7.1. INTRODUCTION

Recognition and Enforcement of foreign judgement is third most important pillar of Conflict of laws or Private International law. A judgement given by the competent Court of a rendering or a foreign State is not effective and useful till the time it is not recognised and enforced by the Court of the receiving State. One of the purpose of the recognition and enforcement of foreign judgment is to reduce the repetition of litigation on the same issue in the receiving court. In case of ubiquitous nature of exploitation of copyright work on Internet, filing case in every State court is a difficult and time consuming task. For enforcement and recovering the damages filing suit in the receiving State is again a frustrating act. Recognising the foreign judgement saves time and money of parties as well as the judiciary of the receiving State. However, problem of recognition and enforcement is accumulated due to territorial nature of copyright laws which includes the enforcement mechanism by State legislation. It is compounded by the fact that the various legal systems prevails around the world limits the role of legislature or judiciary to evolve the rules according to its requirements.

In this background the present chapter deals with the issue of recognition and enforcement of foreign judgment by various states.

7.2. HARMONISATION OF ENFORCEMENT MECHANISM AT INTERNATIONAL LEVEL

As discussed in the earlier chapters various international conventions were formed due to advancement of technology from time to time, which forced the States
either to amend the convention\(^1\) or to draft a new convention\(^2\) to deal with the
development of technology and its effect on copyright issues. Very less uniformity
was attempted before the Trade Related aspects of Intellectual Property Rights
(‘TRIPs’) relating to enforcement mechanism of Intellectual Property Rights (‘IPR’) issues, which resulted into divergent enforcement mechanism applied by the Berne
Member States. Major initiatives were taken during TRIPs negotiations to harmonise
the rule under World Trade Organisation (‘WTO’) framework. Harmonisation is one
step towards reducing the tension between the States relating to the recognition and
enforcement of foreign judgement as it reduce the differences on the State practice to
enforce the rules relating to Intellectual Property Rights (‘IPR’).

7.2.1. ** Enforcement mechanism of Copyright under TRIPs**

The Agreement on Trade Related Aspects of Intellectual Property Rights\(^3\)
established international minimum standards for intellectual property protection both
in its substantive and enforcement provision. The enforcement mechanism is provided
in the TRIPs, Article 41 to 61 which provide enough guidelines to be followed within
the territorial limits of Member States. These provisions oblige Member States to
provide enforcement procedure including civil or administrative remedies, as well as
criminal remedies that permit effective action against any act of intellectual property
rights infringement. Since, TRIPs also cover the computer programme under the
copyright concept, therefore it covers the online infringement of copyright and
constitutes a deterrent to further infringement.

Article 41 sets out the principle for enforcement of foreign judgment. Article
41(1) insists on the effective action against infringements, including expeditious
remedies to prevent infringements and remedies which constitute a deterrent to further

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\(^1\) Berne Convention for the Protection of Literary and Artistic Work, 1886 was modified several
times till the Paris Amendment of 1971. First amended in 1896 at Paris; Second amendment in
1914 at Berne: Third amendment in 1948 at Brussels; Fourth amendment at 167 at Stockholm;
Fifth amendment at 1971 at Paris.

\(^2\) WIPO Copyright Treaty, 1996 (‘WCT’) and WIPO Phonogram and Performance Treaty, 1996
(‘WPPT’) are the result of development of Internet and related technology. Conventions are
available at <www.wipo.int>.

\(^3\) TRIPs Agreement, available at <http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm>
[accessed on 10.10.2011].
infringement. Article 41(2) requires the procedures to be fair and equitable, not necessary lengthy and unreasonable. Article 41(4) requires that the final administrative decisions, a review by a judicial authority must be available. A right to appeal of initial judicial decision on the merits of a case must similarly be available.

Further, Article 44 of TRIPs lays down the important concept of injunction. Since the concept is not universal, therefore Article 44(2) prefers to express it as;

“An order to desist from an infringement, interalia, to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of an intellectual property right.”

Injunctions are in the form of a Court order against the defendant to prohibit an infringing act. It is one of the most important remedy against the infringement of intellectual property rights. Injunction is further classified as permanent injunction and temporary injunctions. Permanent injunction is usually issued if the plaintiff proves his right and the infringement. The injunction order may remain in force till the exclusive right that was infringed by the defendant ceases to exist. Permanent injunctions are generally issued after a trial on the merit of the case, whereas interlocutory or provisional injunctions are issued during the pre trial phase. In case of copyright Antop Pillar order, Merva injunction and John doe order (in Indian version known as ‘Ashok Kumar order’) are widely used.

Article 45 (1) encapsulates the common rule that an infringer should pay damages to compensate the right holder for injury suffered. Knowledge or reasonable knowledge of damage by the infringer is required. Constructive knowledge is required for the application of this Article. Article 45(2) allows Members States to give their courts the power to award apart from compensatory damages, recovery of profits made by the infringer and pre-established damages, even where he had no actual or constructive knowledge that he was engaging infringing activity.

Article 46 provides that judicial authorities must have the authority to order that seized goods be disposed of outside the channels of commerce. Article 47 allows judicial authorities in civil and administrative matters to order the infringer to give the
names of his suppliers and distributors. The provisions includes both upstream and downstream channel of production and distributing as required by the Article. Refusal to provide information would invite sanctions and contempt of court. In case the defendant is innocent then Article 48 directs the judiciary of the Member State to order the plaintiff to pay the defendant expenses, which may include appropriate attorney’s fees.

Article 61 imposes criminal measures in order to deter the infringer of the infringement activity. The criminal remedies must include fines and imprisonment at level sufficient to deter the accused and other professional infringers. The judicial authority should also have the authority in appropriate case to order the seizure, forfeiture and destruction of both the goods and the materials and implements whose predominant use was the commission of offence.

7.2.2. Enforcement mechanism under European Union

Responding to the obligation imposed by TRIPs, the European Union drafted the Enforcement Directive for Intellectual Property Rights in 2004\(^4\), requiring Member State to provide fair and equitable remedies which must also be “effective, proportionate and dissuasive”.\(^5\)

Article 7 of the Directive requires that the Member States shall, even before the commencement of proceedings on the merits of the case, order prompt and effective provisional measures to preserve relevant evidence, subject to the protection of confidential information. Such measures may include the detailed description (search), with or without the taking of samples, the physical seizure of the infringing goods and, in appropriate cases, of materials and implements used in the production and/or distribution of these goods and the documents relating thereto. Where necessary, these measures shall be taken without the other party having been heard. They shall be revoked or cease to have effect if the applicant does not initiate, within a period specified by the Directive, proceedings leading to a decision on the merits of

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the case before the competent judicial authority. In that case or where the infringement of the intellectual property right was not established in the judicial proceeding, the judicial authorities shall have the power to order the applicant to provide the defendant with an appropriate compensation for any injury caused by those measures.

Under Article 6(2), Member States' judicial authorities shall have the possibility to order the communication of banking, financial or commercial documents which are under the control of the opposing party, in case of an infringement committed on a commercial scale, subject to the protection of confidential information. This is a provision that goes beyond TRIPS, which does not contain any provision on this issue.

Article 8 of the Directive requires Member States to enable the competent judicial authorities to order that information be provided by the infringer or another person on the origin and distribution networks of the goods which infringe intellectual property rights. The scope of the group of persons that can be forced to provide the information goes beyond the infringer and includes anyone directly or indirectly involved in the infringing act.

Article 9 of the Directive obliges Member States to ensure that right holders are in a position to apply for an injunction against the infringer aimed at prohibiting the continuation of the infringement (‘interlocutory’, ‘interim’ or ‘temporary’ injunction). It appears that injunctions against infringers were not new to Member States' legal systems and seem to have been widely used in the Member States even before the adoption of the Directive. Non-compliance with an injunction is sanctioned by a fine to be paid to the plaintiff or to the court or by criminal sanctions in some cases.

Article 11 of the Directive requires that where a judicial decision confirming an infringement of an intellectual property right is taken, judicial authorities may issue an injunction (‘permanent’ injunction) against the infringer aimed at prohibiting the continuation of the infringement. In the same way as temporary injunctions, permanent injunctions can also be issued against intermediaries and they may be issued against them irrespective of the intermediaries' (potential) liability.
Article 10 of the Directive requires that the competent judicial authorities may order recall from the channels of commerce of goods which have been found to be infringing an intellectual property right, and in appropriate cases also materials and implements principally used in the creation or manufacture of these goods. Furthermore, their definitive removal from the channels of commerce or their destruction may be ordered. Such measures shall be carried out at the expense of the infringer.

Further, Article 12 of the Directive provides for an option for Member States to introduce alternative measures in the form of a pecuniary compensation to the injured party if the person that infringed the intellectual property right acted unintentionally and without negligence, if execution of other measures would cause disproportionate harm and if pecuniary compensation appears reasonably satisfactory.

Article 13(1) of the Directive requires Member States to enable the competent judicial authorities to order the infringer who knowingly, or with reasonable grounds to know, engaged in an infringing activity, to pay the right holder damages appropriate to the actual prejudice suffered by him as a result of the infringement. Where the infringer acted in good faith (i.e. without reasonable ground to know), Member States have the possibility to allow the judicial authorities to order the recovery of profits or the payment of damages, which may be pre-established (Article 13(2)).

Currently very few countries have enacted the laws according to the Directive. UK implements it by enacting the Intellectual Property (Enforcement, etc.) Regulation, 2006. It is also implemented in Dutch and in force from May 1, 2007. France by ‘Decret 2008-624’ of June 27, 2008 enforced it. In case of Swedish made it a part of it on April 7, 2009.

