurisdiction based on domicile and specific jurisdiction in the UK and the USA. He touches upon the role of the Brussels I Regulations as well.
3. **“Brussels and Lugano: Should you Race to a Courthouse or Race for a Judgement”** – In his paper, *Herzog* analyses the choice between pursuing a legal dispute in different jurisdiction within the Brussels I Regulations and the Lugano Conventions. He examines the two in light of jurisdiction, recognition and enforcement of judgements among European countries. The advantages and the disadvantages of each of the two are discussed along with case laws.

4. **“The Application of Brussels I (Recast) in the Legal Practice of EU Member States” –**

In this synthesis report, *Kramer, Ontanu*, and *Rooij* analyse the practicality of various provisions of the Brussels I (Recast) Regulations. The authors attempt to lay a comprehensive understanding of the history of the Regulations, explanations relating to the various principles of general jurisdiction under Article 4 and specific jurisdiction under Articles 7 to 9 of the Regulations. Furthermore, they analyse the changes brought about by the recast and track the acceptance of these changes through statistical survey methodologies.

5. **“Public Policy as a Ground for Refusal to Enforce EU Antitrust Damages Awards” –**

In her paper, *Pozdnakova* discusses public policy as one of the exceptions for refusal of recognition and enforcement of judgements under the Brussels I regime and elaborates upon case laws to substantiate her views.

ANALYSIS OF THE BRUSSELS I RECAST REGULATION AND THE LUGANO CONVENTIONS

The Brussels I Recast Regulation (hereinafter referred to as “**the Regulations**”) is a critical instrument in the recognition and enforcement of foreign judgements along with the Lugano Convention (hereinafter referred to as “**the Convention**”).

BRUSSELS I (RECAST) REGULATIONS

The Brussels I Recast Regulations is the youngest yet the most far-reaching instrument in the area of jurisdiction and recognition and enforcement of foreign judgements in the European Union. It is applicable to the entirety of the European Union community. The primary aim of this convention is to facilitate predictable access to justice by providing rules to determine adequately the jurisdiction of the Courts and the rules on recognition and enforcement of judgements. These aspects of the convention shall be discussed in a generalised manner pointing to relevant provisions and adequate landmark case laws.

JURISDICTION: GENERAL AND SPECIFIC

The Regulations are based on mutual trust between judicial systems of the various parties and respect to comity. The Regulations provide for two kinds of jurisdiction i.e., general and

specific. The general jurisdiction is based upon the defendant's domicile⁴. It is important here to note that the definition of domicile is governed by the respective national laws. For example, if a defendant is domiciled in Italy, he may be sued in the Courts of Italy subject to the defendant qualifying under the definition of domicile in the Italian law⁵. For companies, general jurisdiction can be attributed depending upon its statutory seat (i.e., where the company has been incorporated), central administration, or the principal place of business⁶.

Specific jurisdiction entails the exercise of a form of minimum contacts that enables a Court other than the Court of the defendant's domicile to exercise jurisdiction over a dispute. Articles 7-9 of the Regulations contain rules in connection with specific jurisdiction. There are primarily two kinds:

- Specific jurisdictional conditions relating to tort, delict, or quasi-delict, the jurisdiction can be attributed to the place where the harmful event occurs or may potentially occur⁷. For example, damage in a car's parts that were manufactured in Germany but sold in Austria. Special jurisdiction attributes to Austria since the damage primarily occurred with the purchasers in Austria⁸.
- Specific jurisdictional conditions relating to contract are attributed to the place where the performance of principal obligation of contract relates to. For example, in the sale of goods, the place where the goods are to be delivered⁹. For example, a contract between an individual in Spain and an individual in Italy relating to the procurement of pizza ingredients¹⁰. The delivery of goods has been agreed to be made in France. Hence, specific jurisdictional conditions attributes to the Courts of France¹¹.

⁴ Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (recast), Art. 4, No. 1215/2012.

⁵ Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (recast), Art. 64, No. 1215/2012; *Handelskwekerij G. J. Bier B.V. v. Mines de Potasse d'Alsace S.A.*, Case 21/76, CJEU (Nov. 30, 1976).

⁶ Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (recast), Art. 63, No. 1215/2012; *Car Trim v. Key Safety Systems*, ECR 2010 I-01255.

⁷ Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (recast), Art. 7(2), No. 1215/2012.

⁸ *Verein für Konsumenteninformation v Volkswagen AG*, Case C-343/19, Judgment of the Court (First Chamber) of 9 July, 2020.

⁹ Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (recast), Art. 7, No. 1215/2012.

¹⁰ *Id.*

¹¹ *Falco Privatstiftung and Thomas Rabitsch v Gisela Weller-Lindhorst*, ECR 2009 I-03327.

RECOGNITION AND ENFORCEMENT OF JUDGEMENTS

Authors opine that one of the most important changes that came along with the Brussels I Recast in light of the recognition and enforcement of judgements was the abolition of the “exequatur procedure” which postulated that a judgement must be recognised by a state and this procedure was used to give the judgement an executive force¹². It is no longer the case as the judgement holder does not need to apply for the recognition of the judgement in the state where it is sought to be enforced. However, the Brussels I Recast Regulation maintains safeguards in the form of extraordinary remedies that may be allowed for the review of foreign judgements¹³. The judgement holder needs to merely procure a certificate that states that the judgement is enforceable and contains an extract of the judgement as well as relevant information relating to recoverable costs of the proceedings and the calculation of interest¹⁴.

