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COMPARATIVE JURISDICTION IN THE INTERNATIONAL CONTEXT: WILL THE PROPOSED HAGUE JUDGMENTS CONVENTION BE STALLED?

Linda Silberman*

INTRODUCTION

My perspective for this Symposium on American Civil Justice in a Global Context focuses on the differences between jurisdictional regimes in the United States and Europe.¹ Those differences have been highlighted most recently through the lens of the negotiations at the Hague Conference on Private International Law in an attempt to arrive at a worldwide convention on international jurisdiction and the enforcement of judgments. While my Article compares contrasting approaches of the United States and Europe to judicial jurisdiction, the tensions about the proper scope of jurisdictional rules that came to a head in the Hague negotiations are really reflective of other aspects of American procedure that are discussed in some of the other articles in this Symposium.² That is to say, much of the attack on American-style judicial jurisdiction is not really about jurisdiction at all, but


This article reflects the collaborations and co-authorships of related papers with my colleague, Andreas Lowenfeld, and as always, I am grateful for his guidance and his help.

1. My primary focus is on the European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the Brussels and Lugano Conventions), along with the recent modification of the Brussels Convention in the Council of the European Union Regulation on Jurisdiction and Judgments (Brussels Regulation). The jurisdictional provisions in these Community arrangements do not necessarily track domestic jurisdictional rules of individual Member States, and in many cases, certain national jurisdictional rules of Member States are prohibited in the context of claims against domiciliaries of Member States. Nonetheless, the jurisdictional provisions of the Brussels and Lugano Conventions and the Brussels (EU) Regulation offer a starting point for my comparison. It is worth noting that civil law countries outside of Europe have jurisdictional regimes not dissimilar to the rules adopted in Brussels/Lugano. Finally, where appropriate, I include references to domestic jurisdictional rules in individual countries.

2. See, e.g., Stephen N. Subrin, Discovery in Global Perspective: Are We Nuts?, 52 DePaul L. Rev. 299 (2003) (comparing access to information before trial in U.S. and other systems); Edward F. Sherman, Emerging Mechanisms for Aggregation and Group Litigation In Foreign Legal Systems: Variations and Alternatives to Class Actions, 52 DePaul L. Rev. 401 (2003) (discussing U.S. class action as compared with alternative models for group litigation in other countries); Michael Zander, Will the Revolution in the Funding of Civil Litigation in England Eventually
about unhappiness with other aspects of civil litigation in the United States—juries, discovery, class actions, contingent fees, and often substantive American law, which is perceived as pro-plaintiff and selected under similar pro-plaintiff choice of law rules in U.S. courts. In the context of transnational litigation, of course, implementation of those unattractive (from the European perspective) features of American civil justice are achieved through assertion of judicial jurisdiction in U.S. courts, often over foreign country defendants. In the context of an initiative for a worldwide judgments convention, the Europeans perceived a “corrective mechanism” if they could obtain an international consensus on rules for asserting judicial jurisdiction, and thereby set limits on jurisdiction over foreign defendants by U.S. courts.

II. TWO CENTS’ WORTH OF BACKGROUND: THE HAGUE JUDGMENTS PROJECT AND THE ROLE OF JUDICIAL JURISDICTION

Although the initiative for a multilateral treaty dealing with recognition of judgments was that of the United States, the United States has expressed unhappiness with the results of those negotiations, culminating in the June 2001 Draft. Indeed, the negotiators recognized that they had arrived at a stalemate with respect to the 1999 and 2001 Drafts; and at the General Affairs and Policy Session at the Hague in

[References]


April 2002, an effort was undertaken to determine if a more modest convention framework—that looked to more limited jurisdictional provisions such as the “home” of commercial defendants and the use of choice of forum clauses as a basis for a jurisdiction/recognition convention—would be possible. The United States is not a party to any bilateral judgments convention; enforcement of U.S. judgments abroad is often resisted, whereas the United States is extremely liberal in enforcing the judgments of other countries. Thus, the United States had substantial interest in negotiating a worldwide convention that would make a broad range of U.S. judgments enforceable in other countries. The Europeans had greater reservations. As among the members of the European Union (EU) and the European Free Trade Association (EFTA), the Brussels and Lugano Conventions already regulated both the exercise of judicial jurisdiction and the recognition and enforcement of judgments. At the same time, judgments from EU and EFTA countries were lib-


10. The Brussels Convention, 1990 O.J. (C 189) 2, was replaced by EU Regulation 44/2001, O.J. 2001 (L 121), effective March 1, 2002 [hereinafter Brussels Regulation]. The use of a “regulation” rather than a revision of the Brussels Convention by a new treaty was intended to avoid the need of individual Member States to go through the ratification process with submission of the revised text to their respective parliaments. For an overview of the substantive changes made by the new Regulation, see Andreas F. Lowenfeld, INTERNATIONAL LITIGATION AND ARBITRATION 472-74 (2d ed. 2002). For more on the new Brussels Regulation, see Peter E. Herzog, Rules on the International Recognition of Judgments (And On International Jurisdiction) By Enactments Of An International Organization: European Community Regulations 1347/2000 And 44/2001, in LAW AND JUSTICE IN A MULTISTATE WORLD, supra note 3, at 83-105.
erally enforced in the United States without benefit of a treaty and generally without any requirement of reciprocity.\footnote{11} Thus, one of the incentives for the EU and EFTA countries (as well as other countries) to enter into a recognition/enforcement convention with the United States was to obtain from the United States, in exchange for broader enforcement, some restrictions on perceived excesses with respect to U.S. assertions of jurisdiction.