7.3. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGEMENT

Currently there is no universal convention on the issue of recognition and enforcement of foreign judgments for the IPR issues. Various regional and bilateral agreements have been formed between the member countries from time to time laying down some fundamental rules of recognition and enforcement of foreign judgments.
relating to specific issues. However due to non uniformity, the differences lies in practice of the Member State in implementing these general grounds. Hague Conference made an attempt in 1971 to lay down uniform rules of Recognition and Enforcement of Foreign Judgment, but failed measurably as it could not get the required ratifications. In comparison to that Hague Convention on Choice of Court Agreement 2005 is an important achievement though narrowly deals with the Internet related IPR issues.

7.3.1. Hague Convention on Choice of Court Agreement, 2005

US proposed in 1992 that Hague Conference on Private international law should devise a worldwide convention on enforcement of foreign judgments in civil and commercial matters. It was an opportunity for northern world to harmonise the bases of jurisdiction as European Countries had dual system of jurisdiction and recognition and enforcement of foreign judgments rules. Despite great efforts, Hague Conference did not succeed in devising a convention that laid down common rules of jurisdiction and civil and commercial matters. After longer negotiation the Conference was only able to agree on Hague Convention on Choice of Court Agreements, 2005\(^6\) which incorporates the rules of recognition and enforcement of foreign judgements for the choice of court related foreign judgments.

Article 8 and 9 of the Convention is related to the recognition and enforcement of foreign judgement. Article 8 is the key provision of the convention. It states that a judgement given by a court in a contracting State designated in an exclusive choice of court agreement must be recognised and enforced in other contracting States.\(^7\) Therefore important requirement is that there is need to be an exclusive choice of court agreement designating the court of origin which must be a contacting State. Article 8 also covers situations where the court of origin based its jurisdiction on some other ground, such as the domicile of the defendant.\(^8\)


\(^7\) *id.*, Article 8 (1); “A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States in accordance with this Chapter. Recognition or enforcement may be refused only on the grounds specified in this Convention.”

Further Article 8(2)\(^9\) prohibits the review as to the merits of the judgements. The other part of the Article provides that the court addressed is bound by the finding of fact on which the court of origin based its jurisdiction, unless the judgement was given by default. This Article does not apply where the court of origin based its jurisdiction on some other ground other than the choice of court agreement.

Article 8(3)\(^{10}\) of the Convention provides that a judgement will be recognised only if it has effect in the State of origin and will be enforced only if it is enforceable in the State of origin. Therefore the convention recognises the distinction between recognition and enforcement. Recognition means that the court addressed gives effect to the determination of the legal rights and obligations made by the court of origin. Whereas enforcement means the application of the legal procedures of the court addressed to ensure that the defendant obeys the judgement given by the court of origin. If the judgment is not enforceable in the State of origin, it should not be enforced elsewhere as per the convention. It is possible that the judgment will be effective in the State of origin without being enforceable there. Enforceability may be suspended pending an appeal and in such case enforcement will not be possible in the contracting State until the matter is resolved in the State of origin. Article 8(4)\(^{11}\) provides that recognition or enforcement may be postponed or refused if the judgement is the subject of review in the State of Origin or if the time limit for seeking ordinary review has been expired.

Article 9 lays down seven exceptions to the general rule of recognition and enforcement rule set out in Article 8. The exceptions are as follow:

- First exception, if the agreement is null and void on any ground including incapacity under the law of the State of the chosen court,

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\(^9\) Hague Convention, *Supra* note 6, Article 8(2); “Without prejudice to such review as is necessary for the application of the provisions of this Chapter, there shall be no review of the merits of the judgment given by the court of origin. The court addressed shall be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.”

\(^{10}\) *id.*, Article 8(3); “A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.”

\(^{11}\) *id.*, Article 8(4); “Recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired. A refusal does not prevent a subsequent application for recognition or enforcement of the judgment.”
• Second exception, a party lacked the capacity to conclude the agreement under the law of the requested State;

• Third exception, if the defendant was not properly notified of the suit in sufficient time and in such a way as to enable him to arrange for his defence. This rule is however not applicable if the defendant entered an appearance and presented his case without contesting notification, even if he had insufficient time to prepare his case properly.

• Forth exception, the judgment is obtained by fraud in connection with the matter of procedure. If the plaintiff deliberately serves the writ or causes it to be served on the wrong addressed on the wrong address or put wrong inform as to the time and place of the hearing etc.

• Fifth exception, recognition and enforcement are incompatible with the public policy of the recognising State. It may include situations where the specific proceedings leading to the judgment were incompatible with the fundamental principles of procedural fairness of that State.

• Sixth exception, deal with the situation in which there is a conflict between the judgment for which recognition and enforcement are sought under the convention and another judgment given between the same parties. Where the inconsistent judgment was granted by a court in the recognising State.

• Seventh exception, concerned with the situation in which both judgment were given by foreign courts. In both exceptions the cause of action and the parties must be the same.

7.4. UNITED STATE: DOMESTIC RULE OF RECOGNITION AND ENFORCEMENT

a. Among Sister States

US is a federal State and every State of US has its own Private International law to regulate their cross border issues. Therefore, as between the States of the US, the Recognition and Enforcement of Foreign Judgment requirements are prescribed by
federal laws. The Constitution’s full faith and credit clause under Article IV, Section 1 provides that;

“Full Faith and Credit shall be given in each State to the Public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”

This Article imposes ‘Full Faith’ and ‘Credit’ in every court within US. The State’s statute relating to recognition and enforcement of foreign judgment only describe the procedure for the enforcement of foreign judgment. They define the degree of effect to be accorded to the Sister court’s judgment. The Court in US States has aggressively used the ‘Full Faith’ and ‘Credit clause’ as a unifying instrument for recognition of Sister State’s judgment. The court has repeatedly held that States of US must recognise the rendering Sister State’s judgment, even if recognition is against the public policy of the receiving Sister State. This sentiment was expressed in the case of Fauntleroy v. Lum, as court held in the case that,

“Whether the ruling of Missouri court was right or wrong, there can be no question that the judgment was conclusive in Missouri on the validity of the cause of action. A judgment is conclusive as to all the media concludendi; and it needs no authority to show that it cannot be impeached either in or out of the State by showing that it was based upon the mistake of law. Of course a want of jurisdiction over either the person or the subject matter might be shown. But as the jurisdiction of the Missouri court is not open to dispute, the judgment cannot be impeached, even if it went upon a misapprehension of the Mississippi law.”

In this case the issue was relating to Mississippi gambling contract between Mississippi parties, which was illegal and unenforceable in Mississippi. The Mississippi Court refused to enforce a judgment obtained by the plaintiff in Missouri


Court. On appeal the US Supreme Court reversed the judgment in the greater interest of unity among the sister State. This was also followed in the case of Thomas v. Washington Gas Light Co.\textsuperscript{14} Analysis of these two cases reflects that U.S. implement full faith and credit clause as an instrument for national uniformity for free and unimpeded circulation of judgments. The public policy or strong interest is not recognised defence in this regard.\textsuperscript{15}

For recognition in the receiving State ‘the judgment’ of the sister State should be full and final and on the merits as per the definition of rendering State’s law. It is required that the rendering State must have had jurisdiction according to own law. If rendering State lacks jurisdiction, then the judgment is invalid in receiving State. In this case even full faith clause of the US Constitution will be of no use. Therefore, before recognition any judgment of the Sister States the receiving court need to confirm the jurisdiction aspect of rendering State in the case. Jurisdiction can be \textit{in personam} or on the submission of the defendant before the court.\textsuperscript{16} The receiving State has to give the recognition to the sister State’s judgment the same status, as if the judgment is being delivered by its own court.

b. Judgement of a Non Sister State

USA does not have any bilateral treaties with any other countries for the recognition and enforcement of foreign judgments, decrees, or orders in US by non US state. The full and credit clause of the US Constitution is also not applicable in international case in enforcement of foreign judgment in US. In the absence of treaties and constitutional guidelines the US Supreme Court in the landmark case of \textit{Hilton v. Guyot},\textsuperscript{17} treated the enforceability of foreign judgement as a matter of ‘comity of nations’. The court defined the notion of comity as:

“No law has any effect beyond the limits of the sovereignty from which its authority is derived. The extent, to which one nation shall be allowed to operate within the dominion of another nation, depends upon the comity of

\textsuperscript{14} 448 US 261 (1980)
\textsuperscript{15} Symeon, Supra note 12, at p. 328-329.
\textsuperscript{16} Id., at p. 330.
\textsuperscript{17} 159 U.S. 113 (1895), available at<http://scholar.google.co.in/scholar_case?case=1676016052442579285&hl=en&as_sdt=2&as_vis=1&oi=scholarr> [accessed on 10.10.2011].
nations. Comity is neither a matter of absolute obligation, nor of mere courtesy and good will. It is a recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws. The comity thus extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy, or prejudicial to its interests. But it contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignty to which they belong, that courts of justice have continually acted upon it, as a part of the voluntary law of nations. It is not the comity of the courts, but the comity of the nation, which is administered and ascertained in the same way, and guided by the same reasoning, by which all other principles of municipal law are ascertained and guided.”

As regarding the recognition and enforcement of foreign judgment, the court laid down the general rule as,

“Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh…”

In this case US Court refused to recognise the French judgment because of lack of reciprocity. US court recognise the foreign judgment only if it is full and final.

