# The Proposed Hague Convention on Jurisdiction and Foreign Judgments: Where We Are and the Road Ahead

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## I. Where We Are

In June 1992, the U.S. delegation to the Meeting of the Special Commission on General Affairs and Policy of the Hague Conference on Private International Law proposed that the Conference begin work on a convention dealing with the recognition and enforcement of foreign judgments.[1] This suggestion was nothing new. The Hague Conference has attempted to tackle judgments recognition for over a century,[2] so far with little success when measured in terms of conventions concluded and ratified.[3] While an effort in 1925 apparently suffered from too much

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1 *See*, e.g., Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 Law & Contemp. Probs. 271, 271 (Summer 1994) [hereinafter von Mehren, *New Approach*]; Peter H. Pfund, *The Project of the Hague Conference on Private International Law to Prepare a Convention on Jurisdiction and the Recognition/Enforcement of Judgments in Civil and Commercial Matters*, (1998) 24 Brook J. Int'l L. 7.

2 *See*, e.g., Kurt H. Nadelmann, *Ignored State Interests: The Federal Government and International Efforts to Unify Rules of Private Law* 102 U. Pa. L. Rev. 323, 323 (1954) (noting 1874 effort of the Government of The Netherlands to convoke a conference on enforcement of foreign judgments).

3 There are other ways to measure the success of international negotiations. *See infra* note 27. For example, the 1925 draft for a Hague Convention on Judgments Recognition, *see infra* note 4, because of its visionary approach for the time, became a basis for many bilateral recognition treaties later on. *See, e.g.*, Gerhard Walter & Samuel P. Baumgartner, *General Report, The Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions*, in Recognition and Enforcement of Foreign Judgments Outside the Scope of the Brussels and Lugano Conventions 1, 6 n. 37 (Gerhard Walter & Samuel P. Baumgartner eds. 2000) [hereinafter Walter & Baumgartner, *Recognition*].

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ambition at the time,[4] the latest Hague treaty on enforcement of judgments, negotiated throughout the 1960s,[5] lacked sufficient vision to keep the Europeans from turning their attention to creating a more ambitious treaty regime among themselves in the form of the Brussels Convention,[6] the effects of which were soon expanded through the soon equally successful Lugano Convention.[7] In addition, the 1971 Hague Convention suffered from an exceedingly complex form,[8] leading to ratifications only by Cyprus, the Netherlands, and Portugal.[9]

Thus, it was clear from the beginning that, in order to be considered for ratification by a significant number of nations, the new project needed to adopt what is perhaps the most important feature distinguishing the Brussels and Lugano

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[4] *See, e.g.*, Haimo Schack, *Perspektiven eines weltweiten Anerkennungs- und Vollstreckungsübereinkommens*, 1 Zeitschrift für Europäisches Privatrecht [ZEuP] 306, 306 (1993) [hereinafter Schack, *Perspektiven*].

[5] Convention of 1 February, 1971, on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. The Convention can be viewed at <http://www.hcch.net/e/conventions/menu16e.html>.

[6] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1972 O.J. (L 299) 32 [hereinafter Brussels Convention]. *See generally* Reinhold Geimer, 'The Brussels Convention – Successful Model and Old-timer' in (2002). 4 *Eur J L Ref.* at pp. 19–35. On March 1, 2002, the Brussels Convention was replaced by the new Regulation on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, 2001, OJ (L-012) 1 [hereinafter Brussels Regulation], as among all EC member states except Denmark.

[7] Convention on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters, 1988 O.J. (L-319) 40 [hereinafter Lugano Convention]. *See, e.g.*, Hague Conference, Preliminary Document 17, *supra* note 8 at Nos. 3 and 6; von Mehren, *New Approach*, *supra* note 1, at 275; Schack, *Perspektiven*, *supra* note 4, at 308.

[8] *See, e.g.*, Hague Conference, Preliminary Document No. 17 of May 1992, in I Proceedings of the Seventeenth Session, 231 at No. 3 (Hague Conference on Private International Law ed. 1993) [hereinafter Hague Conference, Preliminary Document 17]; Monique Jametti-Greiner, *Bericht über die 17. Session der Haager Konferenz für internationales Privatrecht*, 2 AJP 1211, 1217 (1993); Peter Nygh, *Report on Work Towards a Proposed Judgments Convention at The Hague*, in Proceedings of the Twenty-First International Trade Conference Held at Sidney, Oct. 18–19, 1994 at 5–6 (Australian Att'y Gen. ed. 1994); Schack, *Perspektiven*, *supra* note 4, at 307. The relevant materials consist of the Convention itself, a Protocol of the same date, and of bilateral supplemental agreements. In fact, the Convention can only enter into force between two or more contracting states that have entered into bilateral supplemental agreements to determine many of the issues that have been left open by the Convention itself. *See* Convention of 1 February, *supra* note 5, Article 21–23. In other words, the Convention is merely a dependent framework agreement.

[9] *See* Hague Conference, International Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Preliminary Document No. 7 drawn up by Catherine Kessedjian 4 (1997) [hereinafter Hague Conference, Preliminary Document 7]. In fact, the 1971 Convention has not even become effective as among these three nations because the required supplemental bilateral agreements, *see supra* note 8, have not been concluded. *See, e.g.*, von Mehren, *New Approach*, *supra* note 1, at 275 n. 17.

Conventions from most other recognition treaties: It needed to deal with judicial jurisdiction directly rather than merely indirectly as a recognition requirement as had been done in the 1971 Convention and other traditional *conventions simples.*[10] The only question, contentious until relatively late in the process, was whether the new Convention should become a *convention double* like the Brussels and Lugano Conventions, that is, one that exhaustively lists the available bases of jurisdiction, or a *convention mixte.*[11] The latter, essentially the brainchild of Professor von Mehren,[12] attempts to chart a middle ground by distinguishing three types of jurisdictional bases: (1) a list of jurisdictional bases that a member state would need to make available to plaintiffs suing in its courts and that, if used, would entitle an ensuing judgment to recognition in another member State (the white list); (2) a list of jurisdictional bases that may not be used and that, if nonetheless applied, leads to a judgment that must not be recognized in the other member States (the black list); and, finally, (3) an undefined grey area consisting of jurisdictional bases that, if used, may or may not lead to recognition in another member State, depending entirely on that member State's domestic law.

Once it was established that the proposed Hague Convention would deal in some fashion directly with judicial jurisdiction as well as with the recognition and enforcement of foreign judgments, the project quickly gathered steam and interest.[13] The Seventeenth Session of the Conference, assisted by the findings of a small Working Group,[14] decided in 1993 to explore the matter further.[15] Three years later,

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[10] *See* Hague Conference, Conclusions of the Working Group meeting on enforcement of judgments, Preliminary Document No. 19 of November 1992, at 3 (on file with author) [hereinafter Hague Conference, Preliminary Document 19]; Hague Conference, Preliminary Document 7, *supra* note 9, at 4. The 1925 Draft Convention (*see supra* note 5), too, had been a *convention simple. See* Schack, *Perspektiven*, *supra* note 4, at 306. On *conventions simples, doubles*, and *mixtes see* generally von Mehren, *New Approach*, *supra* note 1, at 282–87.

[11] It is the *convention-mixte* approach that ultimately prevailed in the negotiations. *See* Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted by the Special Commission in October 1999 [hereinafter Preliminary Draft Convention], in Hague Conference, Preliminary Document No. 11 at 1 (2000), Articles 3–18; Report by Peter Nygh & Fausto Pocar, in *id.* at 25, 27–28 [hereinafter Nygh & Pocar Report].

[12] *See* von Mehren, *New Approach*, *supra* note 1, at 283–85. *See also* Arthur T. von Mehren, *The Case for a Convention-mixte Approach to Jurisdiction to Adjudicate and Recognition and Enforcement of Foreign Judgments*, 61 RabelsZ 86 (1997).

[13] *See, e.g.,* Monique Jametti-Greiner & Andreas Bucher, *La Dix-septième session de la Conférence de la Haye de droit international privé*, 4 Schweizerische Zeitschrift für internationales und Europäisches Recht 55, 60–61 (1994).

[14] *See* von Mehren, *New Approach*, *supra* note 1, at 272. The Working Group consisted of experts from Argentina, the People's Republic of China, Egypt, Finland, France, Hungary, the United Kingdom, and the United States. *See* Hague Conference, Preliminary Document 19, *supra* note 10, at 1.

[15] *See* Nygh & Pocar Report, *supra* note 11, at 25; Jametti-Greiner, *supra* note 8, at 1218.

the Eighteenth Session of the Conference decided to establish a Special Commission, which, in five lengthy meetings held between June 1997 and October 1999, first discussed and then drafted a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.[16]

Originally, the plan was to negotiate the final treaty on the basis of that Preliminary Draft Convention at a Diplomatic Conference to be convened in the fall of 2000. However, in February 2000, the United States suggested postponing the scheduled Diplomatic Conference.[17] It felt that the 1999 Draft and the procedure leading to it did not sufficiently reflect American concerns and left too many thorny issues open to interpretation by national courts, thus potentially leading to inconsistent application of the treaty.[18] The U.S. suggestion caused a furor; and for a while in early 2000 (and, depending on who one asks, a few times since) it looked as if the project were dead.[19] What had happened?

