CHAPTER 2

INTERNATIONAL PERSPECTIVE ON JURISDICTIONAL ISSUES ACROSS THE GLOBE

2.1 Introduction

At the international level efforts have been made by the international community to unify the rules on jurisdiction between the states of the world on the basis of conventions and regulations. But, not all the states have given thumbs up to these efforts. Some or other states have made reservation about enforcing the international instruments in their own states. Till today there is no single instrument which has been ratified or enforced by all the countries of the world which could unify the rules on international jurisdiction among the nations of the world. Each Union, block or countries have enacted their own instrument on the civil and commercial matters to enforce the jurisdictional rules between them uniformly or to facilitate the service of judicial documents between them without any hassle.

Since the researcher’s area of research excludes the research on international conventions or instruments on private international, only passing reference or an overview has been given in this chapter to understand what is going on in contemporary world regarding the jurisdictional rules in private international law. Some of the important international instruments which have been enacted to unify rules on international jurisdiction are:-

1. The Brussels Recast Regulation
2. The Lugano Convention
4. The Rome I Regulation

The new Brussels Recast Regulation has replaced the old Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters which came into force on 1\textsuperscript{st} January 2013 and was enforced on 10\textsuperscript{th} January 2015.\textsuperscript{1} The new Recast Regulation has made some important changes and has modified the provisions of old Brussels Regulation. The new provisions aim to ease and make jurisdictional issues less complicated for the parties. Under Article 23 of the old Brussels 1 Regulation,\textsuperscript{2} the exclusive jurisdiction clause agreement was only available to the parties if one or more of parties to the agreement were domiciled in a member state. But, now under the new Brussels Recast Regulation, the requirement as to the domicile status of one of the parties to the agreement on the jurisdiction has been removed. The new Article 25\textsuperscript{3} of the Recast uses the word ‘regardless of their domicile’. According to the Article, if the parties regardless of their domicile, have agreed that a court or the courts of a member state are to have Jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction,

\textsuperscript{1} Available at: www.wikipedia.com (last visited on January 15, 2015).
\textsuperscript{2} Council Regulation (EC) NO 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, sec. 7, art.23 (1). 1. It reads thus: “If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.” Available at: http://eur-lex.europa.eu/ (last visited on January 19, 2015).

\textsuperscript{3} Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast), sec.7, art.25 (1). It reads thus: “1. If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise”. Available at: http://eur-lex.europa.eu/ (last visited on January 20, 2015).
unless the agreement is null and void as to its substantive validity under the law of that member state. Where such an agreement has been entered into between the parties and to contract and the agreement forms the part of the contract, such an agreement conferring the jurisdiction shall be treated as an independent agreement of the other terms of the contract. Simply because the contract is not valid the validity of the jurisdiction agreement cannot be challenged on this ground.

Section 9, Article 27 of the old Brussels 1 Regulation\(^5\) dealt with lis pendens related actions. According to the said article where there was same cause of action between the same parties brought in the courts of different member state, then the court before whom the proceedings were first brought would have jurisdiction and the other court before whom the proceedings were brought after the first court sized of jurisdiction would have to stay the proceedings brought before it until such time the first court’s jurisdiction was established. Where the first court established its jurisdiction the other court would have to decline jurisdiction in favour of that first court. The new Article 29\(^6\) of the Brussels Recast has the same provision, but with

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\(^5\) Council Regulation (EC) NO 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, sec. 9, art.27. It reads thus: “Lis pendens related actions Article 27 1. Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. 2. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court”. Available at: http://eur-lex.europa.eu/ (last visited on January 19, 2015).

\(^6\) Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast), sec.9, art.29. It reads thus: “(1) Without prejudice to Article 31(2), where proceedings involving the same cause of action and between the same parties are brought in the courts of different Member States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. (2). In cases referred to in paragraph 1, upon request by a court seised of the dispute, any other court seised shall without delay inform the former court of the date when it was seised in accordance with Article 32. (3). Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favour of that court.” Available at: http://eur-lex.europa.eu/ (last visited on January 20, 2015).
one exception which was not there under the old Brussels Regulation. The old and the new article aim to avoid the multiplicity of proceedings and conflict of judgments on the same matters between different courts which may crop up when two different courts give the different judgments on the same matter. Now as per exception added to the new Article 29 of the recast regulation, if the parties enter into an exclusive jurisdiction agreement conferring exclusive jurisdiction to a particular court and also there are parallel proceedings going on in the court of another member state, then in such case the court of the another member state shall stay the proceedings in their court up the time the court on which the exclusive jurisdiction is conferred by the agreement between the parties declares that it has no jurisdiction under the agreement entered into between the parties. But where such court declares that it has jurisdiction under the agreement any other court of another member state shall decline to exercise jurisdiction over the dispute in the favour of the court designated in the agreement between the parties. This exception in favour of exclusive jurisdiction clause was not there in the old Brussels regulation. Hence, Italian Torpedo no longer exists under the new Brussels Recast Regulation. Earlier what used to happen that if one of the parties to the contract had malafide intention to cause delay the judgment of the case by knowingly institutes case in the court of another member despite agreeing to the exclusive jurisdiction with the other party to contract. Taking advantage of the rule until the court which seized of the matter first declines to exercise the jurisdiction, the court even though is the one agreed on between the parties, cannot continue with the proceedings until the time the court first seized refuses to exercise the jurisdiction which lead to great inconvenience, frustration and wastage of time and expenses to the other party. So, under the new Recast Regulation this hurdle has been removed.