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18 *Id.*, at 164.
19 *Id.*, at 202-03.
c. **Domestic law**

Uniform Foreign Money Judgments Recognition Act, 1962 (‘UFMJRA’) is applicable in most of the States of US. This Act has been modified by UFMJRA of 2005. The Act defines “foreign country judgment” as “a judgment” of “a court” of the foreign country. The foreign country need not take a particular form like any order or decree that meets the requirements of this Section and comes within the scope of the Act under Section 3. Therefore, any competent government tribunal that pronounces such a “judgment” comes within the term “court” for the purpose of the Act. The judgment must be a judgment of an adjudicative body of the foreign country, and not the result of an alternative dispute mechanism chosen by the parties. Thus, the foreign arbitral award is not covered under the Act.\(^{20}\)

UFMJRA has been adopted in the States with slight variations. The Act help in recognising the judgments for recovery of money other than taxes, penalty or matrimonial of family matters.\(^{21}\) This Act recognises the foreign money judgments even in lack of any kind of reciprocity provisions.\(^{22}\) However, some States have still maintain in their State legislation that the foreign judgment shall not be recognised, if the foreign court does not have reciprocity practice with regard to US decisions.\(^{23}\) Therefore regarding reciprocity there is no clear and uniform policy.

i. **Jurisdiction**

UFMJRA provides that a foreign judgment ‘shall not be’ recognised, if the foreign court did not have personal jurisdiction over the defendant\(^ {24}\) or, the foreign court did not have jurisdiction over subject matter.\(^ {25}\) Further, the Act lays down the jurisdictional grounds which is required to be followed by the rendering State if a foreign judgment is to be recognised in the US State;

\(^{20}\) The issue of Arbitral Award is governed by the Federal law, Chapter 2 of the U.S. Arbitration Act.  
\(^{21}\) UFMJRA, 2005., Article 3(b).  
\(^{22}\) *Bank of Montreal v. Kough*, 612 F.2d 467 (9th Cir. 1980)  
\(^{24}\) UFMJRA, 2005., Article 4(b) (2)  
\(^{25}\) *id.*, Article 4 (b)(3).
1. If the defendant was served personally in the foreign State;\(^{26}\)

2. If the defendant voluntarily appear in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the Court over him;\(^{27}\)

3. If the defendant prior to the commencement of the proceeding had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;\(^{28}\)

4. If the defendant was domiciled in the foreign State when the proceedings were instituted or, being a body corporate had its principal place of business, was incorporated or had otherwise acquires corporate status, in the foreign State;\(^{29}\)

5. If the defendant had a office in the foreign State and the proceedings in the foreign court involved a cause of action arising out of business done by the defendant through that office in the foreign State;\(^{30}\)

6. If the defendant operated a motor vehicle or air place in the foreign State and the proceedings involved a cause of action arising out of such operation.\(^{31}\)

ii. Default judgments

Default judgments are accepted provided they are competent one according to the basic requirement of jurisdiction.\(^{32}\) If the defendant did not appear before the foreign court, though the State had jurisdiction according to its own substantial law and the law of American jurisprudence, then judgment will be recognised.\(^{33}\)

iii. Contested proceedings

If the defendant appears in the foreign court, but fails to challenge the jurisdiction of the court, then at the time of recognition of judgment in State court the

\(^{26}\) John Sanderson & Co. (Wool) Pty. Ltd. v. Ludlow Jute Co. ltd. 569 F.2d 696 (1st Cir. 1978)

\(^{27}\) Supra note12, p. 338.
judgment may or may not be allowed to raise this issue as defence.\textsuperscript{34} However, if the rendering State is Sister State, the defendant will be barred from relitigating the jurisdictional issue.

iv. Fairness of the judgment

This is one of the essential requirements of the recognition and enforcement of foreign judgment. Proceedings whether domestic or international should be a fair and conducted in an impartial administration of justice. The Constitutional due process and the faith clause guarantees the fair judgment by the sister State in USA. Therefore, when a judgment is given by the sister State, this requirement is part and parcel requirement of a valid judgement. If it is not according to constitutional standards, then it will not be recognised. However, in case of recognition of foreign judgment in USA, there is uncertainty relating to application of similar principles.\textsuperscript{35} UFMJRA prohibit recognition of a foreign judge rendered ‘under a system which does not provide impartial tribunals or procedures compatible with the requirement of due process of law.\textsuperscript{36} UFMJRA of 2005 under section 4(c) (7) and (8) states that a foreign judgment need be recognised if:

“the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgement; or... the specific proceeding... leading to the judgment was not compatible with the requirements of due process.”

On the question as to whether ‘due process’ required to be as per the USA standard, the court as well as jurist have suggested that the word ‘compatible’ tamper the implication of ‘due process’. It is not accepted that the judgment has to be in full conformity with USA standard. What is required that rather a substantial compliance with a certain international minimum standard of procedural fairness is needed.\textsuperscript{37} The court in the case of Hilton\textsuperscript{38} made it clear much before, that the laws and regular practice of the foreign country are an essential, though not determinative, element in

\textsuperscript{34} id., at 340.
\textsuperscript{35} id.
\textsuperscript{36} UFMJRA., Article 4(a).
\textsuperscript{37} Society of Lloyds’s v. Aschenden, 233 F.3d 473 (7th Cir., 2000)
\textsuperscript{38} Hilton case, Supra note 15.
judging the fairness of the foreign proceedings. Further the court in the case of *Tonga Air Services, ltd. v. Fowler*, the court observed that:

“The public policy of the State of Washington is not violated simply because there is a difference between the laws of a foreign State and this State. The laws and legal systems of different nations reflect historic and cultural diversity of their people. These laws and systems are designed to meet the needs of those people. Accordingly, differences of systems and of issues addressed by laws rationally exist between nations.”

v. Fraud

The ground of fraud is available in almost all countries as a ground for non recognition of foreign judgment. In case of sister states fraud is a defence to recognition, but only if it would have been a ground for challenging the judgment in rendering State and such challenge was not preceded by other factors. In case of foreign judgment fraud gives a ground of non recognition. In UFMJRA fraud is discretionary ground for non recognition.

vi. Notice

USA due process is applicable to both the substantial issue of law as well as the procedural aspect of law. Lack of fair and equitable procedural system may defeat recognition of a foreign judgement. Under UFMJRA failure to give notice to the defendant in sufficient time to enable him to defend is a ground of non recognition of foreign judgment. Court in the case of *Mullane, Special Guardian v. Central Hanover Bank & Trust co., Trustee, et al.* held that the notice should be served timely and it must also be adequate in providing the information with reasonable certainty to the interested parties about the pendency of the action and afford them an opportunity to present their objections. If these requirements are not met by the notice

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39 826 P.2d 204, 214 (Wash. 1992)
40 UFMJRA., Article 4(b)(2).
41 id., Article 4(b)(1).
then the recognition of foreign judgment is not possible. But if the notice complies with the above requirement, the notice is effective, even if the defendant did not actually see and understand it. As in the case of *Martic Julen v. Phillips Larson* the court refused to recognise the German judgment because notice served on defendant in Germany and written in German was inadequate.

vii. **Public policy exception**

Public policy is one of the most used exceptions applicable throughout the world to raise objection against the enforcement of foreign judgment. The UFMJRA and the Restatement (third) provide that repugnancy to the forum’s public policy is a discretionary ground for non recognition, while the proposed federal statutes makes it mandatory ground. Under UFMJRA, Section 4(C) (3), the public policy exception becomes operable if the ‘cause of action’ on which the foreign judgment is based is repugnant to the public policy of the forum ‘State’.

This exception to be used only in those unusual cases where the foreign judgment is ‘repugnant to fundamental notion of what is decent and just in the State where enforcement is sought’; or when the judgment ‘tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual right of person liberty or of private property, or undermines that sense of security for individuals rights, whether of personal liberty or of private property, which any citizen ought to feel.”

In the case of *Louis Feraud SARL, Intern v. Viewfinder, Inc.*, the District court held that if US Copyright law does not permit fashion design to be copyrighted, that does not mean that a foreign judgment based on contrary policy decisions is somehow

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43 25 Cal. App. 3d 325 (1972); 101 Cal. Rptr. 792, available at<http://scholar.google.co.in/scholar_case?case=13184391481640474056&hl=en&s_dtd=2&as_vis=1&oi=scholarr&sa=X&ei=GJCfT-rQA4bqArVohAQAQ&ved=0CcQkAgMAdw&ved=0CcQkAgMAdw&ved=0CCkQgAMoADAA> [accessed on 01.10.201].
44 UFMJRA., Section 4(C) “(3) the foreign-country judgment or the cause of action, claim for relief on which the foreign-country judgment is based is repugnant to the public policy of this State or of the United States;”
46 *Ackermann v. Levine*, 788 F. 2d 830
repugnant to the public policies underlying the copyright Act and trademark law. The decision means thereby that substantive law is not a sufficient ground to allow the application of the public policy defence against recognition of French judgment in US. On appeal from the dismissal ordered by the district court of the suit for enforcement of foreign judgments filed by plaintiffs who were French clothing designers against the operator of internet website on which photographs of the plaintiffs’ designs had been posted. The judgments were secured from a tribunal in Paris, France in a case for unauthorized use of intellectual property and unfair competition.

The judgments were obtained on default after defendant, a Delaware corporation with principal place of business in New York, failed to respond to the complaint. Plaintiffs sought enforcement under New York’s Uniform Foreign Money Judgment Recognition Act. The district court dismissed the action on the ground that enforcement of the judgments would be repugnant to the public policy of New York. The Court of Appeal disagreed and held that the Intellectual property laws co-exist with the First Amendment in the country, and the fact that an entity is a new publication engaging in speech activity does not, standing alone, relieve such entities of their obligation to obey intellectual property laws. While an entity’s status as a news publication may be highly probative on certain relevant inquiries, such as whether that entity has a fair use defence to copyright infringement, it does not render that entity immune from liability under intellectual property laws.

The appellate court added that since the First Amendment does not provide news entities an exemption from compliance with intellectual property laws, the mere fact that the defendant may be characterized as a news magazine would not, standing alone, render the foreign judgments repugnant to public policy. However on appeal the defence nevertheless succeeded on the basis of free speech, which was seen as a more fundamental right than the intellectual property right involved, and the court accepted that the lower level of protection for the free speech under French law was manifestly incompatible with US public policy.