From their inception, the discussions at The Hague pitted the interest of the United States in improving the international enforceability of its judgments against that of European and other countries in limiting the jurisdictional reach of U.S. courts.[20] They also pitted the European interest in extending the regime of the Brussels and Lugano Conventions to include important non-European trading partners against the U.S. interest in creating a regime more amenable to U.S. jurisdictional practice than the one provided for in those two Conventions.[21] On

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[16] *See* Nygh & Pocar Report, *supra* note 11, at 25.

[17] Letter from Jeffrey D. Kovar, Assistant Legal Adviser for Private International Law, U.S. Department of State, to J.H.A. van Loon, Secretary General, Hague Conference on Private International Law (Feb. 22, 2000) (on file with author) [hereinafter State Department Letter].

[18] *Id.* at 3.

[19] *See, e.g.*, Burkhard Heß, *Steht das geplante weltweite Zuständigkeits- und Vollstreckungsübereinkommen vor dem Aus?*, 20 IPRax 342 (2000).

[20] *See, e.g.*, Andreas Bucher, *Vers une Convention mondiale sur la compétence et les jugements étrangers*, 122 Semaine Judiciaire 77, 79 (2000) [hereinafter Bucher, *Convention*]; von Mehren, *New Approach*, *supra* note 1, at 277–78; Nygh, *supra* note 8, at 6–7; Schack, *Perspektiven*, *supra* note 4 at 330–31; Linda J. Silberman & Andreas Lowenfeld, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 75 Ind. L. J. 635, 638–39 (2000); Peter D. Trooboff, *Ten (and Maybe More) Difficulties in Negotiating a Worldwide Convention on International Jurisdiction and Enforcement of Judgments: Some Lessons for the Future*, in A Global Law of Jurisdiction and Judgments: Lessons from the Hague Convention (forthcoming) (draft of June 29, 2000) (on file with author) at 5–6 [hereinafter Trooboff, *Ten Difficulties*].

[21] *See, e.g.*, Bucher, *Convention*, *supra* note 20, at 77–78; Arthur T. von Mehren, *The Hague Jurisdiction and Enforcement Convention Project Faces an Impasse – A Diagnosis and Guidelines for a Cure*, 20 IPRax 465, 466–67 (2000) [hereinafter von Mehren, *Impasse*]; Trooboff, *Ten Difficulties*, *supra* note 20, at 3–5. On this issue, the United States enjoyed some support from other non-European nations. *See, e.g.*, Nygh, *supra* note 8, at 5. A further motive of the United States has been to limit the discriminatory effects of the Brussels and Lugano Conventions on defendants from non-member countries. *See, e.g.*, Jametti-Greiner, *Bericht*, *supra* note 8, at 1217; von Mehren, *New Approach*, *supra* note 1,

occasion, the lines of battle were drawn between common law and civil law nations, such as with questions regarding *lis pendens* and *forum non conveniens*.[22] Repeatedly, however, the disputes between the Europeans and the Americans so overpowered the discussions that delegates from other countries had difficulty bringing to bear their own insights and concerns.[23]

It is therefore not surprising that, having had only a single vote in the numerous decisions on the text that ultimately became the Preliminary Draft Convention, the United States suggested to postpone the Diplomatic Conference originally scheduled

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at 276 n. 22, 278; Kathryn A. Russel, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action*, 19 Syracuse J. Int'l L. & Com. 57 (1993). Those effects occur because a member state of those Conventions is not prevented from basing jurisdiction on one of the exorbitant jurisdictional grounds listed in Article 3 of those Conventions in a suit against a defendant from a non-member state. *See* Brussels and Lugano Conventions, Article 4(1). Worse, Article 4(2) of both Conventions extends the right to use these exorbitant grounds of jurisdiction to all domiciliaries of a member state against defendants domiciled outside a member state, thus extending the scope of application of those exorbitant grounds that, like Article 14 of the French Code Civil, are otherwise limited to nationals of a member state. Furthermore, the Conventions force their member states to recognize an ensuing judgment sight unseen in Article 28, thus perpetuating those exorbitant jurisdictional bases. *See, e.g.*, Pascal Grolimund, Drittstaatenproblematik im Europäischen Zivilverfahrensrechts (2000); Friedrich K. Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 Mich. L. Rev. 1195, 1211–12 (1984) [hereinafter Juenger, *Jurisdiction*] (who admits that the problem has not so far been one of great practical relevance); Arthur T. von Mehren, *Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States*, 81 Colum. L. Rev. 1044, 1058–60 (1981) [hereinafter von Mehren, *Recognition*]; Pierre Mercier, *Le projet de convention du marché commun sur la procedure civile internationale et les Etats tiers*, 3 Cahiers de Droit Européen 367, 513, 525–26 (1967); Kurt H. Nadelmann, *Common Market Assimilation of Laws and the Outer World*, 58 Am. J. Int'l L. 724, 726 (1964).

[22] *See, e.g.*, Hague Conference, Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Preliminary Document No. 9 drawn up by Catherine Kessedjian 9–10 (1998) [hereinafter Hague Conference, Preliminary Document 9]; Trooboff, *Ten Difficulties*, *supra* note 20, at 9–10.

[23] This is not to say that other delegations have been entirely unable to affect the negotiations at The Hague, however. For example, the discussions about a possible exemption from the black list for purposes of human rights litigation (*see* Hague Conference, Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001, Prepared by the Permanent Bureau and the Co-reporters (2001) [hereinafter Hague Conference, 2001 Text], at Article 18 No. 3; and *infra* note 30) were strongly influenced by delegations concerned about the power to impose their own values upon others that such litigation bestows upon Western courts. Similar concerns led to the bracketing of the refusal of 'the right of each party to be heard by an impartial and independent court' as a ground for refusing recognition under Article 28 No. 1(c). *See id.* at Article 28 No. 1(c).

for the fall of 2000. In fact, it is telling that this U.S. suggestion to apply the brakes and the decidedly negative reactions it reportedly elicited from some of the European delegations was able to so profoundly challenge the fate of the proposed Convention. There is no reason to be overly pessimistic, however.[24] Further informal gatherings among interested delegates have taken place since the U.S. suggestion was made,[25] and a first diplomatic conference took place in June 2001, with one or more sessions, at which the tough decisions would be made, planned for 2002.[26] Through all these sessions, the various delegations have worked hard to overcome the problems identified in the 1999 Draft. It is clear, however, that the success of the enterprise as treaty-making[27] hinges on the negotiation of a Convention text that satisfies the expectations of the relevant legal communities both in the United States and in Europe.[28]

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[24] *See, e.g.*, Hess, *supra* note 19, at 343. *See also* Stephen B. Burbank, *Jurisdictional Equilibration, The Proposed Hague Convention and Progress in National Law*, 49 Am. J. Comp. L. 203, 203 (2001) (arguing that the U.S. suggestion to apply the brakes to the process at The Hague 'should not be cause for regret in any country desiring a workable international agreement') [hereinafter Burbank, *Equilibration*]. *But see* von Mehren, *Impasse*, *supra* note 21, at 468 (expressing only muted optimism).

[25] *See, e.g.*, von Mehren, *Impasse*, *supra* note 21, at 465–66.

[26] *See* Hague Conference, Informational note on the work of the informal meetings held since October 1999 to consider and develop drafts on outstanding items, Preliminary Document No. 15 at 1–2 (2001) [hereinafter Hague Conference, Preliminary Document 15]; Hague Conference, Towards a worldwide Convention on jurisdiction and foreign judgments in civil and commercial matters, Informal meeting in Edinburgh, Draft Agenda proposed by the delegation of the United Kingdom 1 (April 2001); Hague Conference, Press Release of June 22, 2001, available at < http://www.hcch.net/e/events/events.html#dipl2001 >. The latest policy decision of the Hague Conference now envisions yet another meeting of a Special Commission, followed by a continuation of the Diplomatic Conference towards the end of 2003 and an attempt at downsizing the project to "a core area of possible grounds of jurisdiction." *See* Hague Conference, Commission I on General Affairs and Policy held on 22–24 April, 2002, Summary Prepared by the Permanent Bureau (on file with author).

[27] Even if no treaty ultimately emerges, the mutual education regarding procedural systems and needs that take place among the delegates at The Hague and among academics and practitioners from different countries in discussing the merits and demerits of the proposed Convention provides comparative insights that will allow for better calibrated lawmaking for transnational cases in the future. *See, e.g.*, Burbank, *Equilibration*, *supra* note 24, at 203–04.

[28] *See generally* Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 Int'l Org. 427 (1988) (describing process of treaty-making as a 'two-level game', in which negotiations with foreign parties are followed by negotiations with interested domestic interest groups). Note, however, that these expectations and interests, too, may change during the negotiation process, *see, e.g.*, Abram Chayes & Antonia Handler Chayes, The New Sovereignty, Compliance with International Regulatory Agreements 5 (1995) (suggesting that the negotiation of a treaty 'is at its best a learning process in which not only national positions but also conceptions of national interest evolve and change') and that the project's chances are best when those expectations change to positions better informed about the interests and approaches of other negotiating partners. *See infra* text accompanying notes 120–126, 131–135.

## II. The Road Ahead

The list of issues that remain controversial is considerable. It ranges from the scope of application of the proposed Convention to the relative size of the black, white, and grey areas of jurisdiction[29] to specific jurisdictional provisions.[30] Special concerns have also emerged with respect to two matters that were not considered in any depth by the Special Commission – the jurisdictional problems arising from electronic commerce and those connected with the application of intellectual property laws.[31] On the other hand, however, there are some significant aspects of the Preliminary Draft Convention that have not been in dispute since that Draft was adopted in 1999. Most prominent among them are the decision to pursue a *convention mixte*,[32] the provisions dealing with *lis pendens* and declining

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[29] *See, e.g.*, State Department Letter at 4–5; Hague Conference, 2001 Text, *supra* note 23, Articles 6–18, particularly Article 18 n. 104 (noting that there was no consensus on the black list). On distinguishing white, grey, and black areas of jurisdiction *see supra* text accompanying notes 11–12.

