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# A HAGUE JUDGMENTS CONVENTION?

*Friedrich K. Juenger\**

## I. INTRODUCTION

I am delighted to have been invited to the Brooklyn Law School's Symposium entitled "Enforcing Judgments Abroad: The Global Challenge," which gives me the opportunity to discuss a topic that has been on my mind for quite some time. Listening to my good friend Arthur von Mehren evokes memories of a long conversation I had with him six years ago on the Island of Rhodes, where we talked about the feasibility and modalities of a convention on judgments recognition, the proper venue for negotiating it and what features such a potential treaty should have. It turned out that we had rather divergent views on all of these points. Although I have read Arthur's written Symposium contribution carefully, and listened to him attentively, I still question both the need for and the prospects of the type of convention whose contours Arthur has sketched for us.<sup>1</sup>

## II. THE NEED FOR A JUDGMENTS CONVENTION

### A. *Prior Experiences*

Belying the old adage "once burned, twice shy," in spite of an earlier, less than happy experience,<sup>2</sup> a United States delegation is once again prepared to negotiate with its foreign counterparts a Hague convention on judgments recognition.

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\* Edward L. Barrett, Jr., Professor of Law, University of California at Davis.

1. See Arthur T. von Mehren, *Enforcing Judgments Abroad: Reflections on the Design of Recognition Conventions*, 24 BROOK. J. INT'L L. 17 (1998); see also CATHERINE KESSEDJIAN, INTERNATIONAL JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS (Hague Conference on Private Int'l Law, Prel. Doc. No. 7, Apr. 1997) [hereinafter KESSEDJIAN REPORT].

2. See EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 24.39 (2d ed. 1992); Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS., 271, 275 (1994); Kurt H. Nadelmann, *The Common Market Judgments Convention and a Hague Conference Recommendation: What Steps Next?*, 82 HARV. L. REV. 1282, 1285, 1288 (1969).

One of the reasons why that earlier initiative came to naught was that the (then six) member states of the European Community were preoccupied with framing a regional compact,<sup>3</sup> the Brussels Convention<sup>4</sup> (signed in 1968), and the rather unsatisfactory nature of the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters<sup>5</sup> (1971 Judgments Convention), which never became effective. Not only was that document of the "unilateral" variety,<sup>6</sup> thus leaving signatories free to claim jurisdiction on their own idiosyncratic grounds (though an optional "Supplementary Protocol" would have eliminated exorbitant jurisdictional bases), but its implementation also required the cumbersome further step of executing bilateral agreements between those nations that wanted to avail themselves of its provisions.<sup>7</sup>

Hope, however, blooms eternal, notwithstanding the fact that this first disappointment in The Hague was not the only setback the United States suffered in its endeavor to make the world ripe for American judgments. After the United Kingdom had joined the European Community and acceded to the Brussels Convention, we tried to negotiate with our British friends a bilateral judgments recognition treaty. Such a treaty would at least have assured American domiciliaries and enterprises

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3. See von Mehren, *supra* note 2, at 275; Nadelmann, *supra* note 2, at 1282-85, 1287-88.

4. 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] (for the consolidated, current text of this convention see 1990 O.J. (C 189) 1, reprinted in 29 I.L.M. 1413); see generally Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121 (1992); Friedrich K. Juenger, *Judicial Jurisdiction in the United States and in the European Communities*, 82 MICH. L. REV. 1195 (1984); Peter F. Schlosser, *Lectures on Civil-Law Litigation Systems and American Cooperation with Those Systems*, 45 U. KAN. L. REV. 9, 38 (1996).

5. Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 1144 U.N.T.S. 249 [hereinafter 1971 Judgments Convention].