Under the old Brussels regulation, when one party obtained judgment against the other party in the court of the member state it has then to take steps for enforcing

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[7] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 38. It reads thus: “…1. A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared
the judgment so obtained in the state of executing court or in the court of the judgment debtors domicile. The interested party or the judgment creditor had to take steps to get it declared enforceable in the member state of enforcement. This process was known as exequatur. But, now under the new recast regulation this process has been abolished. Now under Article 39 of Recast a judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required. Now the only thing required to do by the judgment creditor is to the competent enforcement authority a copy of the judgment which satisfies necessary to establish its authenticity and a standard form certificate that the judgment is enforceable along with other conditions specified in the certificate. After this the process of enforcement of judgment begins in the enforcing member state.

2.2.1 Types of Jurisdiction provided under the Recast Regulation

The recast regulation provides for the following types of jurisdiction

(a) General Jurisdiction
(b) Special Jurisdiction
(c) Exclusive Jurisdiction
(d) Prorogation of Jurisdiction
(e) Jurisdiction by appearance

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8 Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast), art. 39. It reads thus: “A judgment given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States without any declaration of enforceability being required”. Available at: http://eur-lex.europa.eu/ (last visited on January 20, 2015).

9 Available at: http://uk.practicallaw.com/ (last visited on January 20, 2015).

(A) **General Jurisdiction**

The General Jurisdiction of the member state courts are embodied in Article 4 of the Regulation which states that “persons domiciled in a member state shall, whatever their nationality, be sued in the courts of that member state. The article states in general terms that in normal circumstances the defendants are to be sued in the member state in which they have domicile no matter whatever their nationality is. They should be sued in the courts of that member state. The domicile status of the defendant is considered at the time of the institution of the proceedings against him and not when the process is issued on him. Chapter V, Article 62 and Article 63 of Regulation lay down rules how to determine the domicile status of the parties. As per Article 62, the domicile status of a party in a member state whose courts are seised of the matter shall be determined according to the internal law of that member state. But, where a party is not domiciled in the member state which has seized of the matter, then in such case, the court seised of the matter shall apply the law of that other state in which the party is domiciled for the time being to ascertain the domicile status of the party. Article 63 explains how to determine the domicile status of the companies or other legal persons or association of natural legal persons. According to the Article, domicile of the above juristic entities is at the place where they have statutory seat, central administration or principle place of business. There is no precise definition of what constitutes statutory seat of a company, what is meant by Central administration or how to identify the principal place of business. For the purpose of jurisdiction it is assumed that ‘principle place of business’ of the company is the place where the company carries on its economic activities; place of ‘central administration’ of the company is the place where the company takes its most important decisions and ‘statutory seat’ of the company is the place where the company is incorporated or the place under whose law the formation of the company took place. It may happen that a company may have central administration at one place and principal place of business at another place. In such case forums available
in both the member states are available to the claimant for instituting the suit\textsuperscript{11}. There is fear of multiplication of competent forum when the domicile of company gets fit into all three places, namely at one member state it has statutory seat, at another it has central administration and at third member state it has principal place of business.

If one look at the recital 15 to the recast regulation it states that the rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant’s domicile and jurisdiction must always be available on this ground save in a few well defined situations in which the subject matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction\textsuperscript{12} which means that there are certain numbers of cases where general rule of jurisdiction based on the defendant’s domicile is not applicable. Except for the provision laid down under the heading of ‘General Jurisdiction’, all the below types of jurisdiction are exception to the rule laid down under the heading of General Jurisdiction that a defendant has to be sued in court of that member state where he has domicile for the time being.

(B) Special or Alternative Jurisdiction

Rules relating to special jurisdiction are contained in Article 7 to 9 of the regulation. These rules provide to the claimant special or alternative power to sue the defendant in an alternative or additional form in addition to the forum of defendant’s domicile. Special or alternative jurisdiction is available to the claimant in special cases such as in cases of claims arising out of contractual cases or out of the branch operation. Special jurisdiction is based on a close links between the court and the action or in

\textsuperscript{11} Supra note 4 at 28.
order to facilitate the sound administration of justice.\textsuperscript{13} The claimant decides whether he wishes to sue in the defendant’s domicile court under Article 4 or in another member state under section 2, Article 7 to 9. Special jurisdiction rules determine both international and local jurisdiction by directly designating the court that is locally competent without reference to the domestic rules of the member states. The Article is directly in Contrast to Article 4 which provides for general jurisdiction to the Courts of the member state in which the defendant is domiciled, but leaves it to the internal rules of that member state to determine which of its national court has jurisdiction to hear the dispute. This is justifiable by the fact that special jurisdiction rules are based on a specific connection between the claim and a specific place and therefore a specific court. However special jurisdiction rules only indicate an alternative court if it is located in one of the member states. If the rule indicates a court outside the territorial scope of the Regulation, special jurisdiction is not available, and accordingly the only forum available to the plaintiff is the defendant’s domicile as stipulated in Article 4.\textsuperscript{14}

**Special Rules of Jurisdiction relating to Contract**

There are special rules relating to contract under the Regulation. Section 2, Article 7 of the Special Jurisdiction lays down that a person domiciled in a member state may, in another member state be sued:-