[30] *See, e.g.*, State Department Letter, at 6–9 (naming Articles 3 (general jurisdiction at the defendant's habitual residence), 6 (contracts), 7 (consumer contracts), 8 (employment contracts), 9 (branch-office jurisdiction), 10 (torts), 10(2) (exclusion of antitrust matters from tort jurisdiction), 10(4) (limitation of jurisdiction in multi-jurisdiction torts), 12 (exclusive jurisdiction) as problematic). *See also* Hague Conference, Preliminary Document 15, Annex I–VIII (adding to these issues that of jurisdiction and enforcement related to provisional and protective measures); Hague Conference, 2001 Text, *supra* note , Article 28 No. 1 n. 153 (adding disagreement on whether or not the list of recognition requirements in Article 28 should be exclusive). *But see* now Hague Conference, 2001 Text, *supra* note 23, Article 1 No. 2(i) n. 6 (noting that the only controversial aspect left regarding the exclusion of antitrust matters is how to deal with unfair competition). Moreover, partly as a result of the disagreements between European and U.S. delegates over the goals to be reached by the proposed Convention, *see supra* text accompanying notes 20–22, there is the contested question of the scope of application of the proposed Hague Convention in relation to other international instruments, particularly to the Brussels and Lugano Conventions and to the Brussels Convention's successor regulation. *See* Hague Conference, 2001 Text, *supra* note 23, Article 37. For a strongly EC-based suggestion on this topic *see* Olivier Tell, La 'Disconnecting Clause', paper presented at the Edinburgh Seminar (April 2001). A final issue remaining controversial more in its precise form than in its general desirability is a possible exemption from the black list that would allow for human rights litigation to be brought even in the absence of an allowed ground of judicial jurisdiction. *See supra* note 23; Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int'l L. J. 141 (2001).

[31] *See, e.g.*, Trooboff, *Ten Difficulties*, *supra* note 20 at 8; State Department Letter at 4, 8. These issues have since been discussed at a number of informal gatherings among interested delegates and at meetings of experts in those areas. *See, e.g.*, Hague Conference, Preliminary Document 15, *supra* note 26; von Mehren, *Impasse*, *supra* note 21, at 466.

[32] *See* Hague Conference, 2001 Text, *supra* note 23, Article 17.

jurisdiction,[33] and the central issues regarding recognition and enforcement of judgments.[34]

As in any ambitious lawmaking enterprise of this sort, the devil appears to be in the detail. On closer inspection, however, many of the disagreements between the Europeans (especially the continental Europeans) and the Americans reflect deeper jurisprudential assumptions and, with them, ingrained views about proper approaches to transnational litigation[35] in general and to jurisdictional and recognition law in particular. These respective views and assumptions – some of which are bound up with constitutional issues[36] – have not only influenced the

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[33] *Id.*, Articles 21 & 22. Indeed, these two provisions represent an interesting compromise between, and useful combination of, civil law and common law approaches, *see, e.g.*, Burbank, *Equilibration*, *supra* note 24, at 219–20; Gerhard Walter, '*Lis Alibi Pendens* and *Forum Non Conveniens*: From Confrontation via Coordination to Collaboration' in (2002) 4 *Eur J L Ref* at pp. 69–85, and perhaps may help light the way towards an approach acceptable to the relevant delegations in the area of judicial jurisdiction. While some improvements might be made, *see, e.g.*, Burbank, *id.*, at 221–26, 236–42, the two provisions represent such a delicate balance that any attempt to tinker with them might endanger the compromise they represent. *See, e.g.*, State Department Letter, *supra* note 17, at 9.

[34] *See* Hague Conference, 2001 Text, *supra* note 23, Articles 23–36.

[35] Litigation may become transnational, or international, in character because of the involvement of any international element, such as a foreign party, a foreign proceeding, or evidence located abroad. *See, e.g.*, Andreas Bucher, I/1 Droit international privé suisse 17 (1998); Giuseppe Campeis & Arrigo de Pauli, Il Processo Civile Italiano e lo Straniero 1 (1996); Reinhold Geimer, Internationales Zivilprozessrecht 4–5 (4th ed. 2001); Andreas F. Lowenfeld, International Litigation and Arbitration v (1993); Haimo Schack, Internationales Zivilverfahrensrecht 1 (2nd ed. 1996) [hereinafter Schack, IZVR]; Louise Ellen Teitz, Transnational Litigation 1–2 (1996); Gerhard Walter, Internationales Zivilprozessrecht der Schweiz 47 (2nd ed. 1998); Stephen B. Burbank, *The World in Our Courts*, 89 Mich. L. Rev. 1456, 1457 (1991) (book review) [hereinafter Burbank, *World*]. There, however, the agreement among continental Europeans and Americans ends. The lack in the common-law world of the traditional distinction between public and private law and the concomitant distinction between civil courts and administrative tribunals, *see, e.g.*, Rudolf B. Schlesinger et al., Comparative Law 300–301 (5th ed. 1988), necessarily leads to a broader coverage of issues by the field of transnational litigation in the United States than on the European continent, where 'international civil procedure', as it is usually called, is considered limited to private-law litigation. *See, e.g.*, Walter & Baumgartner *Recognition*, *supra* note 3, 12–15. Moreover, because of the relatively recent emergence of casebooks and treatises on transnational litigation in the United States, a consensus as to what should be covered in a course on that topic has not yet emerged. Thus, while some authors only cover what Americans would consider 'international civil litigation', *see, e.g.*, Gary B. Born, International Civil Litigation in United States Courts (3d ed. 1996); Teitz, *id.*, others also include related aspects such as international judicial cooperation in criminal matters. *See, e.g.*, Lowenfeld, *id.* While the former difference in view is highly relevant for our purposes, *see* State Department Letter at 6 (suggesting that the terms 'civil and commercial' and 'administrative matters' need further clarification); Hague Conference, 2001 Text, *supra* note 23, Article 1 No. 1 n. 3 (noting desire of some delegations for further clarification), the latter is not and can therefore safely be put aside for present purposes.

[36] *See infra* text accompanying notes 56–87.

negotiating positions of continental Europeans and Americans at The Hague. They may also significantly color the interpretations given the proposed Convention by domestic courts and legislators in those countries in the future and thus may determine the usefulness of this or any other treaty as an instrument of lawmaking for transnational litigation among them where there is no international court to ensure uniform interpretation. Gaining a better understanding of these views and assumptions is therefore crucial for the successful conclusion of the current project at The Hague and of any other treaty in transnational litigation. Gaining such an understanding would also significantly assist delegates in grasping more completely the nature and strength of the interests that drive the project, both their own and those of other countries' delegations, thus revealing useful avenues toward compromise.[37] In what follows, I shall attempt to identify some of the jurisprudential assumptions and constitutional limitations that will require more attention at The Hague.[38] But first, let me note a few points on negotiating procedure.

## *A. Procedural Issues*

If indeed the success of the proposed Convention as treaty-making requires a resolution 'that satisfies the expectations of the relevant legal communities both in the United States and in Europe',[39] it is incumbent upon the Hague Conference to adopt a negotiating procedure that permits those expectations significantly to influence the ultimate text of the Convention. A drafting procedure that relies primarily on voting up or down suggested treaty language immediately faces the problem that the United States can easily be outvoted by the (continental) Europeans and others occasionally tagging along with them.[40] This may not be quite as bad as it first seems if those opposing the United States are willing to yield significant territory in the areas important to that country, as has happened to some

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[37] On the importance of the interests of groups and individuals in determining outcomes in international relations see Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 Int'l Org. 513 (1997).

[38] *See infra* Part II.B. For a more thorough analysis in this regard and for trans-Atlantic lawmaking for transnational litigation in general *see* Samuel P. Baumgartner, The Proposed Hague Convention on Jurisdiction and Foreign Judgments and Trans-Atlantic Lawmaking for Transnational Litigation (forthcoming).

[39] *Supra* text accompanying note 28.

[40] This may change significantly in the near future. The Commission of the European Communities is currently arguing that, under the new Article 65(c) of the EC Treaty, the various EC Member States no longer have the competence to negotiate treaties in the area of private international law, leaving the European Communities with a single vote. *But see* now Proposal for a Council Decision authorizing the Member States to sign in the interest of the European Community the convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in respect of Parental Responsibility and Measures for the Protection of Children (the 1996 Hague Convention), COM (2001) 680 final, available at: <http://europa.eu.int/eur-lex/en/com/pdf/2001/com2001_0680en01.pdf> (shared competence between Community and Member States).

degree in the negotiations leading up to the 1999 Draft.[41] Nevertheless, serious gaps in comparative knowledge and the characteristics of negotiating psychology may impose considerable limits on such an approach, as the 1999 Draft demonstrates.[42]

Thus, for the 2001 session of the Diplomatic Conference last summer, the Hague Conference, careful not to submerge the interests of any important member State, opted for a consensus-based approach to negotiate. The resulting process, too, has its limits, however. As the heavily bracketed and richly annotated text resulting from that session demonstrates,[43] it may be difficult so to achieve agreement on any issue that elicits objections from a single member State. For this approach to work, the discipline imposed by an impending vote must be replaced by the self-discipline of the various delegations, who will need to constantly remind themselves that the successful conclusion of this or any other treaty requires a *quid pro quo* or, in other words, that it is difficult to get something out of these negotiations without giving something in return.[44] At any rate, the negotiation procedure should be 'designed to ensure that the final result will represent, to some degree, an accommodation of the interests of the negotiating states.'[45] Ideally, this process would allow for the various delegations to adjust their own interests in response to

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[41] *See, e.g.,* Bucher, *Convention, supra* note 20, at 84–87, 93–94. *Compare also* Hague Conference, Synthesis of the Work of the Special Commission of June 1997 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters, Preliminary Document No. 8 drawn up by Catherine Kessedjian 11 (1997) (noting preference of most delegations for a *convention double*) with *supra* note 11.