6. Concerning the drawbacks of this type of convention, see von Mehren, *supra* note 1, at 23-25.

7. 1971 Judgments Convention, *supra* note 5, art. 21; Supplementary Protocol to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, Feb. 1, 1971, 1144 U.N.T.S. 271 [hereinafter Supplementary Protocol]; see Kurt H. Nadelmann & Arthur von Mehren, *The Extraordinary Session of the Hague Conference on Private International Law*, 60 AM. J. INT'L L. 803, 803-04 (1966).

that judgments rendered against them in a Brussels Convention member state that were based on exorbitant jurisdictional grounds would not be enforced against them in the United Kingdom.<sup>8</sup> Alas, these negotiations came to naught even though the United Kingdom and the United States share a common legal heritage and the British have traditionally been most liberal in recognizing foreign country judgments,<sup>9</sup> because British insurance and manufacturing interests were leery of excessive American jury verdicts and punitive damages awards, as well as judgments in antitrust cases.<sup>10</sup>

### B. *Inducements to Other Countries*

The inevitable pressure imposed by the need of having to do better than we have done in the past is not the only reason why those negotiating judgments recognition treaties on behalf of the United States deserve our sympathy. To begin with, what inducements can this country offer to persuade other nations that they should enter into an international judgments recognition convention with us? In the United States, foreign country judgments are already liberally recognized either as a matter of common law<sup>11</sup> or pursuant to the Uniform Foreign Money Judgments Recognition Act<sup>12</sup> (Uniform Act), which has become law in many states, including the major industrial ones. While the U.S. Supreme Court initially required a limited form of reciprocity,<sup>13</sup> state courts have largely abandoned this requirement,<sup>14</sup> as has the Uniform Act.

To be sure, some states have reintroduced reciprocity, an ill-conceived notion,<sup>15</sup> in their version of the Uniform Act.<sup>16</sup>

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8. See Brussels Convention, *supra* note 4, art. 59; P.M. North, *The Draft U.K./U.S. Judgments Convention: A British Viewpoint*, 1 NW. J. INT'L L. & BUS. 219, 222-23 (1979).

9. See Friedrich K. Juenger, *The Recognition of Money Judgments in Civil and Commercial Matters*, 36 AM. J. COMP. L. 1, 9-11 (1988).

10. See von Mehren, *supra* note 2, at 274; North, *supra* note 8, at 230-31.

11. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 228 (1895) (narrowing the reciprocity requirement); *Phillips USA, Inc. v. Allflex USA, Inc.*, 77 F.3d 354, 359 (10th Cir. 1996) (applying state law).

12. Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 261 (1962).

13. See *Hilton*, 159 U.S. at 170-71 (limiting reciprocity requirement to executory foreign money judgments in favor of nonresident alien against American defendant).

14. See, e.g., *Nicol v. Tanner*, 256 N.W.2d 796, 801 (Minn. 1976); *Johnston v. Compagnie Générale Transatlantique*, 152 N.E. 121, 123, 124 (N.Y. 1926).

15. See Juenger, *supra* note 9, at 31-34.

But whatever obstacles some states may put in the path of judgments, recognition can be readily avoided by having a foreign-country judgment recognized in a more liberal American jurisdiction, and that determination is then entitled to Full Faith and Credit throughout the United States. Thus, the contemplated Hague Convention can provide foreign signatories, at best, with an incremental margin of assurance that their judgments will be recognized in the United States. Whatever potential minor improvement on existing recognition practices the contemplated convention might have to offer does not amount to much of a bargaining chip.<sup>17</sup>

### C. American Interests

And what does the United States stand to gain? There may be some American judgment creditors with horror stories to tell about their inability to collect abroad on a domestic judgment; but there does not seem to be an army of them clamoring for greater comity. In fact, the typical foreign defendants in American courts are global enterprises such as Volkswagen or Mitsubishi with enough domestic assets to satisfy any American judgment. Even medium-sized and smaller foreign enterprises are bound to have open accounts or other assets that American judgment creditors can readily attach. Thus, the problem of recognizing American judgments abroad tends to arise only in the event that the defendant is a fairly small business or an individual.<sup>18</sup> In such cases counsel ought to advise their clients to sue abroad, rather than waste time and money in the hope of enforcing a domestic judgment that may be considered excessive by foreign standards. But, as a case decided by the German *Bundesgerichtshof* shows, even a

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16. See MAURICE ROSENBERG ET AL., CONFLICT OF LAWS 225 (10th ed. 1996).

17. See Patrick J. Borchers, *A Few Little Issues For the Hague Judgments Negotiations*, 24 BROOK. J. INT'L L. 157, 157-59 (1998); Russell 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. 167, 178-84 (1998).