(a) In matters relating to a contract in the courts for the place of performance of the obligation in question e.g. the place of performance of contract is India, in such case if any dispute arises between the parties of India and a EU member state, then, Indian court is also entitled to assume jurisdiction over the defendant, even though the defendant’s domicile is in that EU member state. There is no definition of term


“Contractual relationship’ in the Regulation. The European court of Justice has tried to give autonomous term to the term. The reason being there are different definition of term ‘Contractual Relationship’ in the legal system of EU members. So, the term has to be interpreted independently from the meanings given in National rules of the member state. ECJ has held that the term should be interpreted seeing the facts and issues of each case. For the first time in the case Martin Peters GMBH v. Zuid Nederlandse Av the ECJ giving the autonomous interpretation to the term ‘contractual relationship’ held that matters relating to contract includes relationships which involve close links of the same kind as are created between the parties to a contract. The contractual obligation should be identifiable and also there must be identifiable place of performance. There must be a single place of performance for the contractual obligation in question.

The recast regulation does not contain any definition as regarding the meaning of place of performance of the obligation. However in the case of Industrie Tessili v. Dunlop, ECJ laid some guidance as to how to determine the place of obligation. The court held that the place of performance of the obligation in question was to be determined by the law which governed that obligation. The National courts before whom the case is brought up should determine the governing law by applying their own conflict of law rules. But, where the place of performance had been indicated by the parties in a clause which was valid by the law applicable to that contract then, such a clause would generally be upheld. In the case of De Bloos v. Bouyer, the ECJ court held that the ‘obligation’ in question cannot refer to any obligation arising under the contract but only refer to the contractual obligation forming the basis of legal proceedings, meaning thereby, the obligation which corresponds to the contractual right upon which the plaintiff’s action is based. Therefore where a claim

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was brought by a seller of goods for non-payment by the buyer then, clearly the obligation in question was that of the buyer to pay the agreed price. Conversely, where the buyer brought an action against the seller for non delivery of goods, then the obligation in question was that of the seller to deliver the place of performance of the obligation in question.

Article 7(1)(b) states that unless the parties have agreed otherwise the place of performance of the obligation in question in 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 case of services, the place of performance of obligation shall be the place in a member state, where the services were provided or should have been provided under the contract. The Article implies that while ascertaining the place where goods were delivered or should have been delivered, regard must be paid to the terms of the contract agreed between the parties. Where there is no express agreement as to the place where goods are to be delivered reference must be had to the terms of contract, to gather implied terms for the place of delivery of goods. Where in a case of contract there is multiple place of delivery, then in such case it cannot be said that each court of multiple place of place will have the right to assume jurisdiction on that basis. Instead, attempt should be made to find out singular place of delivery or the place which is the principle place of delivery. The Article is silent as to how to find out singular place of delivery, when there are multiple places of deliveries in a contract. Sometimes the parties to contract provide for the delivery of goods to a fictitious place with the sole object of establishing jurisdiction of a particular court of a particular place. Then in such case the goods may be delivered into member state ‘A’ rather than at member state ‘B’ which is fictitious place of delivery. In cases, where the goods are mis-delivered in one member state than the place where the actual delivery was to be effected, the court of the member state in which actually delivery of the goods were to made shall have jurisdiction rather the court of the place
where mis-delivery was made.\textsuperscript{18} Where no delivery has taken place or no place is specified for delivery then in such case the place of delivery is to be identified by law governing the contract or by rule of exfori.\textsuperscript{19}

Article 7(1)(c) provides for the cases which are out of the scope of Article 7(1)(b). Examples of cases falling outside the scope of Article 7(1)(b), which are neither contracts for the sale of goods nor the contract of services are, contract for the assignment of intellectual property rights, a licensing agreement, an agreement to provide a joint tender for construction project, a contract for the payment of a prize, a contract whereby a person received a percentage participation in an oil concession etc.\textsuperscript{20} The Article provides that in such types of contract jurisdiction will be determined as per Article 7 (1) (a), which states that a person domiciled in a member state may be sued in another member state in matters relating to contract where the performance of the obligation under the contract is to be made. Hence the jurisdiction of all the contracts which don’t fall under Article 7(1) (b) shall be determined according to Article 7 (1) (a).

(C) Exclusive Jurisdiction

The exclusive jurisdiction of the member states are dealt by Article 24 of the recast regulation, which empowers the court of the member states to deal with certain subject matters without paying regard to the domicile status of the defendant. The Article is an exception to the rule that the defendant is to be sued in the state of domicile in EU. The court of member states assume exclusive jurisdiction by virtue of close geographical link between the subject matter of the dispute and particular court of a member state. The Article even over rides the jurisdiction which is based on the agreement between the parties under article 25 of the recast regulation. Even the cases of defendants not having domicile in the member states are covered within the scope

\textsuperscript{18} James Fawcett and Jannen M. Carruthers, \textit{Cheshire, North and Fawcett: Private International Law} 241( Oxford University Press, UK, 14\textsuperscript{th} edn.,2008).

\textsuperscript{19} \textit{Supra} note 15 at 89.

\textsuperscript{20} \textit{Supra} note 19 at 243.
of this Article. In the following cases the courts in the member state have exclusive jurisdiction over the defendant irrespective of the domicile status of the defendant:

1. Where the subject matter of the proceeding is immovable property and the immovable property is situated in the member state and also the issue in proceeding is related to the rights in rem or tenancies in the courts of the member state, that member state shall have exclusive jurisdiction. But where the proceedings are related to tenancy of immovable property concluded for temporary private use for a maximum period of six consecutive months, the courts of the member state in which the defendant is domiciled shall also have jurisdiction provided, firstly, the tenant should be a natural person and secondly, the landlord and the tenant are domiciled in the same member state.