[42] *See* State Department Letter at 2 (deploring 'bloc voting in support of established positions'), 3 (noting that 'the project as currently embodied in the October 1999 preliminary draft convention stands no chance of being accepted in the United States').

[43] *See* Hague Conference, 2001 Text, *supra* note 23.

[44] [T]here is no durable treaty which is not founded on reciprocal advantage, and indeed a treaty which does not satisfy this condition is no treaty at all, and is apt to contain the *see*ds of its own dissolution. Thus, the great secret of negotiations is to bring out prominently the common advantage to both sides of any proposal, and so to link these advantages that they may appear equally balanced to both parties.

François De Callieres, On the Manner of Negotiating with Princes 109–10 (A.F. White trans., 1963) (1716). Institutionalist international relations scholars and negotiation theorists refer to this as 'issue linkage'. *See, e.g.,* Robert O. Keohane, After Hegemony: Cooperation and Discord in the World Political Economy 92 (1984); Howard Raiffa, The Art and Science of Negotiation 13 (1982); Ernst B. Haas, *Why Collaborate? Issue Linkage and International Regimes*, 32 World Pol. 357 (1980); Robert D. Tollison & Thomas D. Willett, *An Economic Theory of Mutually Advantageous Issue Linkages in International Negotiations*, 33 Int'l Org. 425 (1979). Those who *see*m to think that the current negotiations at The Hague should be any different, *see, e.g.,* Andreas F. Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the von Mehren Report*, 57 Law & Contemp. Probs. 290, 302 (Summer 1994), increase the danger of a wasted effort. Such views reflect the widely-held, yet erroneous, assumption that, in matters of private international law, the United States can exercise leadership in treaty-making without giving up the power to act unilaterally. *See* Baumgartner, *supra* note 38, §2.III.C.

[45] Chayes & Chayes, *supra* note 28, at 4.

what they learn about the interests and preferences of other procedural systems represented at The Hague.[46]

## *B. Fundamental Problems on the Road Ahead*

### *1. Jurisdictional Doctrine and Its Jurisprudential Underpinnings*

With the decision to pursue a *convention mixte* apparently unchanged[47] and at least some of the fundamental interests in support of the proposed Convention reposing in issues of judicial jurisdiction,[48] much depends on the jurisdictional provisions of the envisioned treaty and thus on the assumptions underlying jurisdictional doctrine in the various negotiating States.[49] Here, the differences between the United States and continental Europe are remarkable. Understanding these differences will be essential for the success of the enterprise.

#### (A) UNITED STATES

In the United States, the evolution of the law of judicial, or personal, jurisdiction has remained largely uninfluenced by foreign sources. Although some of the U.S. Supreme Court's early decisions,[50] including *Pennoyer v. Neff*,[51] contained references to foreign practice and to international law,[52] the Court soon framed the American constitutional law limiting state-court jurisdiction with no visible influence of foreign law.[53] The refusal of the U.S. government until the late 1950s to enter into any international treaties in the areas of civil procedure and private international law,[54] primarily out of concern for state lawmaking prerogatives but effectively reflecting deeper jurisprudential preferences,[55] further fostered an independent American evolution of jurisdictional law.

The resulting differences to European practice are considerable. Most importantly for our purposes, the American approach has focused on general constitutional

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[46] *See supra* note 28.
[47] *See supra* note 32 and accompanying text.
[48] *See supra* note 20 and accompanying text.
[49] *See, e.g.*, Arthur T. von Mehren & Donald Trautman, *Recognition of Foreign Adjudications: A Survey and a Suggested Approach*, 81 Harv. L. Rev. 1601, 1610 (1968) (proposing that 'compliance with appropriate standards of adjudicatory jurisdiction' represents the '"hallmark" function of suggesting that the rendering system shows fairness and judgment generally in its handling of litigation involving significant foreign elements').
[50] *See, e.g., D'Arcy v. Ketchum*, 52 U.S. (11 How.) 165 (1851).
[51] 95 U.S. 714, 723 (1877).
[52] *See, e.g.*, Burbank, *World*, *supra* note 35, at 1458.
[53] *See, e.g.*, Friedrich K. Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. Colo. L. Rev. 1, 2–17 (1993).
[54] *See, e.g.*, Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 Law & Contemp. Probs. 103 (Summer 1994).
[55] *See, e.g.*, Baumgartner, *supra* note 38, §2.VI.

doctrine, shaped primarily by the U.S. Supreme Court, since that Court, in *Pennoyer v. Neff*,[56] elevated personal jurisdiction to a matter controlled by the due process clause.[57] Over time, of course, this doctrine changed a great deal, along with significant shifts in jurisprudential preferences in the American legal landscape.[58] In *Pennoyer v. Neff*, the Court held to the territorialist view that, except where the defendant had consented to jurisdiction or in cases affecting the plaintiff's status, jurisdiction could only be acquired by a symbolic act of exercising the forum state's sovereignty: service of process upon the defendant or attachment of his property within the forum state.[59] At the same time, either would also be sufficient for asserting jurisdiction under the due process clause.[60]

This rigid constitutional concept of personal jurisdiction, both overbroad[61] and overly constricting, soon proved problematic in the industrial United States of the late 19th and the early 20th Centuries. Thus, the Supreme Court, after experimenting with the liberal use of concepts such as 'implied consent'[62] and 'presence',[63]

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[56] 95 U.S. at 733.

[57] *See* Juenger, *Jurisdiction*, *supra* note 21, at 1196–97.

[58] On those shifts see generally Neil Duxbury, Patterns of American Jurisprudence 9–299 (1995).

[59] 95 U.S. at 722, 723, 733. *See also* Juenger, *Jurisdiction*, *supra* note 21, at 1196.

[60] The results of this aspect of the Court's holding in *Pennoyer* have been tag jurisdiction and *quasi in rem* jurisdiction. The latter was later outlawed by the Court as an independent jurisdictional basis in *Shaffer v. Heitner*, 433 U.S. 186 (1977). The former still lingers on after the Court upheld it in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), and questions regarding its continued validity in international cases remain. *See, e.g.*, Born, *supra* note 35, at 121–23. At any rate and in spite of the claim of the *Restatement (Third) of Foreign Relations Law* at § 421, Reporters Note 5 (1987), that '[j]urisdiction based on service of process on one only transitorily present in a state is no longer acceptable under international law', a few federal courts have recently begun to revert to tag jurisdiction more often in the international context, disregarding the Supreme Court's holding in *James-Dickinson Farm Mortgage Co. v. Harry*, 273 U.S. 119, 122 (1927), that '[j]urisdiction over a corporation of one state cannot be acquired in another state or district in which it has no place of business and is not found, merely by serving process upon an executive officer temporarily therein, even if he is there on business of the company'. *See, e.g., First American Corp. v. Price Waterhouse LLP*, 154 F.3d 16 (2nd Cir. 1998); *Aluminal Indus., Inc. v. Newtown Commercial Assoc.*, 89 F.R.D. 326 (S.D.N.Y. 1980). *See also U.A.R. Sports Mgt., Inc. v. Barnaby*, (1993) WL 524154 (E.D. Pa. 1993) (summarily rejecting motion to dismiss for lack of personal jurisdiction over a Canadian hockey player, served with process at the airport in Philadelphia, with a brief reference to *Burnham*). Thus, the inclusion of tag jurisdiction in the black list, *see* Hague Conference, 2001 Text, *supra* note 23 Article 18 No. 2(f), represents an important achievement for the many who view this jurisdictional ground as exorbitant. *See, e.g.*, Stephen B. Burbank, *Jurisdiction to Adjudicate: End of the Century or Beginning of the Millennium?*, 7 Tul. J. Int'l & Comp. L. 111, 116 (1999) [hereinafter Burbank, *Jurisdiction*]. An exception, of course, is being discussed for purposes of human rights litigation. *See supra* notes 23 & 30.

[61] *See supra* note 60 and accompanying text.

[62] *See St. Clair v. Cox*, 106 U.S. 350 (1882); *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404 (1855).

[63] *See, e.g., Philadelphia & Reading Railway v. McKibbin*, 243 U.S. 264 (1917).

recalibrated the limits set by the due process clause in the 1945 case of *International Shoe v. Washington*.[64] In that case, the Court pronounced that 'due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it 'such that the maintenance of the suit does not offend "traditional notions of fair play and justice" '.[65]

The focus in *International Shoe* on minimum contacts and fairness became the basic inquiry that has controlled the constitutional law of personal jurisdiction in the United States to this day. In expanding on *International Shoe*'s standards in a considerable number of cases, the Court has shifted its focus somewhat from the defendant's purposeful establishment of forum contacts[66] and from a concern with fairness towards the defendant to a greater emphasis on balancing the burden placed on the defendant in having to defend herself away from home against such factors as the forum state's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, and the interstate judicial system's interest in the most efficient resolution of disputes in a general reasonableness inquiry.[67] The Court also quickly abandoned its interest in distinguishing clearly, on the basis of the strength of the defendant's contacts to the forum, between general and specific jurisdiction[68] as it had done in *International Shoe*.[69]

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[64] 326 U.S. 310 (1945).