18. For a foreign case dealing with the recognition of a California judgment rendered against a German individual, see BGHZ 118, 312; see generally Peter Hay, *The Recognition and Enforcement of American Money-Judgments in Germany—The 1992 Decision of the German Supreme Court*, 40 AM. J. COMP. L. 729 (1992); Weintraub, *supra* note 17, at 181 n.83; Joachim Zekoll, *The Enforceability of American Money Judgments Abroad: A Landmark Decision by the German Federal Court of Justice*, 30 COLUM. J. TRANSNAT'L L. 641 (1992).

hefty American judgment rendered against an individual may still be recognized, at least to the extent that it does not represent punitive damage.<sup>19</sup>

Another reason advanced to justify the Hague negotiations in terms of American interests are foreign exorbitant jurisdictional assertions.<sup>20</sup> To be sure, jurisdiction premised on such spurious foundations as the plaintiff's forum contacts or the presence of assets within the forum, do amount to a serious breach of international etiquette and deserve censure.<sup>21</sup> While the Brussels Convention bars the use of exorbitant member state jurisdictional assertions against European Union domiciliaries,<sup>22</sup> article 4(1) preserves them for use against outsiders, such as American residents and corporations.<sup>23</sup> To make matters worse, the Convention precludes signatories from refusing to recognize, on grounds of public policy, member state judgments rendered on such exorbitant grounds.<sup>24</sup> Regrettable as such Eurochauvinism doubtless is, it is open to question whether the member states' jurisdictional exorbitance, and its extension pursuant to Article 28(3), put American business at risk. While it has been predicted that the Brussels Convention's exorbitant features "may seriously affect the interests of Americans with assets abroad,"<sup>25</sup> the concededly anecdotal evidence I have been able to collect by reading foreign cases and literature suggests that European courts rarely

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19. See BGHZ 118, 312 at 334; Hay, *supra* note 18, at 745-48.

20. See von Mehren, *supra* note 1, at 24.

21. See, e.g., Friedrich K. Juenger, *La Convention de Bruxelles du 27 Septembre 1968 et la Courtoisie Internationale—Réflexions d'un Américain*, 72 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 37 (1983); Kurt H. Nadelmann, *Jurisdictionally Improper Fora*, in XXTH CENTURY COMPARATIVE AND CONFLICTS LAW: LEGAL ESSAYS IN HONOR OF HESSEL E. YNTEMA 321 (Kurt H. Nadelmann et al. eds., 1961); von Mehren, *supra* note 1, at 28.

22. See Brussels Convention, *supra* note 4, art. 3.

23. See *id.* art. 4(1).

24. See *id.* arts. 4(1), 28(3); von Mehren, *supra* note 1, at 20-21.

25. Nadelmann, *supra* note 2, at 1282. But see Andreas F. Lowenfeld, *Thoughts About a Multinational Judgments Convention: A Reaction to the von Mehren Report*, 57 LAW & CONTEMP. PROBS. 289, 303 (1994) (noting in regard to "the supposed nightmare that a judgment will be rendered against an American defendant in a member state of the European Community on an exorbitant basis of jurisdiction and then enforced against assets of the defendant in another member state of the Community," that "[w]e have seen no such cases in the twenty years since the Brussels Convention entered into effect, and it is unlikely that we will see such cases—or at any rate many such cases—in the future"); Weintraub, *supra* note 17, at 172-73; Schlosser, *supra* note 4, at 37.

render judgments against American citizens or enterprises that have no "minimum contacts" with the foreign forum.<sup>26</sup>

### III. NEGOTIATING PROBLEMS

#### A. *Brussels and Lugano Countries*

Furthermore, how eager will other nations be to enter into the kind of convention currently contemplated by our negotiating team? An important group of industrial nations already enjoys the benefit of a well-functioning regional arrangement. The Brussels Convention has been a resounding success. Each and every day of the week, member state judgments are enforced across legal and linguistic barriers with minimal transaction costs.<sup>27</sup> So far, the European Court of Justice has rendered more than ninety decisions,<sup>28</sup> which have clarified a considerable number of questions left open, or not dealt with satisfactorily, by the Brussels Convention's drafters. Indeed, the Brussels Convention—the single most important private international law treaty in history—works so well that the remaining European Free Trade Association nations have entered into the parallel Lugano Convention.<sup>29</sup>