Article 36 of the Regulations state that a judgement rendered by a member state of the Regulations shall be recognised by the other member states without any requirement of a special procedure¹⁵. The limited grounds pose as safeguards for refusing enforcement. These are provided under Article 45 of the Regulations. These are as follows:

1. The recognition should not be at the cost of it being manifestly arbitrary to the public policy of the member state addressed¹⁶.
2. When the judgement was given in default of the defendant and no documents were served upon him in sufficient time so as to enable him to prepare for his defence, unless the defendant failed to commence proceedings to challenge the said judgement when it was possible for him to do so but failed.
3. Conflicts with the judgement rendered in the addressed state between the same parties or conflicts with the judgement rendered another state between the same parties.

¹² Xandra Kramer, Alina Ontanu & Michiel De Rooij, *The Application of Brussels I (Recast) in the Legal Practice of EU Member States*, 1 (2020).

¹³ *Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (recast)*, Art. 38,43,45,46, No. 1215/2012

¹⁴ *Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (recast)*, Art. 42(1)(b), No. 1215/2012

¹⁵ *Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters (recast)*, Art. 36, No. 1215/2012.

¹⁶ *Meletis Apostolides v David Charles Orams and Linda Elizabeth Orams*, Judgment of 28 April 2009, ECLI:EU:C:2009:271, para. 59.

The CJEU has construed EU law narrowly, highlighting the inherent vagueness of the "public policy" term. Due to the fact that the threshold is so high, it is practically impossible to convincingly demonstrate that the required standard has been attained. The Brussels I Regulation's public policy clause may be invoked in the area of judgment recognition and enforcement, according to the CJEU, only when enforcement or recognition of the judgment given in a different State Party would be at variation to a degree that is not acceptable with the legal framework of the member state in which enforcement or recognition is sought insofar as it would infringe a fundamental or mandatory principle¹⁷. The CJEU affirmed in the *FlyLAL* case that the public policy that the ruling is obviously averse to must be stated in unambiguous language¹⁸.

The above mentioned are by no means an exhaustive list of provisions and salient features of the Regulations. The author merely seeks to point out the extent to which harmonisation is brought through the Regulations with an established accepted framework. It is one of the most successful instruments in such harmonisation and strikes a great balance between interests of states in the domestic affairs and in the international context¹⁹. In the situations whereby the Regulations come into picture, it supersedes all other treaties relating to the subject matter of the Regulations. Hence, in this regard, the Regulations are laudable and a landmark in the field of private international law.

THE LUGANO CONVENTION

Lugano Convention was a treaty that came into existence in 1988, the 12 member states of the European Union at the time signed a treaty which came to be known as the Lugano Convention with the then six members of the European Free Trade Association. The convention has been completely superseded by a 2007 version.

One of the most crucial pieces of legislation for international civil and commercial disputes is the Lugano Convention. A treaty involving the three out of four members of the European Free Trade Association—Switzerland, Norway, and Iceland—and the members of the European Union. The fact that the Brussels I Regulations permit the Court of Justice of the European

¹⁷ *ibid.*

¹⁸ *flyLAL-Lithuanian Airlines' v Starptautiskā lidosta*, Case C-27/17, Judgment of the Court (Second Chamber), 5 July 2018.

¹⁹ *Alla Pozdnakova, Public Policy as a Ground for Refusal to Enforce EU Antitrust Damages Awards*, 5 OLR, 4-20 (2018).

Union to interpret legal issues is one of the key distinctions between them and the Lugano Convention²⁰. The Lugano Convention is often known as the “parallel-convention” as it extends the provisions of the Regulations to non-member states of the European Union. This entails that the presence of a interpretative court such as the CJEU is present and thus, may lead to ambiguities in the law related to the Lugano Convention²¹.

RECOMMENDATIONS

Though in theory, there seems to be separate operability between the Brussels I (Recast) Regulations and the Lugano Convention, in practicality, these lines are often blurred and lead to confusions. Though the Regulations can be seen to harmonise the rules of jurisdiction and enforceability of judgements, the existence of Lugano Convention creates overlap, enforcement challenges and differences in interpretation. The Regulations have been regularly amended by the changing needs of modern circumstances but the Lugano Convention remains far behind in terms of its rules on jurisdiction and recognition and enforcement.

CONCLUSION

The Brussels I Recast Regulations and the Lugano Convention serve as examples for methods of harmonisation of law. As certainly they do have their limitations, they have ensured better legal cooperation, harmonisation, predictability and certainty in commerce as no other treaties or conventions. These treaties can serve as models for future conventions such as the Hague Convention on Recognition and Enforcement of Foreign Judgements and the amendments related thereto. The inherent ambiguities in private international law can be fixed through extensive dialogue and cooperation following but improving upon the Regulations and the Lugano Convention.

²⁰ Peter E. Herzog, Brussels and Lugano, Should you Race to the Courthouse or Race for a Judgement?, 43 AJCL, 3, 379 (1995).

²¹ Patrick McCann, The Brussels and Lugano Regime - Recent Developments and Emerging Issues, 12 Irish J. EUROPEAN L. 304 (2005).