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49 id., at 281.
50 Louis Feraud SARL, Intern v. Viewfinder, Inc, 489 F 3d 474 (2nd circuit 2007), available at <http://scholar.google.co.in/scholar_case?case=12932875578371681606&hl=en&as_sdt=2&as_vis=1&oi=scholarr&sa=X&ei=eJKfT9zHEcPHrQfZhaDhAQ&ved=0CB0QgAMoATAA> [accessed on 01.10.2011].
In the case of *Yahoo Inc. v. La Liue Contre Racisme et L’ antisemitisme*\(^{51}\) related to two interim order of French plaintiffs against Yahoo!, a California Internet Service Provider. The French order required Yahoo! to remove from its auction website Nazi memorabilia or to prevent access to it from French territory. The district court held, on first amendment ground that the French orders were unenforceable in the United State. Ultimately, the Ninth circuit court of appeals sitting reversed this decision on other grounds. The court agreed that the first amendment would preclude recognition of a foreign judgment that imposed restrictions on speech in the US. Three of the panel’s eleven judges found that, in its present phase, this case did not implicate the first amendment because the French orders did not purport to restrict access by Internet users in the US and Yahoo! did not have a first Amendment interest in enabling internet users in France to violate French criminal law.

viii. **Non Recognition of foreign judgement**

Under certain circumstances US Court refuse to recognise or enforce the foreign laws or rights and liabilities based thereon. The recognition and enforcement may be denied on the grounds that,

- The law in question is a penal or revenue statute.
- The law in question violates the public policy or positive law of the forum state.
- The law in question is contrary to good morals.
- To give effect to the foreign law would prejudice the state’s own rights or the rights of its citizen.

7.5. **AMERICAN LAW INSTITUTE’S (‘ALI’) PROPOSAL**

Part IV of the ALI proposal proposed the rule to be very specific relating to Recognition and enforcement of foreign judgments in transnational cases. The ‘transnational’ character of the proposal leaves no scope for the Sister State’s recognition and enforcement of judgment. Proposed Section 401 of ALI suggests that the States which receive the foreign judgment ascertain whether the rendering State apply the principle similar to enforcing State relating to recognition and enforcement.

If the rendering State applies the same principle then the enforcement court shall recognise and enforce the foreign judgment on these principles. In absence of lack of appreciation for the similar principle by the rendering State, the enforcing State shall decide the recognition and enforcement of foreign judgement on the basis of domestic rules. Section 403 of the proposal list out the judgments that shall not be recognised by the recognising state on the following grounds:

- The judgment is not fair due to partiality by tribunals or procedures;\textsuperscript{52}
- The judgment creates substantial doubt the integrity of the rendering state;\textsuperscript{53}
- The judgment was rendered without proper notice within reasonable time;\textsuperscript{54}
- The recognition of judgment would be against public policy in the enforcing state;\textsuperscript{55}
- The rendering court exercised jurisdiction in violation of the forum’s own rules of judicial competence\textsuperscript{56}

Further the proposal requires that the judgment should final in the rendering State.\textsuperscript{57} A provisional or protective order rendered by the court shall be considered a judgment and be recognised for enforcement.\textsuperscript{58} A default judgment is generally not to be recognised except in a case where the enforcement court after examine finds that the rendering court has personal jurisdiction according to the law of rendering State.\textsuperscript{59}

### 7.6. WIPO DRAFT ON JURISDICTION AND RECOGNITION OF JUDGEMENTS\textsuperscript{60}

Article 20 of the draft define “judgment” as any decision given by a court whatever may the nomenclature of the judgement as it may be decree or order. For recognition and enforcement it is required that the decree or the judgment should be related to the case. The convention does not deal with other jurisdictional grounds which

\textsuperscript{52} American Law Institute,, Article 403 (1)(a).
\textsuperscript{53} id., Article 403 (1)(b).
\textsuperscript{54} id., Article 403 (1)(c).
\textsuperscript{55} id., Article 403 (1)(e).
\textsuperscript{56} id., Article 403 (1)(h).
\textsuperscript{57} id., Article 401(2).
\textsuperscript{58} id., Article 401(4).
\textsuperscript{59} id., Article 402.
are based on the domestic law and not part of the draft convention. For the recognition of the judgement it is important that the judgement should be effective in the State of origin and enforceable there. It may be postponed if the judgement is the subject of review in the State of origin itself. It will be open for recognition and enforcement in the receiving State if the time limitation has expired in their State of origin.

The draft makes it clear that the procedure of recognition and enforcement of judgement are to be governed by the law of the State addressed.\(^{61}\)

The draft Convention is not applicable in case where the jurisdiction grounds are in conflict with the jurisdiction under the draft.\(^ {62}\)

The draft enlists the grounds on the basis of which recognition and enforcement is refused. Following are the grounds of refusal;

1. Proceeding between the same parties and having the same subject matter are pending before a court of the sate addressed
2. The judgment is inconsistent with the judgement of the court first seized
3. The judgment is incompatible with fundamental principles of procedures of the state of addressed.
4. The document which instituted the proceedings or the documents of essential elements of the claim was not notified to the defendant and the defence is not properly arranged due to it.
5. The judgment was obtained by procedural fraud
6. Recognition and enforcement is incompatible with the public policy of the State of addressed.

### 7.7. EUROPEAN UNION

In European Union, the Brussels I Regulation on Jurisdiction and the Recognition and Enforcement of Foreign Judgment in Civil and Commercial matters\(^ {63}\) plays an important role, as it is drafted with the main purpose of unifying and

\(^{61}\) id., Article 27.

\(^{62}\) id., Article 23.

simplifying\textsuperscript{64} the formalities governing the reciprocal recognition and enforcement of foreign judgment. The Convention is intended to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure.

\textbf{a. Scope}

The Regulation is applicable where the judgment has been given in a Member State of European Union. The word “Judgement” has been defined in Article 32 as;

“any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court”.

Therefore, the Courts of all levels are covered by these provisions. There is no requirement that the judgement is a final one, since ‘order’ of the court is also part of the definition of judgement. As far as copyright cases are related, an injunction can come within Article 32 as interim order. The Regulation applies irrespective of the basis on which the Court or tribunal of Member State took jurisdiction.\textsuperscript{65} The Court or tribunal can take jurisdiction on the basis of the jurisdictional rule that is contained in the Brussels I Regulation or on the basis of traditional national rule.\textsuperscript{66} The automatic recognition and enforcement system of Regulation applies on the presumption that the final judgment will only be handed down after both parties have been notified of the proceeding and were given the opportunity to put their case to the court. Since any judgement of the European court of Justice takes care of these universal accepted principles, a foreign judgement is to be accepted automatically. However, in the case of 	extit{EMI Records Ltd. V. Modern Music Karl Ulrich Walterbach GmbH}\textsuperscript{67}, the court did not recognise the foreign judgement on the ground of \textit{ex parte} decision. The issue was enforcement of a German \textit{ex parte} permanent injunction which was refused to be

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{64} \textit{id.}, Recital 2 states that “Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.”
\item \textsuperscript{65} \textit{id.}, Article 35 (2).
\item \textsuperscript{67} [1992] 1 QB 115.
\end{itemize}
\end{footnotesize}
enforced because the defendant had not been served with process in the judgment granting State and had not been given an opportunity to be heard before the order was made. The court held in the case that *ex parte* nature of judgment does not change if the defendant was given an opportunity at a later date prior to the information of the judgment.

b. **Recognition**

Before the foreign judgment to be enforced in other Member State, it is important to be recognized as competent valid foreign judgment. For this purpose recognition of the foreign judgment is very important. In regard to recognition, Article 33(2) of the regulation lays down simple rule that the judgment given in a Member State shall be recognized in the other Member State without any special procedure being required. Therefore, the Regulation does not ask for any strict guidelines or procedure for the recognition of foreign judgment. It gives automatic recognition to the foreign judgment once it is pronounced by a competent court of the Member State. However, Article 34 lays down the principle regarding the recognition of foreign judgment. According to it a foreign judgment to be recognizes required to clear the test of public policy, natural justice and irreconcilable judgment in the recognising State.

c. **Public policy**

Article 34(1) highlights the importance of public policy of the Member State in the recognition and enforcement of foreign judgement. The Regulation refers to the ‘recognition’ of foreign judgment, which is contrary to the public policy and not the ‘enforcement’ of it. Recognition of foreign judgment should produce results in the recognising State which is ‘manifestly’ against their public policy. Therefore if the

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68 Brussels I Regulation, *supra* note 63, Article 34(1) “A judgment shall not be recognised: 1. if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought”

69 *id.*, Article 34(2):“where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings to challenge the judgment when it was possible for him to do so.”

70 *id.*, Article 34(3) “If it is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought;” Article 34(4) “If it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.”
decision of foreign court was reached on the basis of proceedings that deviate from the basic principles of the recognising country’s procedural law to such an extent that, according to the law of recognising country, the decision can’t have been reached in regular and constitutional proceedings, then it is against public policy.\textsuperscript{71} Article 34(2) states that where the defendant is given notification of the institution of the original action, but is then denied a reasonable opportunity to present his case, it is against public policy of the State.

The European Court of Justice in the case of \textit{Dieter Krombach v. Andre Bamberski},\textsuperscript{72} the court held that if the judgement is at variance to an unacceptable degree with the legal order of the enforcing country as it infringes a fundamental principle and if that infringement constitute a manifest breach of a rule of law which is regarded as essential in the legal order of the enforcing country than the defence of public policy can be used. In case of copyright infringement, due to diversity and territoriality in substantial laws of copyright issues of one State may be in contradiction to the substantial copyright laws of another state. In case of \textit{Renault v. Maxicar}\textsuperscript{73} car body parts were protected by an intellectual property rights in France for which no equivalent existence in Italy. Court of France gave the judgement for infringement, but Italy refused to enforce /recognise the judgment on the basis of the public policy defence. The court of justice categorically rejected the argument and ruled that the public policy exception could not apply in such cases when there is a difference in terms of substantive law.