The solid framework for inter-European judgments recognition, which already links the signatories to their major trading partners, may well put in question the need for a broader convention. In fact, the very presence of this group is bound to complicate negotiations in The Hague, just as their initial dealings interfered with the elaboration of the 1971 Judgments Convention.<sup>30</sup> To be sure, these European nations recognize the need to further perfect the Brussels and Lugano docu-

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26. In fact, the German *Bundesgerichtshof* has ameliorated the exorbitant provision of § 23 ZPO—the German Civil Procedure Code—which authorizes the exercise of full *in personam* jurisdiction over persons who own any assets in Germany. See Juenger, *supra* note 4, at 1204. The Code does so by requiring some relationship of the parties or the transaction in addition to the mere presence of property. See Judgment of July 2, 1991, BGH, 11th Senate, BGHZ 115, 90.

27. See Friedrich K. Juenger, *A Shoe Unfit for Globetrotting*, 28 U.C. DAVIS L. REV. 1027, 1038 (1995).

28. See Paul R. Beaumont, *A United Kingdom Perspective on the Proposed Hague Judgments Convention*, 24 BROOK. J. INT'L L. 75, 89 (1998).

29. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9, reprinted in 28 I.L.M. 620.

30. See *supra* note 3 and accompanying text.

ments, although they may not agree on exactly how to go about it.<sup>31</sup> However, the delegates from Brussels and Lugano countries will have to take into account European interests, and at least some of them are bound to take a common position in the Hague.<sup>32</sup> Moreover, having worked out the mechanics of international judgments recognition among themselves in a satisfactory manner, they can be expected to look askance at ideas proffered by other delegations that strike them as less sophisticated and workable than their own practices.

### *B. American Jurisdictional Notions*

The American delegation is also in an unenviable position because American jurisdictional law is simply not fit for export.<sup>33</sup> In consequence of well over a century of experimentation and vacillation, we are stuck with a confused, unwieldy and, at times, unfair Supreme Court case law. In contrast to not only civil law nations but also other common law countries,<sup>34</sup> to this day we lack a rational catalog of jurisdictional bases. Instead of reasonably clear and cogent provisions, as they are found throughout the civilized world, we rely on a jumble of state long-arm statutes and Supreme Court case law that is chaotic and incoherent.<sup>35</sup> Not only practitioners and lower state and federal judges, but even law professors<sup>36</sup> and, at times, Supreme Court Justices,<sup>37</sup> find it difficult to make sense out of the hodgepodge of majority, concurring and dissenting opinions and the Court's opaque terminology. To this day—over half a century after the landmark decision in *Inter-*

31. See Beaumont, *supra* note 28, at 80-104.

32. See *id.* at 80-82.

33. See Juenger, *supra* note 27, at 1038.

34. See, e.g., Order 11 of the Rules of the Supreme Court (England); Supreme Court Rules 1970, part 10 (N.S.W., Australia).

35. For cogent critiques of American jurisdictional notions, see Symposium, *Fifty Years of International Shoe: The Past and Future of Personal Jurisdiction*, 28 U.C. DAVIS L. REV. 513 (1995). A succinct description of the root of the problem is found in William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 600-02 (1993).

36. Charity prevents me from furnishing a citation.

37. Compare *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.10 (1982) (White, J.) (discussing minimum contacts analysis) with *Worldwide Volkswagen v. Woodson*, 444 U.S. 286, 294 (1980) (White, J.) (discussing same).

*national Shoe Co. v. Washington*<sup>38</sup>—for instance, the parameters of general jurisdiction remain doubtful;<sup>39</sup> not too long ago our Supreme Court reaffirmed the propriety of exorbitant tag jurisdiction, albeit for divergent reasons.<sup>40</sup>

However questionable our Supreme Court's contribution to American jurisdictional law may be, the American delegation in The Hague considers our highest court's case law to be non-negotiable, because the Justices have imposed their mandates as a matter of constitutional law. Ever since *Pennoyer v. Neff*,<sup>41</sup> the Court has taken the position that its pronouncements are compelled by the Fourteenth Amendment's Due Process Clause. This proposition may be dubious,<sup>42</sup> but the negotiators believe that their hands are tied. Unlike their counterparts from other nations, the American delegates, therefore, do not feel free to trade off this country's idiosyncratic rules and approaches for saner ones. At most, they are prepared to shorten, but they are unwilling to lengthen, the domestic long arm or the recognition of foreign judgments that do not pass the muster of the Supreme Court's Due Process jurisprudence.