[65] *Id.* at 316.

[66] *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (requiring 'some act by which the defendant purposefully avails itself of the [...] benefits and protection of [the forum state's] laws.').

[67] *See, e.g., Shaffer v. Heitner*, 433 U.S. 186, 204; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292; *Burger King Corp v. Rudzewicz*, 471 U.S. 462, 476 (1985). As Professor Burbank has pointed out, however, at least until recently, that is, until *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), was decided, this reference to the relationship among plaintiff, defendant, and forum state has largely remained rhetoric while the majority of the Court effectively decided cases on the basis of whether or not the defendant had established sufficient contacts with the forum state. *See* Burbank, *Jurisdiction, supra* note 60, at 121.

[68] *See, e.g.*, Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610 (1988). The failure of this distinction came to the surface in *Helicopteros Nacionales de Colombia, SA v. Hall*, 466 U.S. 408 (1984), where a struggle ensued between Justice Brennan and the majority over whether Helicopteros Nationales' contacts with Texas, while perhaps insufficient to create specific jurisdiction, had nevertheless been substantial enough to support the assertion of general jurisdiction. *Compare* 466 U.S. n. 10 with 466 U.S. 420 (Brennan, J., dissenting).

[69] 326 U.S. at 317:

> 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of Process has been given [...] Conversely it has been generally recognized that the casual presence of the corporate agent or even his or her conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.

Throughout these changes, due process analysis has remained the cornerstone of the American law of personal jurisdiction. Thus, the Court's jurisprudence, the written work of legal academics, and the discussions in classrooms all across the country[70] have focused on analyzing and developing these general constitutional principles and the ways in which they interrelate. Indeed, there has been ample ground for such analysis. Identifying more specifically the factors under which it is fair for a defendant to be haled into a particular forum has proved a difficult task. For example, there has been little agreement as to whether and to what extent interjecting a product into the 'stream of commerce' may support an assertion of jurisdiction.[71] Moreover, difficult questions have arisen as regards the relationship between federalism and due process, particularly with a Supreme Court that has vacillated between dismissing and reviving *Pennoyer's* notion that somehow jurisdiction is limited by a state's sovereignty.[72] Finally, novel theoretical twists have emerged, such as the question introduced in *Burnham v. Superior Court*,[73] whether the emphasis should be on '*traditional* notions of fair play'[74] or on '*contemporary* notions of due process'.[75]

While these and many other issues of constitutional theory have continually ensured spirited debates, American jurists have paid scant attention to fashioning more specific policy choices or to interpreting jurisdictional statutes. In fact, state legislatures have increasingly chosen to refer jurisdictional decisions entirely to the courts by drafting their jurisdictional statutes so as to reach as far as constitutional due process allows.[76] Similarly, some state courts have construed their state's long-arm statutes as incorporating the relevant due process jurisprudence.[77] As a result,

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[70] To someone legally educated in a civil law country, it is surprising to learn how much time of a basic course in civil procedure in the United States is spent discussing personal jurisdiction, how much of that discussion focuses on constitutional doctrine, and how little, if any, on studying jurisdictional statutes, state or federal. *See also* Burbank, *Jurisdiction*, *supra* note 60, at 112 (suggesting as one explanation 'the utility function of law professors: the desire of most of us to teach at least some constitutional law').

[71] *See* the plethora of opinions in *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987).

[72] *See e.g.* Burbank, *World*, *supra* note 35, at 1467–68.

[73] 495 U.S. 604 (1990).

[74] *Id.* at 621–27.

[75] *Id.* at 628–40 (Brennan, J., concurring).

[76] *See, e.g., Cal. Code Civ. Proc.* § 410.10 (West 1973); *Iowa Rules of Ct.* 56.2 (West 1987); *N.J. Civ. Practice* 4:4-4(e) (1988); *R.I. Gen. Laws* § 9-5-33. Other states have amended their listings of jurisdictional bases with a catch-all provision authorizing any assertion of jurisdiction consistent with due process. *E.g. Ill. Rev. Stat. Ch.* 10, §2–209 (Smith-Hurd Supp. 1989); *Neb. Rev. Stat.* § 25–536 (1989).

[77] *See, e.g., Hall v. Helicopteros Nacionales de Colombia, S.A.*, 638 S.W.2d 870, 871 (Tex. 1982) *rev'd on other grounds*, 466 U.S. 408 (1984); John G. Kolbe, Inc. v. Chromodern Chair Co., 180 S.E.2d 664 (Va. 1971); *Flambeau Plastics Corp. v. King Bee Mfg. Co.*, 129 N.W.2d 237, 240 (Wis. 1964). However, there have been some state courts that have not interpreted their state's long-arm statute as extending to the limits of the due process

due process analysis and statutory interpretation today often converge in the United States.[78]

The resulting heavy reliance on facts and first principles that controls the U.S. law of personal jurisdiction today is not merely an effect of approaching jurisdiction as a matter of constitutional doctrine, however.[79] It is also in conformity with the normative stance preferred by many proceduralists in the United States, who have been influenced by the jurisprudential developments referred to above.[80] The break, although by no means clean,[81] with *Pennoyer's* concentration on state power coincided with a general turn away from territorialist approaches in American conflicts law and from the concomitant limitations on state power.[82] The move toward a more open-ended minimum contacts and reasonableness standard, increasingly unencumbered by state statutory limits,[83] was also in line with the antiformalist, particularly legal realist, concern underlying the effort to draft the Federal Rules of Civil Procedure that strict procedural distinctions stand in the way of getting to the substance of a case and thus need to be replaced by more flexible, fact-specific principles and standards.[84] Moreover, the concentration on first principles and its movement to an ever-more encompassing reasonableness standard fit well with the rediscovered virtues of the common-law process and its ability to allow judges to adapt the rules to newly emerging fact patterns.[85] A jurisdictional standard, such as that developed by the Supreme Court in *International Shoe* and its

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clause. *See, e.g., Vendetti v. Fiat Auto S.p.A.*, 802 F. Supp. 886 (W.D.N.Y. 1992) (holding the automobile manufacturer Fiat not subject to jurisdiction under the New York long arm statute in a products liability suit, even though it manufactured, distributed, and sold its automobiles throughout the United States, thus clearly creating jurisdiction under the Supreme Court's due process analysis); *Banco Ambrosiano v. Artoc Bank & Trust, Ltd.*, 476 N.Y.S.2d 64 (1984) (same).

78 *See, e.g.*, Burbank, *Jurisdiction*, at 112 (who admonishes readers that 'the primary source of authority for jurisdiction to adjudicate in state courts, which conduct the vast majority of judicial business in the United States, is state law').

79 *But cf.* Juenger, *Jurisdiction*, *supra* note 21, at 1196–97, 1201–03 (arguing that the Supreme Court's reliance upon constitutional dogma has been primarily responsible for the practical problems arising out of its jurisprudence on personal jurisdiction both under the rule of *Pennoyer* and under that of *International Shoe*).

80 *See supra* text accompanying note 58.

81 *See supra* text accompanying note 74.

82 *See, e.g., Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981). *But see Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, at 814–23 (1985) (application of Kansas law to every single claim in a nation-wide class action violates Due Process Clause).

83 *See supra* text accompanying notes 76–78.

84 *See, e.g.*, Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909, at 943–73 (1987). 'One theme pervades these works: procedural technicality stands in the way of reaching the merits, and of applying substantive law.' *Id.* at 962.

85 *See* Baumgartner, *supra* note 38, 2.III.A.2. On the relevance of this, see infra note 125 and accompanying text.

progeny, which is sufficiently general (1) to be equally applicable to all cases and (2) to allow the trial court to take into account the particular facts of each case was perfectly in keeping with these jurisprudential preferences, particularly when no longer impeded by the limitations of state long-arm statutes. To be true, both transsubstantivity[86] and the heavy reliance of jurisdictional analysis on facts[87] have increasingly been subject to criticism. But they remain strong pillars of procedural philosophy in the United States today.

(B) CONTINENTAL EUROPE

By contrast, the continental European law of adjudicatory jurisdiction reflects a longer and steadier legal development based on a common source and fostered by well over a century of treaty-making. It also reflects the lawmaking preferences of civil law countries, including preferences that arise from an approach to separation of powers that is stricter than its U.S. counterpart.[88] Some of the jurisdictional bases, such as the general rule of *actor sequitur forum rei*, the *forum contractus*, the *forum delicti commissi* and the *forum rei sitae* can be traced back to Roman law.[89] They were then refined[90] and joined with further jurisdictional bases, such as the *forum arresti*,[91] the *forum hereditatis*,[92] and the *forum reconventionis* (i.e., the forum for

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[86] *See, e.g.* Subrin, *supra* note 84, at 985; Juenger, *Jurisdiction, supra* note 21, at 1202 (criticizing the due process jurisprudence of the Supreme Court as treating 'General Motors in the same fashion as the Boy Scouts of America').