2. Where the proceedings are related to the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or of the validity of the decisions of their organs, then in such case the courts of the member state in which the company, legal person or association has its seat shall have jurisdiction. The concerned court shall apply its rules of private international law to determine the seat of the company, legal person or association.

3. Where the object of the proceedings are concerned with the validity of entries in public register, then the court of the member state in which the register is kept shall have exclusive jurisdiction to determine the dispute.

4. Where the proceedings are concerned with the registration or validity of the patent, trademarks, designs or other similar rights required to be deposited or registered, the courts of that member state, where the deposit or registration has been applied for, has taken place or is under the terms of a community

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instrument or an international convention deemed to have taken place, shall have jurisdiction over the proceedings.

5. In case of the proceedings concerned with the enforcement of judgments the courts of the member state in which the judgment has been or is to be enforced shall have jurisdiction.

(D) Prorogation of Jurisdiction

Section 7, Article 25 of the Brussels Recast Regulation deals with the Prorogation of Jurisdiction whereby parties to an agreement may enter into an agreement conferring or agreeing to submit to the court or courts of particular member states to settle any disputes which have arisen or may arise in future between them under a contract, regardless of their domicile. However, the agreement should not be null or void as to its substantive validity under the law of member state identified in the jurisdiction agreement. If any such question arises as to the validity of the agreement, the question will be determined by the law of that country whose jurisdiction has been chosen by the parties to the contract. Such agreements in short are called jurisdiction agreements and such type of jurisdiction is called prorogation of jurisdiction. The agreement between the parties as to jurisdiction may cover not only the disputes which have already arisen but also which may arise in future. No connection between the forum court and the dispute is required for the agreement to take effect. There are basically two types of agreement which may be entered into by the parties under Article 25 of the recast regulation, one, giving jurisdiction to the member courts to decide the issue and the other excluding the jurisdiction of the courts member state to assume jurisdiction over the dispute. Where the parties enter into exclusive jurisdiction clause, the court specified exclusively shall have exclusive jurisdiction to decide the matter. Sometimes the contractual agreements uses the word ‘may’ than ‘shall’ while drafting the jurisdictional agreement. The word ‘May’ does not cast any obligation on the parties to definitely refer the dispute to the forum indicated in the agreement. It will be treated as non-exclusive clause which is merely
offering additional forum choice in addition to other forums available to try the dispute. The words’ unless the parties have otherwise agreed’ in the article also indicates towards the non–exclusive clause. The court has to decide by applying the law governing the contract whether a jurisdiction clause is exclusive or non exclusive, when deciding on the issue of construction of the clause. Clause (5) of Article 25 imparts respect to the jurisdiction agreements entered into between the parties by holding that a jurisdiction agreement which forms a part of the contract, conferring jurisdiction on a particular court, shall be treated as an agreement independent of the other terms of the contract. The validity of such an agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid.²² Hence, where a claim is made that the contract is invalid, the jurisdiction agreement will not be affected by the invalidity of the contractual agreement. The parties will not have to squander time in finding out the court which shall decide the question of validity of the contract, because the court designated in the jurisdiction agreement will resolve the claim of the parties, since the jurisdiction agreement is an independent agreement from the whole of the contract.

The exclusive jurisdiction agreement between the parties under Article 25 of the recast regulation cannot exclude the exclusive jurisdiction of the courts under Article 24 of the recast regulations. As to the form in which the agreement must be, there are three conditions: -

1. The agreement must be in writing or evidenced in writing or
2. It must be in the form which accords with practices which the parties have established between themselves; or
3. The agreement must in international trade or commerce be in the form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce in widely known to, and regularly observed

²² Ibid art. 25.
by the parties to contracts of the type involved in the particular trade or commerce concerned.\textsuperscript{23}

The agreement between the parties agreeing to the exclusive jurisdiction should be in clear writing or evidenced in writing. Sometime the choice of Jurisdiction clause is stated in general terms on the back of the contract entered into between the parties. There is possibility that the one of the party may overlook it. In such situation the European Court of Justice (ECJ) has held that the whole text of the contract must contain a clear express reference to the general terms. Merely the fact that the other party to the contract also has the copy of the contract and they are responsible if they do not see is not relevant. Article 25 (2) states that any communication by electronic means which provides a durable record of the agreement shall be equivalent to writing, hence, the article covers contracts through electronic means like e-mails. There is no separate requirement to reduce the agreements made electronically into writings. If the agreement conferring jurisdiction is in unwritten form and is not electronically made, then it should be in the form which accords with practices which the parties have established between themselves in the course of their continuous trading relationship between each other or it must be according to international trade practices or usages. In the absence of any such trading relationship between the parties, the jurisdiction clause between the parties may still be regarded as valid when such jurisdiction clause is according to the usages of international trade or commerce. The parties should be or ought to have been aware of such usage prevailing in the international trade and commerce. The usage should have been made and regularly observed by parties to contract of the type involved in the particular trade or commerce. There are lots of usages which are prevalent in the international trade or commerce and which have been observed over the centuries. These usages are in unwritten form and are result of international practices between the parties of different states or countries. The usage should not have been only precedent in one country, but should have been internationally known. Parties to