#### IV. WHAT KIND OF CONVENTION?

##### A. *Single, Double and Mixed Conventions*

Caught in this dilemma, our team has attempted to wriggle out of it by putting forward the notion of a "*convention mixte*," a crossbreed between a "single" and a "double" convention.<sup>43</sup> Such a mixed convention would not entirely preempt the member states' jurisdictional rules. Rather, it would outlaw specified exorbitant jurisdictional assertions and, in addition, lay down a set of jurisdictional provisions that, if complied with, would assure the resulting judgments recognition in all member states.<sup>44</sup> At the same time, the convention would allow member states to use jurisdictional bases that are neither

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38. 326 U.S. 310 (1945).

39. See *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984).

40. See *Burnham v. Superior Court*, 495 U.S. 604 (1990).

41. 95 U.S. 714, 733 (1877).

42. See Juenger, *supra* note 27, at 1029, 1031.

43. See von Mehren, *supra* note 1, at 19.

44. See *id.* at 19.

outlawed as exorbitant nor listed among those that predestine judgments to recognition.

Put differently, between the recognized and the impermissible heads of jurisdiction there would be a "gray zone"<sup>45</sup> of jurisdictional bases. The idea of a tripartite division of heads of jurisdiction into black, white and gray (or "green, red and yellow lights"<sup>46</sup>) is not exactly new; it was already implicit in the scheme of the ill-fated 1971 Judgments Convention, which listed a set of "white" jurisdictional bases in Articles 10 and 11 and the "black" ones in Article 4 of the "Supplementary Protocol," leaving room for "gray" ones that would neither assure nor preclude recognition by the other signatories.<sup>47</sup>

### B. Prospects of a Mixed Convention

To repeat, the notion of a mixed convention is an attempt by the American delegation to escape from the dilemma presented by an unsatisfactory domestic jurisdictional law cast in concrete by our Supreme Court. On the one hand, it permits the other signatories to retain jurisdictional bases that might not pass our Supreme Court's constitutional muster; on the other, it allows us to retain such assertions as general jurisdiction over foreign enterprises that do business in the United States, which are suspect abroad. Whether such a hybrid convention will be acceptable to other nations remains to be seen. Even apart from possible aesthetic misgivings about an instrument that is neither fish nor fowl, there are good reasons to expect that such a scheme may encounter resistance abroad.<sup>48</sup> Foreign legal writers complain about the unsettled nature of American jurisdictional notions<sup>49</sup> and the exorbitance of claiming general personal jurisdiction over individuals who are

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45. *See id.*

46. Lowenfeld, *supra* note 25, at 289.

47. *See* 1971 Judgments Convention, *supra* note 5, arts. 10, 11; Supplementary Protocol, *supra* note 7, art. 4; *see also supra* notes 5-7 and accompanying text. In contrast to the currently contemplated scheme, however, Article 2(1) of the Supplementary Protocol merely allowed non-recognition of the resulting judgments, but did not prohibit the rendering state from using the exorbitant bases. *See* Supplementary Protocol, *supra* note 7, art. 2(1).

48. *See* KESSEDJIAN REPORT, *supra* note 1, at 88; Schlosser, *supra* note 4, at 39; Weintraub, *supra* note 17, at 184-86.

49. *See* HAIMO SCHACK, INTERNATIONALES ZIVILVERFAHRENSRECHT 158 (2d ed. 1996).

served in the forum state<sup>50</sup> and foreign corporations that "do business" in the United States.<sup>51</sup> Such excessive jurisdictional assertions are perceived to be all the more threatening in light of what foreign legal writers perceive as exorbitant substantive rules, especially those allowing recovery of punitive damages<sup>52</sup> and the "fabulous" amounts<sup>53</sup> American juries award at times, especially in products liability cases. These, of course, were the very reasons why the project of a bilateral recognition treaty with the United Kingdom foundered in spite of the two nations' common legal heritage and their liberal recognition practices.<sup>54</sup>