However, it is interesting to note that in many respects U.S. assertions of judicial jurisdiction are actually narrower than those in many civil law countries and even other common law countries.\footnote{12} For example, civil law countries have, in some circumstances, asserted jurisdiction based on the nationality of the plaintiff\footnote{13} and have provisions for unlimited jurisdiction based on property in their state.\footnote{14} Jurisdictional bases such as these have been identified as "exorbitant" under the Brussels/Lugano regimes and may not be exercised as against domiciliaries of those countries.\footnote{15} Nonetheless, assertions of jurisdiction on


13. C. civ. art. 14 (Fr.). An alien, even if not residing in France, may be summoned before the French courts for the fulfillment of obligations contracted by him in France towards a French person; he may be summoned before the courts in France for obligations contracted by him in a foreign country towards French persons. \textit{Id., translated in Rudolf B. Schlesinger et al., Comparative Law} (6th ed., Foundation Press 1998).


14. See Art. 23 ZPO. More recently, the German Supreme Court (\textit{Bundesgerichtshof}) seems to have required that jurisdiction under Article 23 could be justified only if the cause of action had some additional link to the forum. Dec. of July 2, 1991. Bundesgerichtshof [BGH], 1 Deutsches Wirtschaftsrecht [DWR] 245 (No. 6 1991), \textit{discussed in Lowenfeld, supra} note 10, at 254.

15. See generally Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1990 O.J. (C 189) 2, art. 5 (consolidated) [hereinafter Brussels Convention].}
these grounds are appropriate with respect to defendants from other countries, including U.S. defendants.16

Another example can be found in domestic English rules of jurisdiction, which in certain provisions offer a broader jurisdictional reach than specific-act statutes of states in the United States.17 For example, jurisdiction in England is permitted when the contract is governed by English law18 or when the English court has jurisdiction over one defendant and the party outside the jurisdiction is a necessary or proper party.19 Indeed, a number of the jurisdictional rules of Brussels/ Lugano, such as the provisions for jurisdiction over multiple parties20 and over third-party defendants,21 as well as several of the English rules noted above, might well run afoul of constitutional restrictions in the United States.22 Thus, the perception outside the United States of the "jurisdictional excessiveness" of U.S. courts is highly exaggerated.

But there is one major area where the assertion of jurisdiction by courts in the United States is different and broader than that of most civil law countries—and that is the concept of general "doing business" jurisdiction, where jurisdiction is asserted on the basis of defendant's substantial activity, even when the claim is unrelated to those activities.23 It is often that basis of jurisdiction that supports some of

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16. Id. at art. 4.
19. Id. at 6.20(3).
20. The Brussels Convention, Article 6(1) provides for jurisdiction over a person domiciled in a Member State "where he is one of a number of defendants, in the courts for the place where any one of them is domiciled." Brussels Convention, supra note 15 at art. 6(1). The new Brussels Regulation (art. 6(1)) is somewhat more restrictive, adding the following proviso: "provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings." Brussels Regulation, supra note 10 at art. 6(1).
21. Brussels Convention, supra note 15 at art. 6(2): Brussels Regulation, supra note 10, at art. 6(2).
22. The absence of any nexus between the additional party defendant and the forum would appear to make such an exercise of jurisdiction unconstitutional under American due process standards. See infra text accompanying notes 58-65.
23. For recent discussions of the general "doing business" jurisdiction, see Patrick J. Borchers, The Problem with General Jurisdiction, 2001 U. CHI. LEGAL F. 119 (suggesting that general jurisdiction may be necessary to fill in gaps in specific jurisdiction created by constitutional restrictions on specific jurisdiction); Friedrich K. Juenger, The American Law of General Jurisdiction, 2001 U. CHI. LEGAL F. 141 (tracing the origins of general "doing business" jurisdiction and urging some adjustments to its scope); Mary Twitchell, Why We Keep Doing Business with Doing-Business Jurisdiction, 2001 U. CHI. LEGAL F. 171 (surveying recent cases on general jurisdiction and recommending certain limitations when foreign country defendants are involved).
the recent human rights cases in U.S. courts against foreign corporations and banks—litigation that is perceived by other countries as particularly egregious.

Therefore, it was not surprising that from its inception, the proposed Hague Convention was directed to both the regulation of judicial jurisdiction and the recognition/enforcement of judgments. Initially, the Europeans were committed to a pure double convention in the manner of Brussels/Lugano—that is, direct jurisdiction that would fall into one of two categories, mandated or prohibited—and rules of recognition and enforcement to follow accordingly. Such a structure proved too restrictive and inflexible for the large number of countries that were to be potential parties to the proposed worldwide Hague Convention; reaching consensus on what belonged in the respective areas of required and prohibited jurisdiction was almost impossible given the variety of different legal systems and jurisdictional regimes that the Convention had to accommodate. Thus, after some initial resistance in early drafts, both the October 1999 Preliminary Draft and the latest June 2001 Draft accept, if rather grudgingly, the idea of a “mixed convention,” that is a convention that has not only required and prohibited bases of jurisdiction but also a category of “permitted” jurisdiction. Within this “third” or gray zone of juris-


dition, a court may exercise jurisdiction when authorized by national law (so long as it does not appear on the prohibited list of exorbitant bases of jurisdiction).30 Judgments rendered on such a basis are not necessarily entitled to recognition or enforcement by other countries; recognition and enforcement are left to the national law of the enforcing country.