\textsuperscript{23} \textit{Ibid.}
contract should have been well aware of it and should have been regularly observed it in the course of their trading.\textsuperscript{24}

(E) Jurisdiction by Appearance

Appendix 26 of the Regulation deals with jurisdiction of the member stated where the defendant submits himself before the court of a member state through an appearance. The Article states, apart from jurisdiction derived from other provisions of this regulation, a court of a member state before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered into to contest the jurisdiction or where another court has exclusive jurisdiction by virtue of Article 24 of the recast regulation\textsuperscript{25}. The provisions of the Article do not apply in the case where the defendant makes an appearance simply to contest the jurisdiction of the court. Where the defendant enters an appearance and fights the actions on its merits (e.g. where he denies breach of contract on his part) the court of the member state before which he appears will have jurisdiction. But, where the defendant merely denies or disputes the jurisdiction of a court of the member state e.g. where the defendant points out that, the court of a member state is using traditional exorbitant basis of jurisdiction against him, which is prohibited by the Regulation, the court of the member state before which he appears will not have jurisdiction. Article 26 has another limitation in it. It does not apply in the cases where the another court has exclusive jurisdiction as per Article 24 of the Regulation. Jurisdiction by appearance will override a jurisdiction agreement, giving exclusive jurisdiction to another member state. This is because a jurisdiction agreement confers jurisdiction based on the consent of the parties to that jurisdiction. Where one party had taken proceedings in a different jurisdiction and the defendant has consented to

\textsuperscript{24} Supra note 19 at 292.
\textsuperscript{25} Id. at 298.
that jurisdiction by appearing before that court to contest the claim, there is no need to enforce the exclusive jurisdiction Agreement.  

2.3 The Lugano Convention

The Lugano convention was the result of the need of the European Free Trade Association to have single system for the legal and economic co-operation of recognition and enforcement of judgment, being the largest bloc and important trading partner with the European States. So on 16th September 1988 Lugano convention on jurisdiction and the enforcement of judgments in civil and commercial matters was entered into between the European Free Trade Association countries and 15 pre 2004 European Union member states and Poland. The Lugano convention was almost parallel to the Brussels Convention of 1968. Since the Brussels convention was replaced with the Brussels 1 Regulation, it was thought to correspondingly amend the Lugano Convention so as to bring it on the lines of the Brussels Regulation. The Lugano Convention was therefore amended and in the year 2007, the new Lugano Convention came into operation. The new Convention was concluded with the efforts of the European Community States, so it was natural for them to be bound by the convention, being the principle makers of the new Lugano Convention. The Contracting parties to the new Lugano Convention are European Community members, Denmark, Norway, Switzerland and Iceland. The main aim of the new Lugano Convention is to unify the rules on jurisdiction in civil and commercial matters and to expand the applicability of the Brussels I regulation to the relations between Member States of the European Community on the one hand and Norway, Iceland and Switzerland on the other. After coming into force, the convention is open to:-

1. The future members of the European Free Trade Association (EFTA);
2. Member States of the European Community acting on behalf of certain non-

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European territories that are part of their territory or for whose external relations they are responsible;

(3) Any other State, subject to the unanimous agreement of all the contracting parties. It will not apply to tax, customs and administrative matters or to the status and legal capacity of natural persons, rights in property arising out of matrimonial relationships, wills and succession, bankruptcy or composition, social security or arbitration. The new Lugano Convention applies where the defendant is domiciled in any of the European Union states or the countries of Denmark, Norway, Switzerland and Iceland in cases of civil and commercial matters between the party of England and the domiciliary of EU or Denmark, Norway, Switzerland and Iceland. But, if the defendant is not domiciled in a member state, then such defendant would be subject to the national rules of jurisdiction applicable in the territory of the member state of the court seized of the matter. Under the Lugano Convention the provision regarding the exclusive jurisdiction of courts in certain matters regardless of domicile of parties and the provisions related to prorogation of jurisdiction are similar to the Recast Brussels Regulation.

As per Article 1 of the Recast Regulation, the regulation applies to the Civil and Commercial matters whatever the nature of the court or tribunal may be. But, what is meant by Civil and Commercial matter is not defined in the Regulation. Even the decision of the Criminal Court is covered by the Regulation if the decision is related to Civil and commercial matters. Though the term ‘Civil’ is of widest connotation under the Regulation, it however excludes certain matters from the scope of

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27 Available at: http://ec.europa.eu/ (last visited on February 5, 2015).
28 21.12.2007, Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Title II, section 1, Article 2 (1), “Subject to the provisions of this Convention, persons domiciled in a State bound by this Convention shall, whatever their nationality, be sued in the courts of that State”. Available at: http://ec.europa.eu/ (last visited on February 15, 2015).
29 Ibid, art. 2(2). It reads thus: “Persons who are not nationals of the State bound by this Convention in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State”.
30 Ibid, art. 22 and 23.
regulation even if such matters fall under the term of civil and commercial matters. These are:

1. The status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship or out of a relationship deemed by the law applicable to such relationship to have comparable effects to marriage;
2. Bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.
4. Arbitration
5. Maintenance obligations arising from a family relationships, parentage, marriage or affinity;
6. Wills and succession, including maintenance arising by reason of death.