Similar case was followed in the case of US case of :

d. \textbf{Natural justice}

Article 34(2) put emphasis on the timely delivery of the documents of the institution of the proceedings to the defendant so that the defendant can arrange his defence. Therefore, if the defendant has not got proper opportunity to argue his case or the notice is not served on him, then the foreign judgment can be questioned. This rule applies to every kind of proceeding. Even in case of the copyright infringement

\textsuperscript{71} Fawcett & Torreman, \textit{supra} note 66, p. 949.
case on the internet the defendant should receive the notice about the suit being filed in a particular country.

e. **Irreconcilable judgment**

Article 34(3) & (4) of Regulation states that if the foreign judgement is irreconcilable with a judgment given by the Member States where recognition is sought or irreconcilable with the earlier judgment given by another Member State or a third State involving the same party and same cause action then the recognition is not possible. The irreconcilable nature of the judgment with the earlier decision on the same issue reflects the rule that the decision is against the public policy of the State. A judgement that has been given in the State in which recognition is sought between the same parties operates as a defence against the recognition and enforcement of foreign judgment.

f. **Breach of the exclusive jurisdiction rule**

One of the grounds of refusal of recognition of foreign judgment is the violation of the exclusive jurisdiction rule of the Brussels I Regulation. According to Article 35 of the Regulation, a judgment shall not be recognised if it conflicts with Section 6, establishing the rules of exclusive jurisdiction. It makes the exclusive jurisdiction very important in the hierarchy of jurisdiction rule in Regulation. Mostly, the suits of Intellectual Property Rights (‘IPR’) carry the issue of infringement as primary issue and the validity of IPR as an incidental issue. Exclusive jurisdiction under Brussels Regulation is for the validity of IPR. Therefore it is important to decide, whether the rule of exclusive will also decide the exclusive jurisdiction. Article 19 of the Brussels Convention now Article 25 of Brussels I Regulation provide the solution that “where a member State is seized of a claim which is principally concerned with a matter over which the courts of another Member State have exclusive jurisdiction by virtue of Article 22, it shall declare of its own motion that it has no jurisdiction.”

However, in the case of *Gesellschaft für Antriebstechnik mbH & Co. KG v. Lamellen und Kupplungsbau Beteiligungs KG* the court considered that the

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interpretation of Article 19 of the convention is of no help. Court held that in the case of proceedings relating to the registration or validity of a patent the exclusive jurisdiction rule must be observed irrespective of whether the issue of validity is raised by way of an action or a plea of objection. Such a large interpretation of exclusive jurisdiction Article means that almost all cases of infringement claims would have to bring before the court of the registration of the patent. However, it does not create problem as exclusive jurisdiction is not applicable to the case of copyright as it does not cover it. Therefore foreign judgment on online copyright infringement case is not to be governed by this provision.

g. Enforcement of foreign judgment

Once the recognition of foreign judgment is cleared, the next issue is to ‘enforce’ the foreign judgment. Brussels I Regulation provides very simple procedure for enforcement of foreign judgment. Article 38 of the Regulation requires the interested party to file an application for enforcement of foreign judgment. The application is to be submitted to the Court or competent authority provided in the list of Annex II. The procedure for making application is to be governed by the law of the Member State in which enforcement is sought.75 The judgment shall be declared enforceable immediately on completion of formalities. No review of foreign judgment under Article 34 and 35 is required. However, Article 43(1) gives either party an opportunity to appeal against enforceability.

7.8. UNITED KINGDOM

UK is party to various multilateral conventions76 relating to recognition and enforcement of foreign judgments either relating to the specific issues or with specific country; however it is not party to any IPR specific recognition and enforcement

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75 Brussels I Regulation, *supra* note 63, Article 40(1).
convention so far. Therefore, it apply its own general domestic law relating to recognition and enforcement of foreign judgements. Before coming into effect of Civil Procedure Rules 1998 (‘CPR’) on 29 April 1999, the Rules of the Supreme Court 1965 and the County Court Rules 1981 (‘CCR’) were applicable to recognise and enforce the foreign judgement. Now CPR governs the practice and procedure to be followed in the Civil Division of the Court of Appeal in High Court and in the County Courts.\textsuperscript{77} Part 74 of the CPR contains the procedure for recognition and enforcement of foreign judgement in England and Wales and the enforcement of foreign judgement in other States.\textsuperscript{78} As per 74.2 (1) (c) of the England & Wales Rules of Civil Procedure mirrors the terminology of Regulation 44/2001, Article 32 as the judgment means subject to any other enactment, any judgment given by a foreign court or tribunal, whatever the judgment may be called, and includes (i) a decree; (ii) an order; (iii) a decision; (iv) a writ of execution; and (v) the determination of costs by an officer of the court. Therefore the judgement may include interlocutory orders, unless they were \textit{ex parte} order when no notice had been given.

\textbf{a. National legislation on enforcement of foreign judgment}

The enforcement of judgement in UK is regulated by the following Act when the parties are from non EU Member States.

- Administrative of Justice Act, 1920
- Foreign Judgment (Reciprocal) Act, 1933
- Civil and Commercial Judgment Act, 1982

\textbf{i. Administrative of Justice Act, 1920 (‘AJA’)}

This Act is applicable where a judgement has been obtained in a superior court in any part of her majesty’s dominions outside the UK to which the provisions extend, the judgement creditor may apply to the High Court in England at any time within 12 months after the date of the judgment, or such longer periods as may be allowed by the Court, to have the judgment registered in the Court. For the purpose of the Act

judgement means any judgement or order given by a court in any civil proceedings whereby any sum of money is made payable, and includes an award in proceedings on an arbitration if, in pursuant of the law in force in the place where it was made, the award become enforceable in the same manner as a judgment. The court may order the judgment to be registered if it thinks in all the circumstances that it is just and convenient that the judgment should be enforced in the UK.

**ii. Foreign Judgments (Reciprocal Enforcement) Act, 1933 (‘FJA’)***

Under this Act reciprocal treatment is provided to the foreign countries judgement. The Act is applicable where a foreign judgement will give substantial reciprocity of treatment in respect of the enforcement of judgments given in courts of the UK. The UK court will also recognise them on the basis of reciprocity. The Act is applicable to judgments or order made by recognised court in civil proceedings or in criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party. The judgment must be for a sum of money, not being a tax, fine or penalty or for multiple damages. It must be final and conclusive as between the judgment debtor and judgement creditor or require the making of interim payment.

The Act lays down some grounds when the foreign judgment is not applicable to a recognised court i.e.,

* • A judgment given on appeal from a court which is not a recognised court, or
* • A judgement or other instrument which is regarded for the purpose of enforcement as a judgement of that court, but was given or made in another country, or
* • A judgment given by that court in proceedings founded on a judgement of a court in another country and having as their objective the enforcement of that judgement.

**b. Requirement of foreign judgment**

**i. Jurisdiction**

It is the fundamental requirement that the foreign court that gave the judgment must have had proper jurisdiction over the defendant in the international sense. This
jurisdiction must exist from English law point of view.\textsuperscript{79} In case of jurisdiction in personam, the English courts recognise the jurisdiction of the court on the presence of natural person within the territorial jurisdiction of the court as proper jurisdiction.\textsuperscript{80} However, in the case of copyright infringement the court of appeal in the case of \textit{Lucas Film ltd. v. Ainsworth}\textsuperscript{81} court changed the rule to some extent. In this case Lucasfilm Ltd. produced Star Wars films and hired Mr. Ainsworth to make 50 helmets and sets of armour for the ‘Stormtrooper’ soldiers in the movie. After the success of the movie Ainsworth began selling same version of helmets through his website and showed himself as the originator of helmets. Plaintiff brought a copyright and trademark suit against Ainsworth in California. A judgment was ordered against them for $10 million. Since Ainsworth had no assets in US it could not be enforced in US and therefore case for recognition of foreign US decree was filed before the English court. High court dismissed action for infringement against Ainsworth and Court of appeal upheld the high court decision and held that US copyright claim was not justifiable in the English courts. It held applying the ‘Mocambique rule’ the English courts will not exercise jurisdiction in relation to claims will not exercise jurisdiction in relation to claims for infringement of intellectual property rights which are outside the territorial limits of the English Courts. The Supreme Court reversed the judgment and held that US copyright infringing claim was justifiable in the UK, stating that much of the reasoning behind the Mocambique rule had been eroded. Instead the modern trend is in favour of the enforcement of foreign intellectual property rights. The Apex Court rejected the Court of Appeal’s concern that the enforcement of foreign intellectual property law might involve a clash of policies, such as that a defendant might be restrained by injunction from doing acts in UK which are lawful in UK, stating that such an injunction would be granted only if the acts were anticipated to achieve fruition in this country, and there was no objection in principle to such injunction.\textsuperscript{82}

\textsuperscript{79} \textit{Sirdar Gurdayal Singh v. Rajah of Faridkote} (1894) AC 670 at 683-684
\textsuperscript{80} \textit{id.}
\textsuperscript{81} [2011] UKSC 39.
\textsuperscript{82} \textit{id.}
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The other ground of valid jurisdiction is that if the defendant submitted or agreed to submit to the jurisdiction of the foreign court. Where defendant in his character as claimant in the foreign action, himself selected the forum where the judgement was given against him, whether this took the form of dismissed of his claim, it is submission. Section 33 (1) of the Civil Jurisdiction and Judgment Act, 1982 (‘CJJA’) provides the guidelines as to when the submission not to be treated as no submission to the court’s jurisdiction i.e.:

“(1) For the purposes of determining whether a judgment given by a court of an overseas country should be recognised or enforced in England and Wales or Northern Ireland, the person against whom the judgment was given shall not be regarded as having submitted to the jurisdiction of the court by reason only of the fact that he appeared (conditionally or otherwise) in the proceedings for all or any one or more of the following purposes, namely — (a) to contest the jurisdiction of the court; (b) to ask the court to dismiss or stay the proceedings on the ground that the dispute in question should be submitted to arbitration or to the determination of the courts of another country; (c) to protect, or obtain the release of, property seized or threatened with seizure in the proceedings.”