One continuing problem in the negotiations at the Hague was reaching a consensus on jurisdictional grounds appropriate for the “gray area.” The gray areas are not easy to find, due partially to the two hundred footnotes and close to one hundred passages in square brackets that appear in the June 2001 Draft. For example, although Article 7, entitled “Contracts Concluded by Consumers,” appears to be a case of required jurisdiction and enforcement, that Article has fifteen passages in brackets, three alternatives (one of which has two variants), and is accompanied by twenty footnotes. One of the major disagreements involves choice of court clauses in consumer contracts and dissatisfaction with the provision in the October 1999 Draft31 that limits (in an action against a consumer) derogation away from the consumer’s habitual residence to post-dispute agreements. One of the alternatives in the June 2001 Draft would permit broader jurisdiction in consumer cases when there is a pre-dispute choice of court clause in consumer cases,32 but then would allow Contracting States to make declarations that they will not recognize or enforce, or will specify conditions under which they will recognize or enforce, a judgment based on such jurisdiction.33 A second alternative would give broader effect to choice of court clauses in consumer cases through declarations to that effect by Contracting States.34 A similar structure is proposed—in a footnote and attached Annex—when the judgment is

30. Article 17 in the June 2001 Draft provides: “[Subject to certain exceptions]. the Convention does not prevent the application by Contracting States of rules of jurisdiction under national law, provided that this is not prohibited under Article 18 [The Prohibited Grounds of Jurisdiction].” June 2001 Draft, supra note 4, at art. 17.

31. See Oct. 1999 Draft, supra note 27, at art. 7(3), which provides:

The parties to a contract within the meaning of paragraph 1 may, by an agreement which conforms with the requirements of Article 4, make a choice of court—

a) if such agreement is entered into after the dispute has arisen, or

b) to the extent only that it allows the consumer to bring proceedings in another court.

Id.

32. See June 2001 Draft, supra note 4, at art. 7. Alternative A(7).

33. See id. at art. 25. bis (which appears as an insert in art. 7. Alternative A. after (7)).

34. See id. at art. 7. Alternative B. Variant 1 & Variant 2.
derived from an action at the habitual residence of the employee based on an individual contract of employment.\textsuperscript{35} 

The proposed Hague Convention's basic jurisdictional principle in consumer and individual employment cases—habitual residence of the plaintiff—is somewhat alien to the American tradition. To the extent the rule does not require a nexus with the defendant, it may well be regarded as violating due process limitations on the exercise of jurisdiction in courts of the United States. The consumer provision now includes the qualification that the claim must be related to trade or professional activities that the defendant has engaged in or directed to that State, and the consumer must have taken steps necessary for the conclusion of the contract in that State,\textsuperscript{36} thus bringing the provision closer in line with U.S. constitutional norms. Moreover, the flexibility reflected in the various alternatives with respect to accommodating those States that accept pre-dispute choice of court clauses in consumer cases represents another bow in the direction of the United States.\textsuperscript{37}

Before turning to a more extensive discussion of some of the differences between the American and European approaches to jurisdiction, several other basic features of the proposed Hague Convention are worthy of examination. Unlike the Brussels Convention/Regulation, the proposed Hague treaty would not have a final authority, such as the European Court of Justice, to oversee its operation.\textsuperscript{38} Without a supranational authority to superintend assertions of jurisdiction by a court exercising jurisdiction consistent with its provisions, the proposed Hague Convention was in need of a checking mechanism at the recognition stage. Article 27 of the proposed Draft Convention provides that the "court addressed shall verify the jurisdiction of the court of origin."\textsuperscript{39} This "verification" provides a means for the enforcing

\textsuperscript{35} The June 2001 Draft, Article 8, entitled "Individual Contracts of Employment," states that the subject of employment contracts was not specifically discussed at Commission II, but that working documents from earlier informal discussions are included in Annex II and "should be viewed in the light of the Alternatives proposed in relation to Article 7 . . . ." \textit{Id.} at art. 8.

\textsuperscript{36} See \textit{id.} at arts. 7(1) and 7(2).

\textsuperscript{37} See \textit{supra} notes 31-35 and accompanying text.

\textsuperscript{38} When the Brussels Convention was signed in 1968, the European Court of Justice did not have the power to review jurisdictional issues. At that time, a joint declaration was adopted committing the Contracting States to study the question of conferring jurisdiction on the European Court of Justice to interpret the Brussels Convention. In 1971, a protocol was adopted that conferred upon the European Court of Justice jurisdiction to give ruling on the interpretations of the Convention. See Brussels Convention, \textit{supra} note 15, at art. 1. The Protocol does not extend to decisions under the Lugano Convention. For the role of the European Court in this area, see C.G.J. Morse, \textit{International Shoe v. Brussels and Lugano: Principles and Pitfalls in the Law of Personal Jurisdiction}, 28 U.C. \textit{D}avis \textit{L. Rev.} 999, 1009-10, 1020-25 (1995).

\textsuperscript{39} June 2001 Draft, \textit{supra} note 4, at art. 27(2).
court to determine for itself whether jurisdiction was properly exercised under the provisions of the Convention; that second court will be bound by the findings of fact on which the court of origin based its jurisdiction (except in default judgments), but not the conclusions of law.