As per Article 4, the basis of jurisdiction under the recast Brussels regulation over the defendant is his domicile in member state. A member state is entitled to assume jurisdiction over the defendant by virtue of his domiciliary in the member state. The courts of member states cannot apply their national rules for the purpose of assuming jurisdiction over the defendant, domiciled in the member state. Only the rules applicable in the regulation are to be applied. The regulation applies only when there is a foreign element in a dispute. If the dispute does not contain any foreign element the regulation is inapplicable. But, if the foreign element has connection with a non-member state then the regulation is applicable. So, where both the parties to the dispute have domicile in a member state and the disputing events occurred in a non-member state, the regulation is validly applicable. The regulation does not affect other conventions on jurisdiction or recognition and enforcement which member states have in the past entered into or statutes implementing them. Thirdly, the rules on jurisdiction and recognition and enforcement do not apply to proceedings or issues
arising in proceedings in member states concerning the recognition and enforcement of judgment given in non member states.\textsuperscript{31}

Where the defendant is not domicile in a member state, jurisdiction over him will be determined as per Article 6 of the recast regulation. Article 6 of the Regulation states that if the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, be determined by the law of that Member State, which means the national rule of member state shall be applied on the defendant for the purpose of determining jurisdiction over him. The Article is subject to Article 18(1), Article 21(2) and Articles 24 and 25 of the recast regulation. The advantage to use the national laws of the member state is also available to the claimant, domiciled in the member state against such non-domiciled defendant, whatever is the nationality of the plaintiff. Chapter II of the recast regulation does not lay down any requirement as to the domicile of plaintiff in the member state before instituting a suit against the defendant domiciled in another member state. The plaintiff may have domicile of a non member state, but for the regulation to be applied the defendant must be domiciled in a member state.

2.4 Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters

All four common law countries of India, England, Australia and Canada have ratified the convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters which have come into force in these countries on different dates. The Convention is called as Hague Service Convention and is a multilateral treaty which was adopted in The Hague, The Netherlands, on 15 November 1965 by member states of the Hague Conference on Private International Law. The convention supersedes the 1905 Civil Procedure Convention, which had previously dealt with the issue of international service of process.\textsuperscript{32} It applies to all cases of civil and commercial nature. The aim of the Convention is to ensure that

\textsuperscript{31} Supra note 19 at 214.
\textsuperscript{32} Available at: https://en.wikipedia.org (last visited on February 17, 2015).
judicial and extra-judicial documents to be served abroad shall be brought to the notice of the court of the addressee in sufficient time. Earlier the service of process in foreign counties were made through the use of diplomatic or consular channels via letter Rogatory which was thought to be time consuming and cumbersome for serving the process. This convention eases the process of serving the judicial and extra-judicial document aboard through the designated central authority who accepts the requests from the contracting states. As per Article 2 of the Convention each Contracting State shall have to designate a Central Authority whose job will be to receive requests for service coming from other Contracting States and to proceed in conformity with the provisions of Convention further. For example India’s central authority for the purpose of the convention is Ministry of Law and Justice, Department of Legal Affairs. It is not necessary for the central authority to oblige to all the requests blindly of the member states. If at any point of time the central authority will feel that the judicial or extra-judicial document received from the contracting state is not according to the provisions of the convention, it shall than inform and file the objection with the state sending request for the service of the document. If the document is complete in all aspects and meet the requirements of the convention, then the central authority may serve the document according to the internal law of the country in which that central authority is located or according to the procedure as requested by the sending state, so far as such procedure is not incompatible with the law of the state addressed. But, even though in the cases where the request of the sending state to serve the document in the state addressed meets the requirement of the convention, the state addressed may still refuse to serve the document if the compliance with the service of document infringes the

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33 Available at: https://www.hcch.net/en/instruments/conventions (last visited on February 17, 2015).
34 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, art.2 available at: https://www.hcch.net (last visited on March 3, 2015).
sovereignty or security of the state addressed.\textsuperscript{37} Once the document has been served in the state addressed, the central authority than shall issue a certificate to the sending state stating the method, place, date and person on whom such document has been delivered. If the authority has failed to deliver the document, it shall then state the reasons in the certificate which have prevented the service in the state addressed.\textsuperscript{38}

There is no prohibition on the use of diplomatic or consular channels in addition to methods of service prescribed under this convention to effect service abroad by the member states.\textsuperscript{39} The convention does not prevent two or more member states to enter into an agreement between them devising and agreeing on other means of serving the document between themselves other than those provided under the convention.\textsuperscript{40} Where the document has been served on the defendant under the provisions of the convention and the defendant does not make an appearance, the sending court shall not give any judgment against such defendant unless it is proved that the document was validly served in the addressed state as per its internal law or the document has been actually delivered to the defendant in the state addressed at his residence by any other method prescribed under this convention and defendant has been given sufficient time to defend.\textsuperscript{41} In case the judgment is given by the court of the sending state against the defendant of the state addressed in compliance with the provisions of the convention if the defendant does not make an appearance, still it is open for the court of the sending state to relieve the defendant from the effects of the expiration of the time for appeal from the judgment if the following conditions are fulfilled\textsuperscript{42} :-

\textsuperscript{37} Ibid, art. 13.
\textsuperscript{38} Ibid, art. 6.
\textsuperscript{39} Ibid, art. 6 and 7.
\textsuperscript{40} Ibid, art. 11.
\textsuperscript{41} Ibid, art. 15.
\textsuperscript{42} Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, art. 16, available at : https://www.hcch.net (last visited on February 18, 2015).
a) The defendant, without any fault on his part, did not have knowledge of the
document in sufficient time to defend, or knowledge of the judgment in sufficient
time to appeal, and

b) The defendant has disclosed a *prima facie* defence to the action on the merits.