Applying this above analogy in the case of copyright infringement, the owner filing the suit abroad can’t at any time object to the enforcement of foreign judgment as he had already submitted to the jurisdiction of the court.

ii. Full and Final judgement

A judgment in personam of a foreign court of competent jurisdiction which is final and conclusive on the merits is conclusive in England between parties. It is not impeachable or examinable on the merits whether for error of fact or of law. Where there are two competing foreign judgments each of which is pronounced by a court of competent jurisdiction, both being final and not open to challenge, the earlier in time will prevail.

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83 Emanuel v. Symon [1908] 1 KB 302 at 309.
85 Godard v. Gray [1870] LR 6 QB 139
86 Showlag v. Mansour [1995] 1 AC 431
iii. **Fraud**

A judgment which has been obtained by fraud will not be recognised or enforced in England as it is against the rule of law and natural justice. The judgement is impeachable whether the fraud was on the part of court\(^87\) or on the part of the successful party.\(^88\)

iv. **Proceeding contrary to natural justice**

A foreign judgement can be impeached, if the proceeding is against natural justice/substantial justice. However, proceeding are not regarded as having been contrary to natural or substantial justice merely because the foreign court admitted evidence which was inadmissible under English law, or excluded evidence which was admissible under English law\(^89\). The court in the case of *Jacobson v. Frachon*\(^90\) held that mere procedural irregularity on the part of the foreign court is not against the natural justice, provided that the unsuccessful party was given an opportunity to present his case. Providing opportunity to the defendant to present his side in a suit is important and fundamental to the concept of law.

v. **Categorises of the judgement which are enforced in UK**

- Money judgement are enforced
- Specific performance are not recognised
- An award of multiple damages not enforceable
- A judgement which is itself recognition of previous foreign judgement is enforceable
- Interim order not enforceable
- Arbitration award are enforceable through the New York convention and arbitration award

\(^87\) *Ochsenbein v. Papelier* [1873] 8 Ch. App. 695
\(^88\) *Price v. Dewhurst* (1837) 8 Sim 279
\(^89\) *Pemberton v. Hughes* [1899] 1 Ch 781, CA
\(^90\) 1927 138 LT 386 at 390, 392.
7.9. FRANCE

France is a civil law country. It enforces foreign judgments of the Member European Union States on the basis of Brussels I Regulation and for non-European Union Member States it enforces the foreign judgment on the basis of bilateral treaties or the general rules of recognition and enforcement of foreign judgments. It is party to various international and bilateral conventions for recognition and enforcement of foreign judgments.

a. Categories of judgement recognised

For enforcement the ‘judgment’ should be pronounced by a foreign authority involving civil matters. The foreign judgements which can be recognised in France are the money judgments, specific performance or non money judgments, injunctions, arbitration awards, an award for multiple /punitive damages is enforceable, judgment against the French state or any of its bodies, if the State is involved in a normal suit are enforceable of the following categories.

b. Conditions of recognition of foreign judgement

To recognise a foreign judgment or an instrument acknowledged by a foreign public officer must be granted the *exequatur*. The action in *exequatur* has both a declaratory function of international regularity and an executor function. The condition of the *exequatur* has been laid down in the case of *Re Munzer v. Dame Jacoby - Munzer*. According to it five requirements are to be fulfilled to grant *exequatur* as follows;

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92 Bilateral Conventions with the following countries like Algeria, Austria, Arab Emirates, Argentine, Brazil, Cameroun, Czechoslovakia, Egypt, Laos, Mali, Morocco, Poland, Quebec, Rumania, San Martin, Togo, Tunisia, Vietnam, Yugoslavia etc.


94 *id.*, at p. France 4.


96 Court of cassation, 7th January 1964.
1. The foreign court must have proper jurisdiction,

2. The decision must apply the law designed by the French conflict of law rules, or at least it must have an ‘equivalent’ result to the decision which would have been rendered under this system,

3. The regularity of the procedure followed in this court,

4. It must not be contrary to international public policy, and

5. The decision must not be obtained by fraud

However, in a judgement of *Bachir* Case of 4th October 1967, the Court of Cessation, 1st Civil Chamber, made one condition explicit that is the requirement of regularity of the foreign procedure is reduced to that of the compatibility with the public order.97

In the another case of *Avianca* on February 20, 2007, the French Court held that foreign judgement which has applied another law than the one that a French court would have applied could be recognised and enforced in France. This decision overrules the 40 years of tradition of the requirement of applicable law according to French conflict of law. Therefore, now only three requirements left i.e., proper jurisdiction, not against public policy and not obtained by fraud.98

c. **Documentary requirements**

As per Article L 311-11 of the Code of Judicial Organisation ‘a single judge in the Tribunal de grande Instance hears the demands of recognition and *exequatur* of foreign judicial decisions and public instruments’. The plaintiff must produce a certified copy of judgment and a certificate of non appeal of the decision by the clerk of the foreign court.

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d. **Review of the judgments**

As per the French Supreme Court Cour de Cassation review or reopening of foreign judgment is strictly not allowed. The Court can only check the judgement upon the merits just to find that the conditions of the procedure of *exequatur* are met. The Court can however partially enforce a judgment, if the segregation is possible. The defendant can raise the issue of fraud at the time of enforcement, even if it is not raised at initial stage at the original foreign judgment.

e. **Final decision**

The foreign judgment should be final and no appeal should be pending in any court of the foreign country. In these kind of case, if the French court comes to know of the foreign judgment pending before the foreign court, than it will hold his judgment or delay it till the time it is delivered to avoid any inconsistency.

f. **Jurisdiction**

Local court of France examines the issue of jurisdiction of foreign court in the foreign judgement before the Court. Competency of a foreign court to adjudicate is only to be derived from the proper jurisdiction of the forum Court. In a case if according to French rules, it has the exclusive jurisdiction to adjudicate, than the foreign Court’s decision will not be accepted.\(^99\) In case the rule does not designate the French system as the exclusive one then the jurisdiction of foreign court will decide the competency of the court.

Cour de Cassation (French Supreme court) on May 23\(^{rd}\), 2006 held in the case of Prieur overruled 80 years old tradition and held that Article 15 of the Civil Code is no bar anymore to the recognition and enforcement of foreign judgement in France. Prior to this judgement Article 15 of the Civil Code provides that French citizen may be sued before French courts and that way this provision gives exclusive jurisdiction to the French court over French citizen. Therefore, it was construed by the court as a defence against the recognition and enforcement of foreign judgement based on foreign jurisdiction over French citizen as not proper jurisdiction. However, the Code

\(^{99}\) *Id.*
allowed the privilege of Article 15 to be waived by the French defendant by arguing to the jurisdiction clause.

In the above case the court finally held that Article 15 could not be used any more to determine whether the foreign court lacked jurisdiction from the French perspective.\(^{100}\)

### 7.10 GERMANY

German has a federal system. The law of enforcement of foreign judgments is federal law and is therefore applicable in every German State. Germany is party to various bilateral\(^{101}\) and multilateral treaties\(^{102}\) relating to recognition and enforcement of foreign judgments.

#### a. National legislations

The Civil Procedure Code of Germany is to be relied on in the absence of any multilateral or bilateral convention relating to recognition and enforcement of foreign judgments.

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101 For example the Treaty between Germany and Israel on the mutual recognition and enforcement of judgments in civil and commercial matters of 20 July 1977; Treaty between Germany and Norway on the mutual recognition and enforcement of judgments and other awards in civil and commercial matters of 17 June 1977; Treaty between Germany and Tunisia on legal protection and legal assistance, the recognition and enforcement of judgments in civil and commercial matters and on commercial arbitration dated on 19 July 1961; Treaty between Germany and Switzerland on the mutual recognition and enforcement of court decisions and arbitration awards in civil and commercial matters dated 2 November 1929; Apart from the above bilateral treaties some more countries have the treaty like Netherland, Great Britain, Northern Ireland, Greece, Austria, Belgium, Italy, Switzerland, Tunisia, Israel, Norway and Spain. The treaties with European countries govern the issue of recognition and enforcement of foreign judgment related to those cases which are not covered under the Brussels I Regulation.

judgement. Relevant provisions for recognition and enforcement are set out in Section 328, 722 and 723 of the Civil Procedure Code (‘Code’ or ‘ZPO’). The term ‘judgment’ is defined as ‘judgments made in proceedings where all the parties were given a right to be heard.’ Therefore Court orders and default judgements are capable of being recognised. However, interim orders or consent orders cannot be enforced since the court has not made the final order in these cases.

The court recognised the following categories of judgement i.e., money judgments, specific performance, injunctions, Civil judgments for damages are generally enforceable so long as only the actual damages are compensated, interim orders are in general not enforceable. Exception exists in case of family and maintenance law.\(^{103}\)

The first step the Code provides is to lodge an application at the local court or the district court which has the jurisdiction in the area where the debtor has his residence or place of business. Copy of the judgment should be attached to the application. The application should fulfil all the requirements required to ascertain the certainty of the foreign award. Then the court has to ponder on the issue of recognition of the foreign judgement.

b. Requirement of Recognition

Judgment should be a final judgment according the requirement of Section 328 in connection with Section 723(2) of German Civil Procedure Code (‘ZPO’). If there is an appeal pending abroad the recognition and enforcement of the decision in Germany can become very time consuming. It should be legally binding. It is legally binding if no legal remedy is available for the parties against the judgment. It should be a civil and commercial matter.

c. Ground of Non Recognition

Section 328 of the Code lays down the grounds of non recognition of foreign judgments. Following are the ground of non recognition:

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• The foreign court issuing the judgment must not lack jurisdiction in its own country under German law.  