Another important set of provisions, so far without significant controversy, are those dealing with recognition and enforcement. The structural aspects of enforcement and recognition appear to be agreed—that is, Convention States would be required to recognize and enforce judgments that rest on jurisdiction on the mandated list;\(^40\) those predicated on a prohibited basis of jurisdiction would be denied enforcement;\(^41\) and judgments rendered on a basis of jurisdiction in the gray area would not have to be recognized by other states, but states would be free to recognize (or not) judgments in this category.\(^42\) Article 28 sets forth a set of discretionary defenses to recognition and enforcement, including the defense of public policy.\(^43\) More surprisingly, perhaps, is the acceptance (so far) by the United States of a provision that permits an enforcing forum to re-examine the amount of damages rendered in the initial action (read United States) to see if comparable sums could have been awarded there.\(^44\) It was precisely this issue of re-examination of damages that had derailed efforts in the 1970s on the part of the United States and the United Kingdom to reach a bilateral agreement on recognition and enforcement;\(^45\) but in the context of a worldwide convention, a provision of this kind is clearly more palatable.

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\(^{40}\) "A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognized or enforced under this Chapter." \textit{Id.} at art. 25.

\(^{41}\) \textit{See id.} at art. 26.

\(^{42}\) \textit{See id.} at art. 24 (entitled "Judgments Excluded from Chapter III").

\(^{43}\) \textit{See id. supra} note 4, at art. 28 (1)(f). The precise language says, "recognition or enforcement would be manifestly incompatible with the public policy of the state addressed."

\(^{44}\) \textit{See id.} at art. 33. As regards non-compensatory damages, such as exemplary or punitive damages, recognition is mandatory only to the extent that similar or comparable damages could have been awarded in the State addressed. \textit{See June 2001 Draft, supra} note 4, at art. 33(1). A debtor may also show that the damages awarded were "grossly excessive," and recognition may be limited to a lesser amount; however, in such a case, the court addressed must recognize the judgment in an amount no less than what could have been awarded in the State. \textit{See id.} at art. 33(2).

III. THE TENSIONS AT THE HAGUE: EUROPEAN AND U.S. APPROACHES COMPARED

The breakthrough to a “mixed convention” with a gray area of jurisdiction, a jurisdictional checking mechanism in the enforcement court, and preliminary acceptance of a limited review of damages offered a basis for optimism for a successful conclusion to the negotiations at the Hague. Still, certain differences about the jurisdictional provisions—both at the general level and at the level of specific detail—remained. Many of those are reflected in the June 2001 Preliminary Draft.

On a theoretical plane, Americans and Europeans take fundamentally different approaches to the issue of judicial jurisdiction (particularly regarding those countries with civil law systems). First, the Europeans aspire to a framework that discourages opportunities for forum shopping at the transnational level. Brussels/Lugano is premised on the existence of a limited number of possible fora from which a plaintiff may choose; a defendant can always be sued at its domicile on any claim,46 and the rules for “special” jurisdiction will often point to a single forum.47 For example, under Brussels/Lugano, in matters relating to a contract, jurisdiction is only appropriate “in the courts for the place of performance of the obligation in question.”48 By contrast, in the United States, jurisdictional schemes usually offer a variety of possible fora in contract actions. In the United States, for example, a defendant would be subject to general jurisdiction in any place where it had extensive activities (“doing business” jurisdiction) and not just its place of incorporation/principal place of business. Additionally, it would be amenable to specific jurisdiction in a number of possible places—such as where the contract negotiations occurred, where the contract was performed, and perhaps even where the contract was entered into. Thus, one objective for the Europeans at the Hague was to limit the possible fora in which suit could be brought.

Secondly, civil law regimes have always had a preference for formal rules as contrasted with discretion. And while concepts like “mini-
mum contacts” and “reasonableness” have consistently presented problems for some U.S. critics of the U.S. Supreme Court’s jurisdictional jurisprudence, the reaction abroad to these American developments has been far more negative. Another example of the differences between Anglo-American and civil law conceptions can be seen in the adaptation of English procedure that was required when England joined the Brussels Convention. Domestic English rules for service out of the jurisdiction require an application for leave, and a variety of factors—including a showing by the plaintiff that there is a good case on the merits—are usually considered in deciding whether to grant such leave and ultimately whether to uphold it. However, in keeping with the Brussels preference for rules rather than discretion, no such leave is required if the case before the English court is within the scope of the Brussels Convention.

Similarly, the doctrine of forum non conveniens, which originated in Scotland and has been long accepted by courts in England and the United States, plays no role in the Brussels/Lugano Conventions. Indeed, the European Court of Justice has held that forum non conveniens has no place in the English courts when jurisdiction is asserted under the Brussels Convention.

Brussels/Lugano does contain lis pendens provisions for simultaneous actions pending in different Contracting States between the same parties and involving the same cause of action, as well as for related actions. However, the solution in


50. See, e.g., Morse, supra note 38.


52. See UK Rules 2000, supra note 18, at 6.19(1).


55. Brussels Convention, supra note 15, at art. 21; Brussels Regulation, supra note 10, at art. 27. A strict “first seized” rule applies in this situation. For an interesting discussion of various abuses that have occurred as a result of the strict lis pendens rule of Article 21 of Brussels/Lugano, see Trevor C. Hartley, How to Abuse the Law and (Maybe) Come Out on Top: Bad-Faith Proceedings Under the Brussels Jurisdiction and Judgments Convention, in Law and Justice in a Multistate World, supra note 3, at 73-81.

56. Brussels Convention, supra note 15, at art. 22 (revised slightly in Brussels Regulation, supra note 10, at art. 28). In this situation, discretion is given to a court other than the court first seized to decline jurisdiction. For a more extensive discussion of Articles 21 and 22 of Brussels/Lugano as well as the new Brussels Regulation, see Stephen B. Burbank, Jurisdictional Equili-
the former situation proceeds via a strict first-seised rule and only in
the latter context is discretion granted and then only to the court sec-
ond-seised. These philosophical differences about the proper balance
between rules and discretion help explain why the June 2001 Hague
Draft contains so many jurisdiction “alternatives,” as well as the rea-
son for the somewhat constrained forum non conveniens and lis
pendens provisions.