Thus, the above were some of the important provisions regarding service of judicial
documents. The provisions for extra-judicial documents are contained in chapter II of
the Convention.

### 2.5 The Rome 1 Regulation

The Rome 1 Regulation governs the choice of law rules in the states of
European Union. The regulation came into force on 17th December 2009 and is
directly applicable to all the EU states except for Denmark. The regulation applies to
the contracts concluded after 17th December 2009. The regulation replaces the Rome
Convention 1980 on the Law Applicable to Contractual Obligations. However, the
contracts concluded before the entry into force of the Rome 1 Regulation will
continue to be governed by the provisions of Rome Convention. The regulations
aim at unifying the conflict of law rules on the choice of law aspect in the contract
between the European Union. The material scope of the regulation is enumerated in
Article 1 of the regulation. According to the said article the regulation applies to
contractual obligations in civil and commercial matters, in situations involving a
conflict of laws. However certain matters are expressly excluded from the preview of
the article which includes, revenue, customs and administrative matters, questions
involving people's status or legal capacity, obligations arising out of family
relationships, obligations concerning matrimonial property, obligations arising under
bills of exchange, cheques and promissory notes, arbitration agreements and
agreements on choice of court, issues governed by company law, disputes relating to

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43 *Available at:* http://www.incelaw.com/ (last visited on February 27, 2015).
trusts, obligations arising out of dealings before the contract was finalized, insurance contracts and matters of evidence and procedure.\footnote{Available at: www.out-law.com (last visited on March 2, 2015).}

As per Article 2 of the regulation, the regulation applies universally or \textit{erga omnes}, which means that it, is irrelevant whether the law of the member state or a non-member state is designated as applicable.\footnote{Available at: http://ec.europa.eu/ (last visited on March 5, 2015).} The members of the regulation have to apply the provisions of the Rome I Regulation even though the parties to contract are not the member of European Union and the Regulation and even if the resultant choice-of-law rules turn out to be those of non EU member. There is no requirement under the regulation that the parties to dispute should be of the member states or the contracting state. Some of the very important provisions of the regulation are:

(a) It gives autonomy to the parties to choose the law which will govern their contract. The parties are required to give in express terms the law governing their contract or to express their intention in a manner that clearly demonstrates the intention of the parties regarding the governing law of the contract. The parties are free to agree and select the governing law for the whole of contract or part of it.\footnote{Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), art. 3, available at: eur-lex.europa.eu (last visited on March 5, 2015).}

(b) Where the parties do not make an express choice then the rules laid down in Article 4 of the Rome I Regulation are applied for determining the law governing the contract in the absence of choice of law rules by the parties. The article lays down specific rules for eight types of contract which are – contract for sale of goods, contract for services, contract relating to immovable property, a contract of private tenancy, a franchise agreement, a distribution contract, a contract for sale of goods by auction and a contract concluded within multilateral financial trading system. However, where the contract does not fall within the above mentioned eight categories, the law governing the contract will be law of the country of habitual
residence of the party required to effect characteristic performance of the contract.\textsuperscript{47}

But, where the habitual residence of the person effecting the characteristic performance cannot be determined, then the contract will be governed by the law of the country with which the contract is most closely connected. The habitual residence of legal person like companies and other bodies cooperate or incorporate shall be the place of central administration, with regard to Individual, the habitual residence of natural person acting in the course of his business activity shall be his principal place of business. Where the contract is concluded in the course of the operations of a branch, agency and any other establishment, or, if under the contract, performance is the responsibility of such a branch, agency or other place of habitual residence will be the place, where the branch agency or any other establishment is located. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.\textsuperscript{48}

(c) Under article 9 of the regulation respect has been given to the overriding mandatory provisions of the law of the countries. Every country has certain laws which are crucial to its political, social and political well being. Overriding of theses mandatory laws may cause severe setback to a nation. So, under article 9 of the regulation even if the parties have freedom to choose a foreign law as governing law

\textsuperscript{47} Ibid, art.4.

\textsuperscript{48} Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), art.19. It reads thus, “1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract”. Available at: eur-lex.europa.eu/(last visited on March 5, 2015).
of the contract, the foreign governing law cannot override the mandatory provisions of member state.  

(d) The material validity of the contract shall be determined according to the law of the member state whose choice of law clause has been incorporated under the contract. But, where one party disputes to the incorporation of governing law in the contract on the ground that he did not give consent to the law governing the contract, then in such case, he may deny such consent on the ground that the consent is not a valid consent according to the law of his habitual place of residence.

(e) Article 11 deals with the formal validity of the contract. As per the article where a contract is concluded between the parties or their agents, and the parties are in the same country when the parties concluded the contract, the contract will be deemed as formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded and in case where the parties or their agents are in different countries at the time of the conclusion it will be deemed as formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.