• Defendant was not served properly  

• If the judgment is inconsistent with the previous German judgment  

• If the judgment breaches the order public  

(i) Jurisdiction

German court examines the issue of jurisdiction in foreign judgment. It does not accept it automatically. The German Court try to identify whether the German court have exclusive jurisdiction on the issue or not. To decide the foreign jurisdiction over a foreign judgment the German applies its own law to examine the issue of jurisdiction. An appearance before the foreign court to defend the claim is considered to be implied consent to the foreign court’s jurisdiction. A default judgement is treated in the same manner as other judgments. In case of jurisdiction based in a contractual case is based on the agreement between the parties then the German court will determine the validity of contractual choice of jurisdiction clause by applying German law. For the issue of jurisdiction it is not important that the respondent be a citizen or resident or own assets or carry on business in Germany.

(ii) Service of notice

If the debtor was not correctly served with documents when the proceedings were commenced before the original court or was not served notice within the reasonable time which resulted in failure on the part of debtor to provide an adequate defence, then this foreign judgment will not be recognised in Germany. This is against the concept of fair trial which is a constitutional right. However, the issue of reasonable time has to be examined closely as the fact varies form case to case.

104 German Civil Procedure Code (ZPO), Section 328(1) paragraph (1).
105 Id., Section 328 (1) paragraph (2)
106 Id., Section 328(1) para (3)
107 Id., Section 328(1) para 4
108 Since German apply the principle of dual functionality in the case of jurisdiction according to which local jurisdiction indicates the international jurisdiction. Therefore examination of the issue of the jurisdiction will be on the basis of ZPO. Governing provision on local jurisdiction are set out in Section 12 to 40 of ZPO.
109 German Constitution, Article 103 paragraph 1.
(iii) **Inconsistent with previous judgment**

Section 328(1) paragraph 3 points out that a foreign judgment will not be recognised by the German court if the judgment is inconsistent with a previous German judgment or a foreign judgment still to be recognised.

(iv) **Order public**

Section 328(1) paragraph 4 of the Code rejects a foreign judgment if it is against German *ordre public*. Public order applies to breaches of substantive as well as procedural law of the country. In fact a foreign judgment cannot be reopened on the merits of the case. It can only be done on the exception of public order.\(^{110}\)

(v) **Reciprocity**

Finally Section 328 refers to the reciprocity as the ground of refusal to recognise the foreign judgment. According to this Section recognition of foreign judgments is subject to an act which is governed by the sovereign equality of countries. It asks for the same kind of treatment relating to the enforcement of foreign judgement.

The prerequisite in Section 328 ZPO for the recognition of a foreign judgement are applicable only if the foreign judgement in Germany is governed by Section 722, 723 ZPO in absence of any treaty.

7.11 **BELGIUM**

Enforcement of foreign document is only possible in Civil (private law), commercial and employment matters. Foreign decisions of criminal nature, taxation are not applicable for enforcement purpose. Belgium is a federal country, but for the enforcement of foreign judgment one legal system prevails throughout the country. The legal system of Belgium recognise the following categories of foreign judgment i.e., money judgments, specific performance judgment, injunction are enforceable, arbitration awards are enforceable; a judgment of insolvency is also, foreign interim

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order is not enforceable since only definite judgments are enforceable. These orders can be enforced in Belgium, if they can be enforced in the country of origin.\textsuperscript{111}

Since Belgium is part of the European Union, on the issue of recognition and enforcement of foreign judgment between the member state of EU, they are governed by the Brussels I Regulation of 2000. Apart from that Belgium is party to various multilateral\textsuperscript{112} and bilateral\textsuperscript{113} conventions which directly or indirectly are related to the issue of recognition and enforcement of foreign judgment. Belgium is party to the following convention:

\textbf{a. Recognition and Enforcement of Foreign Judgment in Case of Non Treaty and Non Conventions Cases}

In the absence of the treaty or convention for the recognition and enforcement of foreign judgment, the Belgium court requires the exequatur.\textsuperscript{114}In other words, the

\begin{footnotesize}
\begin{itemize}
  \item The Convention of 8 July 1899 between France and Belgium relating to Judicial Jurisdiction, the Authority and the Enforcement of Judicial Decisions, Arbitral awards and Authentic deeds; The treaty of 28 march 1925 with Netherlands relating to Judicial Jurisdiction, the authority and the Enforcement of Judicial decisions, Arbitral Awards and authentic deeds; The Convention of 30 June 1958 with Germany regarding the Recognition and Mutual Reinforcement of Judicial decisions, Arbitral Awards and Authentic deeds, The Convention of 29 April 1959 with Switzerland regarding the Recognition and Mutual Reinforcement of Judicial Decisions, Arbitral Awards and Authentic deeds; As regard the judicial assistance Belgium is party to the following Regulation and Decisions at EU level: The Council Regulation (EC) No. 1348/2000 of 29 may 2000 on the service in the member states of judicial and extrajudicial documents in Civil and Commercial matters”; The Council Regulation (EC) No. 1206/2001 of 28 May 2001 on cooperation between the courts of the member states into eh taking of the evidence in civil and commercial matters; The council Decision 2001/470/EC of 28 May 2001 establishing a European judicial network in civil and commercial matters; The Council Directives 2002/8/EC of 28 January 2003 to improve access to justice in cross border disputes by establishing minimum common rules relating to legal aid for such disputes; The council decision 2003/840/EC of 17 November 2003 relating to the conclusion on behalf of the European Community of council of Europe convention no. 180 on information and legal cooperation on information sooty services; The convention of 30 June 1958 with Germany regarding the recognition and mutual reinforcement of judicial decisions, arbitral awards and authentic deeds; The convention of 30 June 1958 with Germany regarding the recognition and mutual reinforcement of judicial decisions, arbitral awards and authentic deeds;
  \item It is a leave order given by a Belgian Court upon an application of leave to enforce a foreign judgment obtained in other jurisdiction.
\end{itemize}
\end{footnotesize}
judgment needs to be certified by the court of the foreign country and must be signed by the competent authorities of that country. Under Article 570 of the Judicial Code of Belgium, following conditions has to be satisfied for obtaining the exequatur, i.e.

- Origin judgment should not contain anything contrary to public policy or rules of Belgium public law,
- Rights of defendant must have given due respect,
- Grounds of foreign court jurisdiction should be proper,
- Final decision according to rendering court,
- All formalities have taken care of for authentication of foreign decision.

Apart from the fulfilment of the above requirements, the Belgium court is authorised to verify the merits of the case. Authorise to verify the merits do not mean reopening of the case. Courts objective is only to determine whether the judgment whose exequatur is requested do not infringe the law. It will be examined where the decision is accepted bearing in mind the fact of the case and the application of the rules of the state of origin. The verification is not only of the question of law, but also of fact. The court can’t modify the foreign judgment or issue an order. The burden of proving that a foreign judgment is defective is of the defendant. The court may not take into account any new information which it may received during the course of its enquiries.115

i. Public Policy

If the judgment is not according to the public policy of the Belgium international public order, the court will refuse to enforce it. It is so fundamental that it can’t be ruled out by contract. The public policy depends upon case to case. These principles apply to the merit of the case as well as the proceeding to the case. Fraud committed by one of the party on other is a fraud which is against the public policy. This notion of public order is linked to what the court consider essential to the Belgium legal order. Therefore it is evolving concept. The Belgium court will

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determine that the rights of the defendants have been complied with. The Belgium court will determine whether the foreign court complied with the foreign procedural law and whether this procedural law does not infringe the rights of the defendant, as the Belgium law understood it.

ii. Final Judgment

The Belgium court enquires to ascertain that the foreign judgement is a final one from the proper court. Therefore, it is not possible to enforce a judgement which is appealed. However, as per the Belgium law it may be still enforceable if it is enforceable in the country of origin.\(^\text{116}\)

iii. Jurisdiction

The Belgium court must verify that the foreign court did not entertain jurisdiction exclusively because of the plaintiff’s nationality. The foreign law determines the jurisdiction of the case. The court will verify this angle to find out that the foreign court applied the jurisdiction correctly. Unlike the State of France, Japan, German it does not scrutinise the jurisdiction of the international jurisdiction of the foreign court according to its own jurisdictional laws. The burden of the proof that the jurisdiction content is rightly applied is on the applicant. Once that is done no further examination is required. The Belgium court will also examine the way in which the rights of the defendant were respected. In this review, the defendant’s conduct and claims will be scrutinised.

iv. Reciprocity

Belgium requires no need for reciprocity for the enforcement of foreign judgements.\(^\text{117}\)

v. Review of Judgements

Belgium courts will examine the merits of the foreign judgments. It is compulsory process for the court. The merit as well as the procedural process has to be examined. Merit doesn’t mean the whole trail has to be reopened. In fact the evidences presented to


\(^{117}\) id., at p. Belgium 5.
the foreign court need not be presented again. The court will review the reasoning, the
application and interpretation of the law of the foreign court.\textsuperscript{118}

\section*{7.12. SWITZERLAND}

Switzerland has the most structured rules relating to every aspects of Private
international law due to its internal law being codified. It recognised both kinds of
foreign judgements i.e., treaty State and non treaty State’s foreign judgements. The
recognition and enforcement of foreign judgments of treaty States are to be governed
by the treaties rules and regulations. It is party to both multilateral\textsuperscript{119} and bilateral\textsuperscript{120}
conventions for recognition and enforcement of foreign judgment.

The Swiss legal system recognises and enforces the foreign judgements of non
treaty States also. The Swiss Federal Code of Private International Law (‘CPIL’)
statute\textsuperscript{121} contains provision of not only the choice of law issues, but also the
recognition and enforcement of the foreign judgement. This statute governs to all
judgments rendered in non European jurisdictions respectively in countries which are
not party or signatories to the Lugano Convention. Under the provisions of CPILs a
foreign judgment will be recognised if the following three requisites are fulfilled;

- The court or the authority of the state in which the judgment will be
  recognised had proper jurisdiction, and
- No further ordinary appeal is possible against the judgment; and
- There is no ground for refusal pursuant to Article 27 CPIL.