[87] *See, e.g.*, Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 Am. J. Comp. L. 121, 153 (1992) (criticizing that jurisdictional theory in the United States 'often turns on hyperfine factual distinctions' and often 'encourages expensive litigation without any commensurate benefit in fair results'); Burbank, *Jurisdiction, supra* note 60, at 114 (noting that '[b]oth the changing contours of due process and its fact dependency have exacerbated the uncertainty of state jurisdictional standards founded in federal constitutional limitations); Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 Cornell L. Rev. 89, 101 (1999) (criticizing the current due process analysis as leaving 'everything to case-by-case adjudication').

[88] On the continental European understanding of separation of powers *see, e.g.*, Mary A. Glendon, Michael W. Gordon & Christopher Osakwe, Comparative Legal Traditions, 67–68 (2nd ed. 1994).

[89] *See, e.g.*, Max Kaser & Karl Hackl, Das Römische Zivilprozessrecht 588–89 (2nd ed. 1996). Juenger, *Jurisdiction, supra* note 21, at 1203–04. Note, however, that the Roman terms for these jurisdictional bases are the creation of the *ius commune* and thus did not yet exist in Roman times. *See* Kaser & Hackl *id.* Note also, that the *forum contractus* was located at the place at which the contract was concluded rather than at the place of performance. *Id.* at 589.

[90] *See, e.g.*, Adolf Wach, Handbuch des deutschen Civilprozessrechts 398 n. 3, 434–35, 492 n. 1 (1st volume 1885). This is particularly true for the *forum contractus vel solutionis. See, e.g., id.* at 445 n. 1, 450 nn. 17, 19.

[91] *See, e.g., id.* at 418 n. 9.

[92] *See, e.g., id.* at 429 n. 1. To be sure, there was considerable vacillation over time as to where this forum should be located. *See id.*

counterclaims)[93] during the period of the *ius commune*. Further refinement and cross-border harmonization occurred as a result of a long history of negotiating and renegotiating bilateral, and later multilateral, treaties regarding issues of jurisdiction and the recognition and enforcement of foreign judgments,[94] culminating in the adoption of the Brussels (and later the Lugano) Convention.

The resulting jurisdictional law produced a common methodological preference in favor of determining jurisdiction on the basis of a well-defined legal relationship. This methodological approach differs considerably from the general activity-based jurisdiction developed by the U.S. Supreme Court in *International Shoe* and its progeny, where the same due process analysis applies equally to all types of legal relationships.[95] Granted, the age of nationalism in the late 18th and early 19th Century did bring about some new and rather exorbitant fora tying jurisdiction to concepts such as the nationality of the plaintiff or the defendant's ownership of assets within the forum.[96] This altered neither the preferred methodology nor the process of refining the preexisting jurisdictional bases in any major fashion, however.

Furthermore, with the notable exception of Switzerland,[97] constitutional

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[93] *See, e.g., id.* at 476.

[94] *See, e.g.*, Baumgartner, *supra* note 38, §3.II; Walter & Baumgartner, *Recognition*, *supra* note 3, at 5–8.

[95] To be sure, in most U.S. authorities distinguish between general and specific jurisdiction. However, the same due process analysis remains applicable to both, so that the difference is one of degree rather than one of distinct legal categories, and one that, for all intents and purposes, is difficult to draw. *See, e.g.*, Twitchell, *supra* note 68; Lea Brilmayer, *Related Contacts and Personal Jurisdiction*, 101 Harv. L. Rev. 1444 (1988). *See also International Shoe Co v. Washington*, 326 U.S. 310, 319:

> It is evident that the criteria by which we mark the boundary line between those activities which justify the subjection of a corporation to suit, and those which do not, cannot be simply mechanical or quantitative. ... Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure.

[96] *See, e.g.*, Juenger, *Jurisdiction*, *supra* note 21, at 1204–1205.

[97] In that country, a more than 500 year-old tradition of resisting the power of alien judges found its way into Article 59 of the Federal Constitution of 1874. In a fashion somewhat resembling the holding of the Supreme Court in *Pennoyer*, that Article provided that *in personam* actions against a solvent debtor could only be brought at the defendant's domicile. While, over the years, both the Federal Supreme Court and the federal legislature had carved out several exceptions from this general rule, Article 59 remained a norm considerably limiting the exercise of personal jurisdiction. Of course, that norm was powerless to confine the direct jurisdiction of foreign courts. Yet it applied with full force at the recognition stage, when the time came to decide whether, from a Swiss point of view, the foreign court was competent to deal with a particular case. *See, e.g.*, Oscar Vogel, Grundriss des Ziviprozessrechts 99 (5th ed. 1997); Walter & Baumgartner, *Recognition*, *supra* note 3, at 20. Article 59 has since been replaced with a provision allowing for exceptions to be made in federal legislation and in international treaties. *See Bundesverfassung (Federal Const.)*, Art. 30(2). *See generally* Fridolin M.R. Walther, *Die Anerkennung und Vollstreckung der gerichtlichen Entscheidungen ausserhalb des Geltungsbereichs des Brüsseler und*

analysis has not nearly played as prominent a role in the development of continental European law of personal jurisdiction as it has in the United States.[98] Of course, since the inception of the constitutional state, jurisdictional statutes have been as much subject to constitutional review as any other statutory provision. But, at least until very recently,[99] this has had little, if any, influence on the development of jurisdictional doctrine in these countries. Thus, the jurisdictional inquiry begins and, usually, ends with the application of jurisdictional statutes carefully crafted under the above-mentioned influences.[100] The resulting jurisdictional law lends itself fairly well to fulfilling the general jurisprudential preferences of continental European lawyers, just as the general minimum-contacts-cum-reasonableness approach of U.S. courts is consistent with the prevalent jurisprudential preferences in the United States.[101] Foremost among these preferences is the goal of consistency and predictability.[102] It is intended to avoid protracted and costly battles over jurisdictional and other procedural questions in every single case and to allow potential litigants to structure their affairs on the basis of relatively reliable knowledge as to where jurisdiction might lie.[103] It also attempts, as much as possible, to treat like cases alike. This requires the legislature to engage in the one activity so despised by the American legal realists[104] – the drawing of lines.

Moreover, the continental European approach of fastening on more specific jurisdictional rules is in line with the general concern to keep lawmaking power as

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*Lugano-Übereinkommens in der Schweiz*, in Recognition and Enforcement of Foreign Judgments, *supra* note 3, at 541, 552–53.

[98] *See, e.g.*, Juenger, *Jurisdiction*, *supra* note 21, at 1203–04.

[99] Some recent scholarship, partly influenced by U.S. practice, has suggested more exacting limitations to jurisdictional law arising from constitutional or international law. *See, e.g.*, Thomas Pfeiffer, Internationale Zuständigkeit und prozessuale Gerechtigkeit: Die Internationale Zuständigkeit im Zivilprozess zwischen effektivem Rechtsschutz und nationaler Zuständigkeitspolitik 646 (1995); Peter Schlosser, *Einschränkung des Vermögensgerichtsstandes*, 12 IPRax 140, 141 (1992). *See generally* Pascal Grolimund, 'Human Rights and Jurisdiction: General Observations and Impact on the Doctrines of *Forum Non Conveniens* and *Forum Conveniens* in (2002) 4 *Eur J L Ref* at pp. 87–118.

[100] *See, e.g.*, Gerhard Walter & Rikke Dalsgaard, *The Civil Law Approach*, in Transnational Tort Litigation 41 (Peter Nygh & Campbell McLachlan eds., 1996).

[101] *See supra* text accompanying notes 79–87.

[102] *See, e.g.*, Mathias Reimann, Conflict of Laws in Western Europe 12–17 (1995) (explicating certainty, consistency, stability, and predictability as principles underlying continental European conflicts law); Schack, IZVR, *supra* note 35, at 198; Walter & Dalsgaard, *supra* note 100, at 42–43, 46; *Réunion européenne S.V. v. Spliethoff's Bevrachtingskantoor B.V.*, Case C-51/97, 1998 E.C.R. I–6511, para. 36.

[103] *See, e.g.*, 1998 E.C.R. I–6511 at para. 36 (stressing 'reasons relating to the sound administration of justice and the efficacious conduct of proceedings'); Geimer, IZPR, *supra* note 35, at 376; Schack, IZVR, *supra* note 35, at 80–81.

[104] *See, e.g.*, Subrin, *supra* note 84, at 1001.

much as possible in the hands of the legislature and away from the courts, particularly from the trial courts, thus avoiding judicial discretion.[105] This last concern arises both from views on institutional competence fashioned in response to the history of comparatively weak continental European courts frequently aligned with the repressive powers of the government rather than operating as a bulwark against it[106] and from constitutional provisions guaranteeing the plaintiff access to justice where well-defined jurisdictional provisions grant a forum.[107] These two traditions have also usually been invoked against the introduction of any discretionary jurisdictional equilibrating device such as a *forum non conveniens* defense.[108] Surely, in this regard the continental European approach to drafting jurisdictional rules has fallen considerably short of its target, particularly if one ignores the ingrained, but artificial distinction between a legislative grant of judicial discretion and liberal judicial interpretation. A look at the jurisprudence of the European Court of Justice interpreting the Brussels Convention, for example, does not necessarily impart the impression that judicial discretion in this wider sense has been strictly curtailed in that treaty's jurisdictional rules.[109] Nonetheless, the aspiration remains and will continue to influence the preferences of continental Europeans at The Hague.