A "*convention double*" cannot really alleviate these concerns, even if the convention were to contain a broad public policy reservation or a provision that would allow foreign courts to cut down excessive American awards. Thus, the U.S.-U.K. bilateral treaty was not saved by a provision that would have allowed the U.K. courts to recognize American judgments only to the extent that they do not vastly exceed the standard of compensation available in the United Kingdom.<sup>55</sup> Even if excessive American judgments were not entitled to recognition abroad, they would nevertheless pose a very real threat to enterprises that have assets in the United States, as most sizeable foreign corporations do. In other words, rules on recognition are not as valuable a bargaining chip as jurisdictional rules. Yet, it is of the very essence of a mixed convention to leave intact bases of jurisdiction that we may consider proper, but foreign countries are likely to deem exorbitant. The threat they pose to foreign enterprises with assets in the United States thus remains as long as they are left untouched; making concessions on recognition does not alleviate the problem of domestic enforcement of judgments based on a questionable jurisdictional foundation.

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50. See *id.* at 160-61; KESSEDJIAN REPORT, *supra* note 1, at 82; Schlosser, *supra* note 4, at 31, 39.

51. See KESSEDJIAN REPORT, *supra* note 1, at 80; SCHACK, *supra* note 49, at 161, 288; Schlosser, *supra* note 4, at 24, 33, 41-43.

52. See SCHACK, *supra* note 49, at 337; Schlosser, *supra* note 4, at 47-48.

53. Smith Kline & French Lab. Ltd. v. Bloch, [1983] 2 All E.R. 72, 74 (C.A. 1982) (Denning, M.R.) (enjoining plaintiff from litigating in Pennsylvania).

54. See *supra* notes 9-10 and accompanying text.

55. See Lowenfeld, *supra* note 25, at 294; von Mehren, *supra* note 2, at 274.

## V. IS THE HAGUE THE PROPER FORUM?

### A. *Drawbacks of Multilateral Negotiations*

As is apparent, because of the peculiarities of American jurisdictional and damages law, the position of American negotiators in the Hague is not exactly rosy. Moreover, in addition to facing a group of nations that adhere to the Brussels and Lugano Conventions, they have to deal with representatives from countries that may be less attuned to the realities of interstate and transnational judgments recognition than the United States and the European Union, both of which have considerable experience with international civil procedure. By virtue of the Full Faith and Credit clause and the Brussels and Lugano Conventions, these two powers deal with jurisdiction and recognition problems on a daily basis. To negotiate, at the same time, with delegates from less experienced countries is bound to complicate rather than simplify an already complicated matter. I, for one, would not be surprised if the obstacles to reaching agreement were to prove insurmountable.<sup>56</sup>

### B. *A Possible Alternative Forum*

The Hague may simply not be the best venue; conceivably a recognition treaty could be more fruitfully discussed with the parties to the Brussels/Lugano Conventions. As I have suggested elsewhere,<sup>57</sup> a Washington or Los Angeles Convention (New York's name being preempted by the United Nations Arbitration Convention)<sup>58</sup> might present an alternative to a Hague Convention. Two major industrial powers, with similar social, political and economic cultures and linked by common interests,<sup>59</sup> each thoroughly familiar with the intricacies of jurisdiction and "interstate" judgments recognition, should be in an excellent position to frame a double convention. All parties concerned would gain, the United States by being forced to frame a set of jurisdictional rules that meet international stan-

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56. See also ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS* 109 (1996); Weintraub, *supra* note 17, at 220. For a more optimistic prediction, see Borchers, *supra* note 17, at 165-66.

57. See Juenger, *supra* note 27, at 1043-44.

58. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

59. See von Mehren, *supra* note 1, at 25-26.

dards, and the Brussels/Lugano nations by a constructive dialogue concerning necessary improvements of their regime.<sup>60</sup> At the same time, the sheer pride of authorship would be a strong incentive for the European Union and its neighbors, confident of the quality of the multinational framework they created, to engage in more intensive bargaining than that which can be expected from them in The Hague.