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\[49\] *Ibid*, art. 9. It reads thus: - “1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application:.

\[50\] *Ibid*, art. 10.
2.6 The Hague Convention on the Choice of Courts Agreement

The Hague Convention on choice of Courts Agreement is an international treaty which was concluded on 30th June 2005 and entered into force on 1st October 2015. The convention aims to promote international trade and investment through enhanced 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. The convention aims to give effect to the exclusive jurisdiction agreement entered into between the parties in civil and commercial matters of international character. Article 1 of the convention states that a case is an international case unless the parties are resident in the same Contracting State and the relationship of the parties and all other elements relevant to the dispute, regardless of the location of the chosen court, are connected only with that State. Also, where recognition or enforcement of a foreign judgment is sought, that case is also a international case. There are certain matters which are kept out of the scope of the convention. Those are covered under Article 2 of the convention. Article 5 of the

Available at: https://en.wikipedia.org (last visited October 15, 2015).
Available at: https://assets.hcch.net ((last visited October 15, 2015).
The Hague Convention on Choice of Court Agreement, 2005, art.3 (a) & (b). It reads thus:-
“exclusive choice of court agreement” means an agreement concluded by two or more parties that meets the requirements of paragraph c) and designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State to the exclusion of the jurisdiction of any other courts; b) a choice of court agreement which designates the courts of one Contracting State or one or more specific courts of one Contracting State shall be deemed to be exclusive unless the parties have expressly provided otherwise”. Available at: https://www.hcch.net/en/ (last visited on October 17, 2015).
Ibid, art.2. It reads thus:- “(1) This Convention shall not apply to exclusive choice of court agreements – a) to which a natural person acting primarily for personal, family or household purposes (a consumer) is a party; b) relating to contracts of employment, including collective agreements. (2) This Convention shall not apply to the following matters – a) the status and legal capacity of natural persons; b) maintenance obligations; c) other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; d) wills and succession; e) insolvency, composition and analogous matters; f) the carriage of passengers and goods; g) marine pollution, limitation of liability for maritime claims, general average, and emergency towage and salvage; h) anti-trust
convention confers exclusive jurisdiction on the court which is designated in the contract entered into between the parties of the member states. The designated court shall not decline or refuse to exercise jurisdiction on the ground that some other court of the state shall decide the dispute unless the contract is null and void under the law of the state designated to have exclusive jurisdiction under the contract. If one of the parties brings an action in another court in breach of the exclusive jurisdiction agreement, the court before which the proceedings are brought shall dismiss or suspend the proceedings brought in breach of exclusive jurisdiction agreement. However, the court seised of the matter may exercise jurisdiction in cases:

1. Where the contract is itself null and void under the law of that member state in favour of whom the exclusive jurisdiction agreement applies, or

2. The agreement is not valid due to the incapacity of a party to conclude the agreement under the law of the State of the court seised, or

3. Where giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised, or

4. There are exceptional reasons which are beyond the control of the parties disabling the performance of agreement, or

(competition) matters; i) liability for nuclear damage; j) claims for personal injury brought by or on behalf of natural persons; k) tort or delict claims for damage to tangible property that do not arise from a contractual relationship; l) rights in rem in immovable property, and tenancies of immovable property; m) the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs; n) the validity of intellectual property rights other than copyright and related rights; o) infringement of intellectual property rights other than copyright and related rights, except where infringement proceedings are brought for breach of a contract between the parties relating to such rights, or could have been brought for breach of that contract; p) the validity of entries in public registers. (3) Notwithstanding paragraph 2, proceedings are not excluded from the scope of this Convention where a matter excluded under that paragraph arises merely as a preliminary question and not as an object of the proceedings. In particular, the mere fact that a matter excluded under paragraph 2 arises by way of defence does not exclude proceedings from the Convention, if that matter is not an object of the proceedings. (4) This Convention shall not apply to arbitration and related proceedings. (5) Proceedings are not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto. (6) Nothing in this Convention shall affect privileges and immunities of States or of international organisations, in respect of themselves and of their property.”
5. The court in whose favour the exclusive jurisdiction agreement has been created has decide not to hear the case.

As per Article 8 of the convention, if the designated court having exclusive jurisdiction give a judgment that judgment shall be recognized and enforced in the other contracting states.

Article 9 states the ground on which the recognition and enforcement of judgment may be refused by the other contracting states. These grounds are-

a) the agreement was null and void under the law of the State of the chosen court, unless the chosen court has determined that the agreement is valid;

b) a party lacked the capacity to conclude the agreement under the law of the requested State; c) the document which instituted the proceedings or an equivalent document, including the essential elements of the claim, i) was not notified to the defendant in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant entered an appearance and presented his case without contesting notification in the court of origin, provided that the law of the State of origin permitted notification to be contested; or ii) was notified to the defendant in the requested State in a manner that is incompatible with fundamental principles of the requested State concerning service of documents;

d) the judgment was obtained by fraud in connection with a matter of procedure;

e) recognition or enforcement would be manifestly incompatible with the public policy of the requested State, including situations where the specific proceedings leading to the judgment were incompatible with fundamental principles of procedural fairness of that State;

f) the judgment is inconsistent with a judgment given in the requested State in a dispute between the same parties; or
g) the judgment is inconsistent with an earlier judgment given in another State between the same parties on the same cause of action, provided that the earlier judgment fulfils the conditions necessary for its recognition in the requested State.

So, in the field of Private international law, lot has been done at the international level to give certainty to the rules of private international law. But, most of the efforts have come from the states of European Union. They have succeeded to quite an extent in unifying the law on private international law. The countries of the rest of the world should also take steps for bringing certainty in the rules of private international law.