Third, the constitutionalization of jurisdictional rules in the United
States via the Due Process Clause means that the debate at the Hague
is not only about different policy views. The rules of “required” juris-
diction adopted in a proposed convention cannot impair the due pro-
cess rights of the defendant as understood in the U.S. Supreme
Court’s most recent jurisprudence. The difficulty arises because the
constitutional limits on judicial jurisdiction in the United States stress
the relationship between the individual defendant and the forum—an
inquiry quite different from the approach of civil law countries,
where the focus is on the relationship between the dispute and the
forum and usually carries no constitutional overlay. Thus, a classic
basis of jurisdiction over torts—that jurisdiction can be exercised by
the State where either the tortious act or injury occurs—is adopted by
the European Court of Justice in construing the Brussels Convention
and appears in various drafts of the proposed Hague Convention.
Such a provision, however, may not satisfy the required nexus with a
defendant as demanded by American constitutional jurisprudence.
Even the latest qualification in Article 10 of the June 2001 Draft,
which eliminates the place of injury when “the person alleged to be
responsible could not reasonably have foreseen that the act or omis-
sion could result in an injury of the same nature in that State,”
may fall short of U.S. constitutional requirements. Similar constitu-
tional problems were presented by articles in earlier convention drafts au-

57. See, e.g., June 2001 Draft, supra note 4, at art. 6. Alternatives A, B; see infra text accompa-
panying notes 73-80.
58. See infra text accompanying notes 139-152.
59. See Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); World-Wide Volk-
swagen Corp. v. Woodson, 444 U.S. 286 (1986). See generally Ronald A. Brand, Tort Jurisdiction
in a Multilateral Convention: The Lessons of the Due Process Clause and the Brussels Conven-
60. See Case 21/76, Bier v. Mines de Potasses d’Alsace, 1976 E.C.R. 1735. See generally Di-
cey & Morris, supra note 54, at 353.
61. June 2001 Draft, supra note 4, at art. 10(b).
62. In World-Wide Volkswagen Corp. v. Woodson, “mere foreseeability” on the part of the
defendant was held constitutionally inadequate. World-Wide Volkswagen, 444 U.S. at 295-97.
Authorizing jurisdiction over multiple defendants if one defendant was habitually resident in the forum, and over claims for indemnity or contribution when there was jurisdiction over the principal claim. These provisions were deleted from the June 2001 Draft, and thus exercise of jurisdiction on one of these bases is now neither authorized nor prohibited; rather, jurisdiction in such matters would now seem to fall into the gray area, thus accommodating concerns expressed by the United States. Similarly, as noted earlier, the specially designed rules for contracts involving consumers (allowing a consumer to sue in the forum of its habitual residence if the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that state) appear to have accommodated potential U.S. constitutional limitations.

Finally, strong disagreements over the propriety of general jurisdiction—whether jurisdiction may be asserted over a defendant without links to the specific transaction but with a more general connection to the forum (apart from its place of residence)—threaten to derail the Convention. Most countries do not subject a defendant to jurisdiction based on its general business activities, and when the United States does so with respect to a foreign defendant, it exacerbates other systemic differences that are perceived as unfair by foreign parties.

IV. The June 2001 Draft: Consensus, Compromise, and Discord

A. The Required Bases of Jurisdiction

If one first looks at the category of “required” jurisdiction—that is, jurisdictional bases that are to be afforded by every Convention State and judgments that are to be enforced if rendered on those grounds—there is little that is controversial from the United States’ perspective. The grounds for general jurisdiction—[habitual] residence for an individual and place of incorporation, statutory seat, principal place of business, and central administration for juridical entities—seem appropriate and consistent with U.S. law, even if the particular terms

64. See id. at art. 16.
65. See June 2001 Draft. supra note 4. at art. 7.
67. For some of the difficulties of applying general jurisdiction to foreign defendants, see Twitchell. supra note 23, at 197-201.
68. See June 2001 Draft. supra note 4. at art. 3.
are not always completely familiar. Both choice-of-forum clauses conferring exclusive jurisdiction and appearance by the defendant other than for the purpose of challenging jurisdiction are also generally compatible with U.S. law. And although it is agreed that “special jurisdictional provisions,” such as those for torts, contracts, and intellectual property, should be included in the Convention, the alternative formulations of many provisions in the June Draft evidence disagreement not only about language but also about substance. In addition, throughout the negotiations there has been discussion about whether jurisdiction should be identified by traditional substantive categories, such as torts and contracts, or left to a more general, activity-based formulation. To take one particular example, Article 6, Alternative B, of the June 2001 Draft contains what can be characterized as the “European” alternative for the appropriate forum in contract cases. In contract cases, the premise is that the proper forum is where the contract is to be performed, and Alternative B in Article 6 identifies the place of performance of the particular obligation: the action may


70. See June 2001 Draft, supra note 4, at art. 4. A forum-selection clause is generally understood by U.S. courts as non-exclusive, but there are good reasons to treat the forum choice as exclusive. Thus, the proposed Hague rule has appeal for United States interests as well. See Kevin M. Clermont & Kuo-Chang Huang, Converting the Draft Hague Treaty into Domestic Jurisdiction Law, in A GLOBAL LAW OF JURISDICTION AND JUDGMENTS: LESSONS FROM THE HAGUE 191-234, supra note 9. Article 4 in the June 2001 Draft contains several modifications from the provision in the prior October 1999 Draft. An absolute prohibition on unilateral designations by plaintiffs was eliminated, and the issue of invalidity due to lack of consent or incapacity is left to national law, including conflict of law rules. Alternative formulations of the rule are found in Article 4(1) and 4(5) of the June 2001 Draft. See June 2001 Draft, supra note 4, at art. 4(1), 4(5).