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[105] *See, e.g.*, Samuel P. Baumgartner, *Related Actions*, 3 ZZPInt 203, 209–210 (1998); Helène Gaudemet-Tallon, *France* in Declining Jurisdiction in Private International Law 175, 177. (James J. Fawcett ed. 1995).

[106] *See, e.g.*, John P. Dawson, Oracles of the Law 370–71, 376 (1968); Schlesinger et al., *supra* note 35, at 295–98; Rolf Stürner, *U.S.-amerikanisches und europäisches Verfahrensverständnis*, in Festschrift für Ernst C. Stiefel 763, 782 (1987) (noting that, as opposed to continental Europe, the United States has never experienced the perversion of both state and judicial power); Gerhard Walter & Samuel P. Baumgartner, *Utility and Feasibility of Transnational Rules of Civil Procedure: Some German and Swiss Reactions to the Hazard-Taruffo Project*, 33 Tex. Int'l L. J. 463, 470 (1998).

[107] *See, e.g.*, Pfeiffer, *supra* note 99, at 394–96; Walter & Dalsgaard, *supra* note 100, at 47. *See also* Reinhold Geimer, *Menschenrechte im internationalen Zivilverfahrensrecht* in Aktuelle Probleme des Menschenrechtsschutzes, 33 Berichte der Deutschen Gesellschaft für Völkerrecht 213, 260–62 (1994) (arguing that judicial discretion in personal jurisdiction violates Article 6 of the European Convention on Human Rights).

[108] *See, e.g.*, Schack, IZVR, *supra* note 35, at 198; Walter, IZPR, *supra* note 35, at 100; Gaudemet-Tallon, *supra* note 105, at 178; Nicolo Trocker, *Italy*, in Declining Jurisdiction in Private International Law, *supra* note 105, at 279, 299–301; Walter & Dalsgaard, *supra* note 100 at 46–48. *But see* Pfeiffer, *supra* note 99, at 421–25; Erik Jayme, *Zur Übernahme der Lehre vom "forum non conveniens" in das deutsche Internationale Verfahrensrecht*, 1975 Staatsanzeiger 91; Paul Lagarde, *Le principe de proximité dans le droit international contemporain*, 196–I Recueil des Cours 150–57 (1986).

[109] The Court's frequent and liberal interpretation of the Convention has led some in the United States to conclude that the Brussels regime is not much better in assuring predictability than the Supreme Court's jurisprudence. *See, e.g.*, C.G.J. Morse, 'International Shoe v. Brussels and Lugano: Principles and Pitfalls in the Law of Personal Jurisdiction' in (1995) 28 *U C Davis L Rev* at pp. 999, 1012–25.

## (C) IMPLICATIONS FOR THE NEGOTIATIONS AT THE HAGUE

The first and most obvious consequence that emerges from this review of jurisdictional doctrine is that the American due process jurisprudence imposes some significant limits on the bases of personal jurisdiction that the U.S. delegation may agree to in the proposed Hague Convention.[110] The trouble, of course, lies in defining the precise limits set by the Supreme Court's case-law. For one thing, there is some difficulty in predicting how the Court would apply its pliable constitutional principles to the jurisdictional long-arm provisions of a Hague treaty, particularly one influenced by civil-law preferences. Moreover, given the splintered opinions of the Supreme Court in its latest jurisdictional decisions, it may be difficult to predict where the Court would come out on any jurisdictional rule.[111] To be true, in judging the treaty's provisions, the Court might be guided by 'what an international consensus regards as desirable',[112] thus being more permissive than if dealing with a state-long-arm statute from within the United States. If so, however, the difficulty remains that the Senate is unlikely ever to ratify, and the President improbable to submit for ratification, a treaty that is viewed by influential interest groups as impinging on existing due process rights.[113]

As a result, the relevant confines that the U.S. due process jurisprudence imposes on the current project at The Hague depends to some degree on the vision and the pragmatism of, and the political feasibility perceived by, the American delegates. For

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[110] *See, e.g.*, Stanley E. Cox, *Why Properly Construed Due Process Limits on Personal Jurisdiction Must Always Trump Contrary Treaty Provisions*, 61 Alb. L. Rev. 1177 (1998); Friedrich K. Juenger, *A Shoe Unfit For Globetrotting*, 28 U.C. Davis L. Rev.1027 (1995) [hereinafter Juenger, *Shoe*]; Harold G. Maier, *A Hague Conference Judgments Convention and United States Courts: A Problem and a Possibility*, 61 Alb. L. Rev. 1207, 1209–10 (1998); Russel J. Weintraub, *How Substantial Is Our Need for a Judgments-Recognition Convention and What Should We Bargain Away to Get It?*, 24 Brook. J. Int'l L. 165, 193–95 (1998). There are, however, some who disagree. *See, e.g.*, Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 Alb. L. Rev. 1237, 1245–67 (1998) (arguing that the due process clause of the Fifth and Fourteenth Amendments was never meant, and should not now be interpreted, to reach jurisdiction in international cases).

[111] *See, e.g.*, Borchers, *supra* note 87, at 153; Juenger, *Jurisdiction*, *supra* note 21, at 1202 (noting that 'the endless decisions that clutter the advance sheets suggest the difficulties state and lower federal courts encounter when forced to apply the test in practice').

[112] Weintraub, *supra* note 110, at 193. *See also* Juenger, *Shoe*, *supra* note 110, at 1044 (opining that the Supreme Court 'might well be prepared' to 'countenance a change of jurisdictional bases by treaty'). Going further even, Professor Borchers has suggested that the Supreme Court would be unlikely to declare unconstitutional a treaty provision negotiated by the President with the advice and consent of the Senate, thus deferring to the foreign-policy prerogative of the political branches of government. *See* Patrick Borchers 'Judgments Conventions and Minimum Contacts' in (1998), 61 *Alb L Rev* at pp. 1161, 1168–73.

[113] *See, e.g.*, Maier, *supra* note 110, at 1215–16.

that purpose alone, it would be useful for those delegates to inform their counterparts at The Hague thoroughly, and the latter to study in some depth, their view of the Supreme Court's due-process jurisprudence. Surely, the difficulties of drafting a multilateral treaty that result from the U.S. Supreme Court's insistence on minimum contacts dissolve to the extent that the continental Europeans (and others) themselves have an interest in limiting the judicial jurisdiction of U.S. courts[114] and thus may be more than willing further to limit their own traditional rules of jurisdiction to require some act of the defendant rendering personal jurisdiction of the forum state foreseeable to him.[115] Those difficulties may remain, however, to the extent that the continental Europeans want to preserve the approach taken by the Brussels Convention and its successor Regulation[116] or remain influenced by their traditional jurisprudential preferences.

A second implication for the current work at The Hague is closely related, but not perhaps as obvious. The concentration in the United States on the due process jurisprudence of the Supreme Court[117] has blurred the line between state long-arm statutes and federal constitutional limits. This is not to suggest that U.S. lawyers are generally unaware of the distinction.[118] Yet, after having pointed out the difference, discussions on jurisdictional law and policy are usually carried on in terms borrowed from the U.S. Supreme Court's constitutional cases.[119] This is unfortunate, for many of the old-type long-arm statutes contain language[120] much closer to the

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[114] *See supra* text accompanying note 20.

[115] *See, e.g.*, Haimo Schack, *Entscheidungszuständigkeiten in einem weltweiten Gerichtsstands- und Vollstreckungsübereinkommen*, 6 ZEuP 931, 948 (1998) (suggesting that jurisdiction in tort be restricted by 'criteria of foreseeability') [hereinafter Schack, *Entscheidungszuständigkeiten*]; Weintraub, *supra* note 110, at 192 (surmising that 'European product manufacturers are not eager to be subject to damage suits wherever the chain of commercial distribution brings their product').

[116] *See supra* text accompanying note 21.

[117] *See supra* text accompanying notes 56–78.

[118] *Cf., e.g.*, Born, *supra* note 35, at 67–70; Teitz, *supra* note 35, at 29–43; Ronald A. Brand, *Tort Jurisdiction in A Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Convention*, 24 Brook. J. Int'l L. 125, 130–32 (1998).

[119] *See supra* text accompanying note 70.

[120] *Nebraska Revised Statutes* §25–536, for example, provides:

A court may exercise personal jurisdiction over a person:

(1) Who acts directly or by an agent, as to a cause of action arising from the person:
   (a) Transacting any business in this state;
   (b) Contracting to supply services or things in this state;
   (c) Causing tortuous injury by an act or omission in this state;
   (d) Causing tortuous injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
   (e) Having an interest in, using, or possessing real property in this state; or
   (f) Contracting to insure any person, property, or risk located within this state at the time of contracting.

jurisdictional rules in force elsewhere in the world than do terms such as 'minimum contacts', 'purposeful availment', or 'reasonableness'.[121] Their further study could thus clearly help sharpen the negotiators' focus and enrich their discussions in elaborating long-arm provisions for an international treaty.[122] This demonstrates again that the negotiations at The Hague provide an opportunity for Americans, as for Europeans, to reflect on their own jurisdictional law and its jurisprudential roots as well as on that of their counterparts.