\subsection*{a. Recognition of categories of foreign judgment}

- Money judgement order,
- For non money judgments, like the specific performance order etc.
- Injunction and Interim injunctions\textsuperscript{122} related to civil and commercial matters

\textsuperscript{118} \textit{id.}, at p- Belgium 7.
\textsuperscript{119} Lugano Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments, 1988;
Hague Convention on Civil Procedure of 1 March 1954; Hague Convention on the Service Abroad of
Judicial and Extra Judicial documents in civil or commercial matters of 15 November 1965.
\textsuperscript{120} Bilateral treaty with many countries for the enforcement of foreign judgments like Germany,
Austria, Belgium, Spain, Italy, Liechtensin, Sweden, Czechoslovakia.
\textsuperscript{121} The Swiss Federal Code on Private International Law, is available on \textless http://www.umbricht.ch/
pdf/SwissPIL.pdf\textgreater  [accessed on 01.10.2011]
\textsuperscript{122} \textit{id.}, Article 50.
Foreign judgment is not defined in the CPILS, but article 25(1) of the Act refers to the ‘decisions’ of foreign ‘courts’ or ‘authorities’. Therefore, the scope of the application of CPIL is not limited to judgments rendered by the court only; it may also be applied if the civil matter is decided by the competent authority. A foreign judgment will be recognised and enforced provided that no ordinary appeal is pending and the judgment becomes the final one. In order to determine the nature of the judgement whether it is final or not recourse must be had to the *lex fori* of the case. The injunction and preliminary orders of foreign judgment are decisions in the meaning of Article 25(a) of CPILs.

The application for recognition or enforcement must be filed with the competent authority and must be accompanied by:

- A complete original or a certified transcript of the judgment, which enables the judge to establish the authenticity of the judgment;

- A confirmation from the foreign court or authority that no ordinary appeal lies against the judgment or that the latter is final, there are no specific rules in the CPILs as to the form of such conformation, the decision on which is therefore within the discretion of the competent court;

- In case of default judgment, a document showing that the defendant was duly served with the compliant and granted sufficient time to conduct its defence.

b. **Review of judgments**

As per Article 27(3) of CPILs as well as Article 29 LC a foreign judgment may as a rule not be re-examined with regards to the merits. If the foreign judgment meets the jurisdictional requirements of the applicable body of law and if there are grounds for refusal the local courts will thus enforce the foreign judgment without review of the case.

The exception of public policy is very strong as it decides the enforcement to foreign judgment or not. Swiss court recognises two kinds of public policy issue, first

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123 *id.*, Article 25(a).
substantive *ordre public* and second is the procedural *ordre public*. Article 27(1) CPIL aims at the public policy caused by the substantive result of the judgment. Whereas the procedure public order is recognised by the Swiss court as the manner in which the foreign proceeding were conducted.

c. **Fraud**

Fraud is one of the important grounds of refusal to implement the foreign judgment provided it is proved by the defendant that the plaintiff had deprived defendant of an adequate opportunity to present its case to the foreign court. Such a fact would be considered a violation of the defendant’s right to be heard.

d. **Grounds of non recognition**

As per Article 27 of CPIL, a foreign judgment will not be recognised in Switzerland:

- Where such recognition would be incompatible with the Swiss public policy
- Where a party can prove that it was not validly served with notice of the proceeding either under the law of its domicile or of its habitual residence unless such party submitted unconditionally to the proceedings
- Where a party can prove that the judgment was made in disregard of essential principles of Swiss procedural law, in particular where a party was denied its right to be heard, or
- Where a party can prove that there is litigation between the same parties in the same judgment or that the matter has already been decided at an earlier date in third country, and that such judgment is capable of recognition in Switzerland.

Article 27(3) mention that a foreign judgment may not be examined on merits.

e. **Jurisdiction**

Under CPIL, the Swiss Court must examine the jurisdiction of the foreign courts or authorities of the State whether they have the proper jurisdiction or not. The CPIL itself provides various jurisdiction rules for various issues under which the jurisdiction of foreign authorities for the purpose of recognition and enforcement. With regard to the claims based on the law of obligations, Swiss law broadens the
jurisdiction of foreign courts. In case of intellectual property right Article 111 deals with the foreign judgment and it requires that:

“Foreign decision concerning intellectual property rights shall be recognized in Switzerland:

a. If the decision was rendered in the State of domicile of the defendant; or

b. If the decision was rendered in the State under the laws of which protection of the intellectual property is sought, provided that the defendant was not domiciled in Switzerland.

Foreign decisions concerning the validity or the registration of intellectual property rights shall only be recognized if they were rendered in the State under the law of which protection of the intellectual property is claimed or if they are recognized there.”

In the contractual cases particular, a foreign judgment is recognised under Article 149 and the jurisdictional grounds should be according to the set jurisdictional standards of this Article as,

1. They were rendered by the State of domicile of the defendant, or
2. Rendered by the State of habitual residence of the defendant, or
3. A decision relating to a contractual obligation was rendered in the State of performance and the defendant was not domiciled in Switzerland, or
4. A decision relating to a contractual obligation was rendered in the State of performance and the defendant was not domiciled in Switzerland, or
5. A decision relating to a claim resulting from the operation of a business was rendered at the registered office of that business, or
6. A decision relating to unjust enrichment was rendered at the place of the act or the resultant injury and the defendant was not domiciled in Switzerland; or
7. A decision relating to a tort was rendered at the place of the act or the resultant injury and the defendant was not domiciled in Switzerland.
f. Public order

An injunction will not be enforced if they are deemed to violate Swiss ordre public by unduly infringing fundamental rights such as the freedom of movement. There are two forms of violations of public policy. The first is one given under article 27(1) CPIL i.e., a violation of the public policy caused by the substantive result of the judgment and the other is the procedural public order. In both cases the concept the approach of the Swiss Federal court is to emphasise that the concept of public policy must be interpreted in a restrictive manner, and should not be used as a means to undermine the obligation assumed by Switzerland to recognise judgment emanating from other countries.

Allegation of fraud can also undermine the enforcement of foreign judgement. However, burden of proof is on the defendant to prove that fraudulent behaviour of the plaintiff had deprived defendant an adequate opportunity to present its case to the foreign court. It resulted in the violation of the defendant right to be heard which is a fundamental rule of law. On the other hand the alleged fraud concerns an issue upon which the foreign court had to decide, such as veracity of testimony or the authenticity of documents submitted to the foreign court, the defend would not be successful, because the Swiss court would consider this to be review of the merits of the case.124

Reciprocity as a rule has been abolished with the passing of CPIL.

7.13. CONFLICT OF LAWS RELATING TO INTELLECTUAL PROPERTY (‘CLIP’)

CLIP defines the judgment as any judgment given by a court or tribunal of any State.125 It is required that proceedings or the judgement may be named anything. It hardly matter till the time, it is pronounced by the court or tribunal constituted by rendering State.

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125 Conflict of laws relating to IP (‘CLIP’), Section 4:101.
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State of origin response to the judgement is important for the final acceptance of the judgement by the requested State. The judgement must have effect in State of origin. It must be enforceable in the State of origin.\footnote{Id., Section 4:102.}

It must be enforceable in the State of origin. Judgement is not subject to recognition if appeal against the judgement has been filed in the State of origin or if the time limit for seeking in the State ordinary review has not been expired. In these kinds of cases if the foreign judgment contains elements which are severable, one or more of them may be separately recognised.\footnote{Id., Section 4:102(5).}

For a judgement to be recognised the jurisdiction grounds used by the State of origin should be according to part 2 of the CLIP. Article 4:301 takes into consideration the provisional and protective measures which are required for the proper enforcement of IPR. They may be of interim injunction like Merva injunction, Antop injunction or John doe orders. CLIP allows it to be recognised by the requested State, if the rendering State has taken into consideration 2 conditions, (1) jurisdiction should be according to part 2 of the CLIP, and (2) provisional and protective measures adopted should only be after prior hearing of adverse party. CLIP presumes the fair procedure to be adopted even in case provisional a protective measures.

As per Section 4:401, a judgment may not be recognised or enforced if such recognition and enforcement would be manifestly incompatible with the public policy of the requested state’s subject matter. The public policy of the State is also violated if the fundamental principle of procedural fairness has not taken into account. Principle of natural justice is one of the important grounds of public policy issue.

Further Section 5 deals with the non recognition grounds of foreign judgments. These grounds are important for receiving State while taking decision to enforce the foreign judgment to confirm the status of the foreign judgments i.e.,

1. If the sufficient time and proper notice has not been given to the defendant then the judgement cannot stand valid and no need to enforce. Though defendant can waive all this by submitting to the court of rendering State on merit.
2. If same nature of cause of action between the same parties are pending before the requested State provided those proceeding were constituted first.

3. If the judgement is incompatible with a judgements given by the requested State between the same parties.

7.14 CONCLUSION

In the absence of any international convention on recognition and enforcement of foreign judgements the States have bilateral agreement and national legislations on the issue. Though the grounds on which recognition and enforcement of foreign judgment should be done or not are almost the same, but some differences lies in the interpretation. One of the important grounds of recognition is with regard to the issue of jurisdiction. Variety of jurisdictional grounds makes it is difficult to consolidate as to how a judgement of one foreign court based on the jurisdiction grounds of passive and interactive will be accepted by a State which does not recognise this kinds of jurisdiction and absolutely based on traditional basis of jurisdiction. The concept of public policy requirement is by every State but no clear demarcation as to what constitute public policy. The enforcement mechanism recognised under TRIPs is protective measures and preventive measures which may be temporary relief before the final decision by the court. However, the requirement of final and conclusive judgment is opposite to this requirement and therefore creates a genuine problem. Therefore it is urgent required to have a uniform rules relating to recognition and enforcement of foreign judgement.