71. Id. at art. 5.

72. Id. at art. 6, Alternatives A, B; id. at art. 7, Alternatives A, B, & C; id. at art. 12, Alternatives A, B.


74. See Nygh & Pocar, Report of the Special Commission, supra note 29, at 49. The Brussels Convention, Article 5(1) originally contained the more general “place of performance of the obligation in question” language for matters relating to contract, but the specific identification of the place of performance for goods and services has been included in the new Brussels Regulation. Brussels Regulation, supra note 10, at art. 5(1)(b). For some of the difficulties presented
be brought in the state in which the "goods were supplied in whole or in part" or where the "services were supplied in whole or in part." As for contracts involving both goods and services, the required forum is where the "performance of the principal obligation took place in whole or in part." From the American viewpoint, this formulation for a jurisdictional provision for contract cases is narrow and formalistic. Many kinds of contracts do not neatly fit the "contracts for goods or services" parameters of the Article, and requiring courts to ascertain whether the principal obligation concerns goods or services—where contracts involve both—seems an unnecessarily grudging approach. The provisions in most U.S. state specific-act statutes offer more flexible alternatives for jurisdictional rules involving contracts. A standard formula for contract actions is to authorize suit in the courts of a state where the defendant "transacts business in the state" when the claim "arises from" that activity. The American approach in the Hague Draft of June 2001 is found in Alternative A to Article 6, which allows an action when the defendant has conducted a certain level of activity and the claim is based on a contract directly related to that activity.

The tort provisions in Article 10, as noted above, have gone a long way in trying to fit with U.S. constitutional requirements. To the extent the existing language of the June 2001 Hague Draft still falls short, it would be appropriate to allow the United States (and any other Contracting State) to take a reservation if a required ground of jurisdiction would violate its own constitutional norms. It is also possible that the provisions of an international treaty could affect the U.S.


75. June 2001 Draft, supra note 4, at art. 6(a). Alternative B.
76. Id. at art. 6(b). Alternative B.
77. Id. at art. 6(c). Alternative B.
78. See Kovar Letter, supra note 4.
79. See Robert C. Casad & William B. Richman, Jurisdiction in Civil Actions 397-98 (3d ed. 1998); see also Clermont & Huang, supra note 70 (discussing the benefits of such a provision).
80. The precise formulation, along with bracketed language, is as follows:

[A] plaintiff may bring an action in contract in the courts of the State —

a) in which the defendant has conducted frequent [and][or] significant activity; [or
b) into which the defendant has directed frequent [and] [or] significant activity;]

provided that the claim is based on a contract directly related to that activity [and the
overall connection of the defendant to that State makes it reasonable that the defen-
dant be subject to suit in that State].

June 2001 Draft, supra note 4, at art. 6. Alternative A. Two variants elaborating the concept of "activity" are offered as an additional paragraph (2) to Article 6.
Supreme Court's analysis of the constitutional limits of due process and permit the exercise of jurisdiction in these circumstances, at least for cases falling within the Convention.\footnote{81} As with the contract provisions, the issue of how to best formulate a "tort" provision on jurisdiction remains. In addition to the basic provision for jurisdiction in the courts where the "act or omission" occurred or where the injury, subject to foreseeability, arose,\footnote{82} there is a proposal to insert an activity-based jurisdiction similar to that suggested in relation to contracts; it appears in bracketed language as Article 10(2).\footnote{83}

One illustration of a compromise of American and European approaches is reflected in Article 10(4), which provides that if the action is brought only on the basis that the injury arose in the State, the court has jurisdiction only in respect to the injury that occurred there, unless that State is the habitual residence of the injured party.\footnote{84} The effect is to provide a strong incentive for the plaintiff to sue in the place where the tortious act occurred or where the defendant is located if the plaintiff is not habitually a resident in the state where the injury arose.\footnote{85} Such a rule has some value in defamation-type cases to discourage the American style forum shopping that often results when the injury occurs in several states.\footnote{86} On the other hand, the approach of the European Court of Justice in interpreting the tort provision of the Brussels Convention in a defamation case creates the likelihood of a multiplicity of actions in different fora, even where a libel victim with a reputation to lose will suffer most of the reputation harm at the habitual residence.\footnote{87} The provision in the June 2001 Hague Draft of-

\footnote{81. The point is not that the treaty would in any way “trump” the constitutional limitations imposed on the exercise of jurisdiction. Rather, the fact that an international treaty and/or federal statute expressly asserted jurisdiction on particular grounds has a bearing on the evaluation of constitutionality. See Linda J. Silberman, "Two Cheers" for International Shoe (And None for Asahi): An Essay on the Fiftieth Anniversary of International Shoe, 28 U.C. Davis L. REV. 755, 762-67 (1995) [hereinafter Silberman, Two Cheers]; see also Walter W. Heiser, A "Minimum Interest" Approach to Personal Jurisdiction, 35 WAKE FOREST L. REV. 915 (2000) (critiquing the existing constitutional standard and offering a proposal that would bring the United States into closer alignment with the jurisdictional rule in Europe).