### C. *Potential Advantages of Bilateral Negotiations*

Should such negotiation ever come to pass, the American delegation would of course have to be prepared for a true give-and-take on jurisdictional issues, even to the extent that the Supreme Court's case law appears to preclude concessions. Jurisdictional practices that European nations have employed successfully for over two decades, without anyone ever complaining to the European Court of Human Rights, can hardly be said to violate Due Process.<sup>61</sup> In fact, the true benefit that the United States could derive from such negotiations is the opportunity to rethink our strange and wondrous law of jurisdiction, and to craft jurisdictional bases appropriate for an international regime in clear and concise terms that are acceptable abroad. It would be a major achievement if we were to rid ourselves, at long last, of the mishmash of state long-arm statutes and ever-vacillating Supreme Court jurisprudence.

Not only would negotiations with the Brussels/Lugano countries allow us to put our own house in order, we could help the Europeans to rearrange theirs. One should think that our foreign counterparts would be happy to rid themselves of the embarrassment of national jurisdictional exorbitance pilloried by Articles 3 of the Brussels and Lugano Conventions and exacerbated by the respective Articles 28(3).<sup>62</sup> They might also be willing to do away with or amend certain questionable heads of jurisdiction, such as the place of performance in the respective Articles 5 of these Conventions.<sup>63</sup> We might even be able to persuade them that the *forum non conveniens* doctrine

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60. Cf. Beaumont, *supra* note 28, at 104-09.

61. See RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW* 6-7 (5th ed. 1988).

62. See *supra* notes 22-24 and accompanying text.

63. See, e.g., HÉLÈNE GAUDEMET-TALLON, *LES CONVENTIONS DE BRUXELLES ET LUGANO* 133 (2d ed. 1996); Georges Droz, *Delendum est Forum Contractus*, 1997 REC. DALLOZ CHRONIQUE 351.

has something to recommend itself.<sup>64</sup>

In the event that such negotiations with the Brussels/Lugano nations were to succeed, could the United States Supreme Court be expected to declare the resulting convention to be unconstitutional if the jurisdictional bases agreed upon do not, in all respects, conform to its case law? I do not believe so. Statements by some of the Justices suggest their awareness of the problematic nature of current American jurisdictional law.<sup>65</sup> As Professor Goldstein observed, a jurisdictional "system cannot be developed adequately by sporadic case law, but rather requires a comprehensive legislative approach."<sup>66</sup> It would be truly astonishing if the Court were to hold unconstitutional jurisdictional and recognition practices that have worked well, for several decades, linking European civil law and common law nations smoothly and effectively.<sup>67</sup> As far as third countries are concerned, Europe and the United States would render a major contribution to worldwide Full Faith and Credit, because there is but little doubt that other nations would ultimately accede to a well thought-out convention between these two important economic powers.

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64. See KESSEDJIAN REPORT, *supra* note 1, at 44; Schlosser, *supra* note 4, at 22, 43-44.

65. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 299 (1980) (Brennan, J., dissenting) (stating that "the standards enunciated by [*International Shoe* and its progeny] may already be obsolete as constitutional boundaries"); *id.* at 313 (Marshall, J., dissenting) ("the constitutional standard is easier to state than to apply"); *Shaffer v. Heitner*, 433 U.S. 186, 217 (1976) (Powell, J., concurring) (referring to the "uncertainty of the general *International Shoe* standard"); *cf.* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (Blackmun, J.) (discussing the "time and expense of pretrial motions to determine the correct forum"); *Burnham v. Superior Court*, 495 U.S. 604, 626 (1990) (Scalia, J.) (noting hazards of "uncertainty and litigation over the preliminary issue of the forum's competence"); *id.* at 628 (White, J., concurring) (criticizing fairness inquiry for inviting "endless, fact-specific litigation").

66. Stephen Goldstein, *Federalism and Substantive Due Process: A Comparative and Historical Perspective on International Shoe and Its Progeny*, 28 U.C. DAVIS L. REV. 965, 997 (1995).

67. See Carol S. Bruch, *Statutory Reform of Constitutional Doctrine: Fitting International Shoe to Family Law*, 28 U.C. DAVIS L. REV. 1047, 1058 (1995) (concluding that "we can expect the Court to understand and defer to well-thought-out jurisdictional schemes, even when they deviate from announced Supreme Court doctrine"); Weintraub, *supra* note 17, at 193-95.