Whether and to what extent the American delegates will be prepared to accept the challenge 'that due process is a floor and, thus, that there is room to live above it',[123] however, also depends on the kind and the strength of the interests that they represent, including 'the interests of their residents or the interests of their lawyers in securing access to a local forum'.[124] They are also unlikely to allow for too large an inroad on their jurisprudential preferences arising from the common law process.[125] Thus, a certain degree of flexibility will need to remain in the white list as well as in the grey area for the project to be acceptable to the United States. However, the United States may also realize that what is fair on the interstate level, on which most of the Supreme Court's case-law is based, may not necessarily be fair on the international plane.[126]

On the other side of the Atlantic Ocean, decades – in some cases centuries – of negotiating with like-minded nations[127] have resulted in a system of lawmaking for transnational litigation that, at least on the surface, has worked relatively well. For the negotiation of a worldwide convention, however, this system bears some dangers. Most important among them is the tendency to approach the current project at The Hague in a fashion and with expectations too similar to those guiding discussions of the Brussels and Lugano Conventions. This is bound to create problems when facing countries that share neither the jurisdictional

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*Cont.*

In subparagraph (2), the statute then adds the now obligatory fall-back provision referring to any other contact sufficient to create jurisdiction under the Constitution of the United States as interpreted by the Supreme Court, *see supra* note 76.

[121] In a similar vein, Professor Clermont suggests that a Hague Treaty could provide the restraint and relative certainty expected of 'subconstitutional regulation' now mostly missing in the United States. *See* Clermont, *supra* note 87, at 110. On other costs of the blurring of the distinction between state law and federal constitutional law *see* Burbank, *Jurisdiction, supra* note 60, at 113–18.

[122] *See, e.g.*, Burbank, *id.* at 114.

[123] *Id.*

[124] *Id.* at 113.

[125] *See supra* text accompanying note 85. *See also* von Mehren, *New Approach, supra* note 1, at 281 (arguing that 'an effort to state exhaustively the bases upon which jurisdiction can be asserted is stultifying and prevents changes in jurisdictional practice that may be needed to take into account future legal or economic developments').

[126] *But see* Arthur T. von Mehren & Donald Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1122 (1966).

[127] *See supra* text accompanying note 94.

methodology nor the legal heritage underlying it.[128] For then, it is no longer sufficient to be ready to discuss and compare[129] the various possible approaches to a particular rule of personal jurisdiction that have been discussed within a shared jurisdictional system.[130] It may be necessary to defend, and reflect upon, the system itself as well as the jurisprudential assumptions underlying it. In particular, it may be helpful for continental Europeans to ponder the question whether consistency and predictability have really been served so well by the current approach[131] and, if so,[132] how much of that has perhaps been the result of deeper assumptions about the proper roles of judges, attorneys, and academics,[133] that are not shared in other countries likely to be a party to the proposed Convention and that are not going to be controlled by a supranational court such as the European Court of Justice. Moreover, to the extent that the resistance to certain American approaches reflects an interest in protecting local business from having to litigate in the United States rather than true disagreements about fair approaches to judicial jurisdiction,[134] it might be advisable to engage the views underlying such interests in a broader discussion about underlying beliefs about the proper function of civil proceedings in society.[135]

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[128] *Cf. supra* text accompanying notes 95–96.

[129] On the problem of applying a method of comparative research that was originally embarked upon to compare legislative approaches without questioning underlying assumptions and a common heritage to understand legal systems that share neither those assumptions nor the heritage *see* William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?*, 143 U. Pa. L. Rev. 1889, 2116–23 (1995).

[130] *Cf., e.g.*, Wolfgang Hau, *Der Vertragsgerichtsstand zwischen judizieller Konsolidierung und legislativer Neukonzeption*, 20 IPRax 354 (2000) (discussing merits and demerits of various ways to define contracts jurisdiction that have been discussed in continental Europe). For a discussion that engages a few deeper policies *see, e.g.*, Schack, *Entscheidungszuständigkeiten*, *supra* note 115.

[131] The question is not only justified as regard the ECJ's determination of the place of performance under Article 5 No. 1 of the Brussels Convention by reference to the choice of law rules of the forum state, *see, e.g.*, Hau, *supra* note 130, at 356; Schack, *Entscheidungszuständigkeiten*, *supra* note 115, at 936–37. *See, e.g., supra* note 109.

[132] In spite of some American doubts on this score, *see supra* note 109, there are good reasons to assume that, indeed, the continental European approach has brought more consistency and predictability than a U.S. approach that has largely concentrated on a constitutional floor. *See, e.g.*, Baumgartner, *supra* note 38, at §9.III.E.7.

[133] *See, e.g.*, Baumgartner, *Related Actions*, *supra* note 105, at 209–211.

[134] *See, e.g.*, Schack, *Entscheidungszuständigkeiten*, *supra* note 115, at; Weintraub, *supra* note 110, at 192.

[135] Others see a similar need. *See* Arthur T .von Mehren, 'Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable Worldwide: Can the Hague Project Succeed?' in (2001) 49 *Am J. Comp L* at pp. 191, 195. *Cf.* Samuel P. Baumgartner, *Debates over Group Litigation in Comparative Perspective*, 2 Int'l L.F. 254, 256–57 (2000) (conference review essay) (suggesting comparison of such beliefs).

## 2. *Recognition and Enforcement*

The difficulties in the area of recognition and enforcement are not perhaps as pronounced as those regarding judicial jurisdiction, and, at least at first blush,[136] they clearly appear more straightforward. The reason is simply that, once the discussion on proper jurisdictional bases is settled,[137] the recognition requirements developed by the various jurisdictions do not differ that much.[138] This is particularly true if the relevant legal texts are the U.S. Uniform Money Judgments Recognition Act[139] and other U.S. state law using *Hilton v. Guyot*[140] as its primary source of rules[141] on the one hand and Articles 25-29 of the Brussels and Lugano Conventions (or Articles 33–36 of the new Brussels Regulation) on the other.

The primary issue here arises from European and other municipal approaches to the recognition of foreign adjudications that, in a tradition dating back to an epoch of pronounced nationalism,[142] still significantly impede recognition if they do not refuse it altogether.[143] Whether those countries will be willing to give up their parochial approaches to recognition is for the most part a political issue rather than one bound up with jurisprudential preferences.[144] The same is not true, however, with regard to the question how strict the courts of the proposed Convention's member States will be in applying flexible concepts such as 'manifest' incompatibility 'with the public policy of the state addressed'[145] and 'proceedings [...] incompatible with fundamental principles of procedure of the state addressed'.[146] Here again,[147]

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[136] *But see infra* text accompanying note 146.

[137] My reference here is to 'direct' as well as to 'indirect' jurisdictional bases, that is, to those dealing with jurisdiction at the rendition stage as well as those dealing with proper jurisdiction according to the view of the recognition court at the stage of recognition, whether they be included in a white, black, or a grey list. *See supra* text accompanying note 12.

[138] *See, e.g.*, Walter & Baumgartner, *Recognition*, *supra* note 3, at 40–41.

[139] 13 U.L.A. 263 (1962).

[140] 159 U.S. 113 (1895).

[141] *See, e.g.*, Born, *supra* note 35, at 939; Ronald A. Brand, *Enforcement of Foreign Money Judgments in the United States: In Search of Uniformity and International Acceptance*, 67 Notre Dame L. Rev. 253, 261–62, 265–66 (1991); Stephen B. Burbank, *Federal Judgments Law: Sources of Authority and Sources of Rules*, 70 Tex. L. Rev. 1551, 1574 (1992).

[142] *See, e.g.*, Walter & Baumgartner, *Recognition*, *supra* note 3, at 2.

[143] *See, e.g., id.* at 17–21.

[144] That this is a political question is not to suggest that it will be easier to resolve, however. As the discussion at the present Conference showed, for example, there may be considerable resistance in Switzerland against abandoning the current rule that, apart from exceptions such as a valid forum selection clause and the defendant's filing a counterclaim in the forum, a foreign judgment against a Swiss resident need not be recognized in Switzerland. *See* Walter & Baumgartner, *Recognition, supra* note 3, at 20. It simply means that this is an issue that can easily be grasped by negotiators from other countries.

[145] Hague Conference, 2001 Text, *supra* note 23, Article 28 No. 1(f).

[146] Hague Conference, 2001 Text, *supra* note 23, Article 28 No. 1(c). *See, e.g.*, Walter & Baumgartner, *Recognition*, *supra* note 3, at 41.

[147] *See supra* text accompanying note 135.

the broader the discussion of underlying assumptions about the proper role of courts and civil proceedings in civil society at The Hague are now, the smaller the number of surprises will be later.

## III. Conclusion

Concluding a convention on jurisdiction and judgments that meets the relevant expectations on both sides of the Atlantic Ocean is not going to be easy. My suggestion hereis that success on that score will depend not only on further discussions of jurisdictional details, but also on a more encompassing consideration and discussion of the assumptions and jurisprudential preferences underlying the law of jurisdiction and recognition in particular, and approaches to transnational litigation in general. Such an approach will also help in identifying and in reshaping more clearly the nature and relative strength of the various interests involved, pinpointing possible areas of compromise, and it may help minimize future disagreements on the proper interpretation of agreed treaty language.[148] I have also suggested that compromise there will have to be. Thus, recent tendencies toward maximal solutions on the side of both Americans and Europeans (here particularly in the shape of the European Communities)[149] are not likely to lead to a successful conclusion of the proposed Convention. Whatever the outcome at The Hague, the discussions on a deeper level that I advocated will help us gain the information necessary to become better transnational lawmakers in these matters in the future.

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[148] *See, e.g.*, Chayes & Chayes, *supra* note 28, at 10–13.

[149] *See, e.g.*, Hague Conference, 2001 Text, *supra* note 23, Articles 6, 10 No. 2, 18 No. 2(a),(e), 37.