\footnote{82. See June 2001 Draft, supra note 4, at art. 10(1).

\footnote{83. Id. at art. 10(2).

\footnote{84. Id. at art. 10(4).

\footnote{85. A “gray area” of permissive jurisdiction does still exist under the Convention, and a plaintiff can sue for the entire damage in the place of injury if permitted to do so under national law. Enforcement of such a judgment, however, is not required by other Convention States. The complexities arising from this situation are discussed in Ronald A. Brand, Current Problems, Common Ground, and First Principles: Restructuring the Preliminary Draft Convention Test, in A Global Law of Jurisdiction and Judgments: Lessons From the Hague, supra note 9.


\footnote{87. In Shevill v. Press Alliance, the European Court of Justice held that a plaintiff libeled by a newspaper article distributed in several Contracting States could bring an action against the
fers an appropriate middle ground between Brussels/Lugano and the generally accepted rule with respect to jurisdiction over libel actions in the United States, although the desirability of such a rule in cases other than defamation is unclear.

A comparison of the October 1999 and June 2001 Drafts reveals a different kind of compromise in yet another aspect of tort jurisdiction. Under the October 1999 Draft, when the injury in the State was economic and the action was based on an allegation of a violation of antitrust or competition law, the place of injury no longer served as a required basis of jurisdiction. Jurisdiction in such cases was not prohibited, but plaintiffs in such actions did not gain the enforcement benefits of the Convention. Moreover, plaintiffs in such actions would be precluded from obtaining jurisdiction on any of the bases found on the prohibited list. The first preference of the United States was to have economic injuries treated in the same way as physical injuries, with jurisdiction appropriate in the courts of the State where the injury arose. With little support by other States for that position, however, the U.S. fall-back position was to eliminate competition-type cases from the Convention altogether. Under the latter scenario, because antitrust and competition judgments would fall outside the Convention, they would not be entitled to recognition and enforcement elsewhere; at the same time, however, the Convention prohibitions on jurisdiction would be inapplicable. The June 2001 Draft appears to have accepted the second alternative and excluded antitrust and competition claims from the Convention.

The complexities around electronic commerce were not initially confronted in the early negotiations at the Hague, but delegates have focused on e-commerce issues at informal meetings, and it is clear that

88. I use the term "generally accepted rule" here because certain specific-act statutes providing for jurisdiction on the basis of an act or injury include an express exception for defamation cases. See, e.g., N.Y. C.P.L.R. §§ 302(a)(2), (a)(3) (2001).
89. The creation of multiple fora for the recovery of partial damages is likely to be inefficient in other types of cases.
90. See Oct. 1999 Draft, supra note 27, at art. 10(2).
91. Antitrust and unfair competition actions brought in the State where the injury occurred would be within the "gray list"; Convention States would be free to decide whether or not to enforce the judgment.
92. See June 2001 Draft, supra note 4, at art. 1(2)(i). I say "appears" because the provision appears in brackets. In addition, the provision in Article 10(2) of the October 1999 draft—which provided that the place of injury was not an appropriate basis of jurisdiction when the injury was "caused by anti-trust violations"—is deleted in the June 2001 Draft. See id. at art. 10 n.66.
e-commerce concerns and the impact of the Internet are significantly affecting the negotiations.\textsuperscript{93} How best to incorporate provisions with respect to e-commerce into the Hague Convention remains unclear.\textsuperscript{94} The June 2001 Draft reflects some recognition of the problem,\textsuperscript{95} but

\footnotesize
\textsuperscript{93} See, e.g., Catherine Kessedjian, \textit{Electronic Data Interchange, Internet and Electronic Commerce} (Apr. 2000), available at ftp://hcch.net/doc/gen_pd7e.doc (last visited Nov. 11, 2002) (summarizing meetings organized by the Hague in Geneva in September 1999). \textit{See generally} David Goddard, \textit{Does the Internet Require New Norms?}, in \textit{2 International Law Forum Du Droit International} 183 (2000). \textit{See also} Avril D. Haines, \textit{The Impact of the Internet on the Judgments Project: Thoughts for the Future} (Feb. 2002), available at ftp://ftp.hcch.net/doc/gen_pd17e.doc (last visited Nov. 11, 2002). A recent international litigation involving Yahoo!, Inc. has been widely reported in the press and has focused additional attention on these issues. Yahoo!, Inc., the California internet portal and service provider, was sued in France by La Ligue Contre Le Racisme et L'Antisemitisme (LICRA), a non-governmental organization based in France dedicated to fighting racism and anti-semitism, and the French Union of Jewish Students (UEJF). LICRA and UEJF alleged that Yahoo!'s auction site, which displayed and made available for sale various Nazi memorabilia, violated certain provisions of the French Penal Code making any such display or sale illegal. In May 2000, the French court found jurisdiction over Yahoo! on the basis of the "wrong" in France. It issued an interim order prohibiting Yahoo! from making its auction service displaying Nazi artifacts accessible in France, and it appointed experts to determine the feasibility of certain compliance defenses asserted by Yahoo!. On November 20, 2000, the judge issued an Ordonnance de Refere, ordering Yahoo! to comply within three months with the injunction issued earlier to "take all necessary measures to dissuade and make impossible any access via Yahoo.com to auction service for Nazi merchandise ... subject to a penalty of FFr. 100.000 per day . . . ." (English translation of French court order on file with author). More particularly, Yahoo! was ordered to re-engineer its content servers in the United States and elsewhere to enable them to recognize French Internet Protocol addresses and block access to Nazi materials by end-users, and to require end-users with "ambiguous" IP addresses to provide Yahoo! with a declaration of nationality when they arrive at Yahoo!'s home page or when they initiate any search using the word "Nazi." \textit{See Yahoo!}, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme, 169 F. Supp. 2d 1181 (N.D. Cal. 2001). Yahoo! then brought an action against LICRA and UEJF in the federal district court in California, seeking a declaration that the French court orders issued against Yahoo! were not subject to recognition or enforcement. The U.S. federal court granted summary judgment in favor of Yahoo!, holding that enforcement of the French order would be inconsistent with the values of the First Amendment. \textit{Id.} For more details on the Yahoo! case, see Mahasti Razavi & Thaima Samman, Yahoo! and Limitations of the Global Village, 19 COMM. LAW. 27 (2001); Allan R. Stein, \textit{Frontiers of Jurisdiction: From Isolation to Connectedness}, 2001 U. CHI. LEGAL F. 373, 395-99 [hereinafter Stein, \textit{Frontiers of Jurisdiction}].

\textsuperscript{94} For example, the new Brussels Regulation in Articles 15(1)(e) and 16(1) did nothing more than to authorize the consumer to sue in his home State when a defendant directs commercial or professional activities to the domicile of the consumer and the contract falls within the scope of such activities. \textit{See} Brussels Regulation, \textit{supra} note 10, at arts. 15(1)(e), 16(1). That is somewhat surprising since the European Union has considered e-commerce issues more specifically in other directives. \textit{See} Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market, 2000 O.J. (L 178). \textit{See generally} Francois Dessemontet, \textit{The European Approach to E-Commerce and Licensing}, 26 BROOK. J. INT'L L. 59 (2000); Norel Ronsen, \textit{International Jurisdiction in E-Commerce Contracts}, available at http://www.llrx.com/features/euecom.htm (last visited Oct. 7, 2002).

\textsuperscript{95} For example, with respect to Alternative A of Article 6 for contracts based on activity when the claim is based on a contract directly related to the activity, jurisdiction on such a basis
many of the implications of e-commerce and the Internet—in areas such as intellectual property, defamation and click-wrap agreements in consumer contracts—have yet to be fully aired.

B. The Prohibited Bases of Jurisdiction

The general concept of a category of exorbitant or prohibited jurisdiction meshes comfortably with U.S. law, which in its national law has elevated an excess of jurisdictional authority to a violation of the U.S. Constitution. Moreover, many of the particularized excesses does not exist "where the defendant has taken reasonable steps to avoid entering into or performing an obligation in that State." June 2001 Draft. supra note 4, at art. 6, Alternative A(3).

Footnote forty-one explains that the provision "seeks to protect business parties including those using electronic commerce who take measures to avoid entering into obligations in a particular State and thereby avoid becoming subject to the jurisdiction of the courts of that State." Similar bracketed provisions can be found in Article 7 (relating to consumer contracts) and in Article 10 (tort provisions). Id. at arts. 7(3), 10(3).

96. Even apart from the e-commerce aspects, the debate over appropriate jurisdictional provisions in intellectual property is completely open. Various proposals appear in Article 12 of the June 2001 Draft, but there is no consensus that intellectual property should be included in the Convention, or if it is, whether the tentative provisions for exclusive jurisdiction should apply to both registered and unregistered marks. See June 2001 Draft, supra note 4, at art. 12. The impact of the internet with respect to copyright and copyright infringement has added to the complexity. See Ronald A. Brand, Intellectual Property, Electronic Commerce and the Preliminary Draft Hague Jurisdiction and Judgments Convention, 62 U. PITT. L. REV. 581, 594-97, 602 (2001) [hereinafter Brand, Preliminary Draft Convention].

97. The jurisdictional ramifications of defamation over the internet are not clear on the national level either. See, e.g., Griffis v. Luban, 646 N.W.2d 527, 536-37 (Minn. 2002) (refusing to enforce Alabama default judgment where jurisdiction in Alabama was asserted over a Minnesota resident on the basis of statements made on an Internet newsgroup). In Griffis, the Minnesota Supreme Court held that Alabama's assertion of jurisdiction in this context violated due process; even though the defendant knew her statements could and were likely to be read in Alabama where plaintiff's reputation would be impacted, the court found that Alabama was not the "focal point" of the activity. See generally Allan R. Stein, The Unexceptional Problem of Jurisdiction in Cyberspace, 32 INT'L L. 1167, 1180-81 (1998) [hereinafter Stein, Jurisdiction in Cyberspace]; Howard B. Stravitz, Personal Jurisdiction in Cyberspace: Something More is Required on the Electronic Stream of Commerce, 49 S.C. L. REV. 925, 934-36 (1998).

98. For example, Article 7 in the June 2001 Draft, entitled "Contracts Concluded by Consumers," effectively allows a consumer in an e-commerce transaction to sue the defendant in the State in which the consumer purchases the goods. See June 2001 Draft, supra note 4, at art. 7(1). Article 7 also prevents a consumer from being sued in a place other than the habitual residence. See id. at art. 7(4). Finally, Article 7 prevents the use of pre-dispute choice of forum clauses. See id. at art. 7(3). However, several alternatives allowing more flexibility with respect to choice of court clauses in consumer cases also appear in the June 2001 Draft. See supra text accompanying notes 31-35.

99. See generally Brand, Preliminary Draft Convention, supra note 96, at 581; Haines, supra note 93.

100. As early as 1877, the Supreme Court held that the assertion of judicial jurisdiction—whether exercised by state or federal courts—is subject to constitutional scrutiny under the Due Process Clause of the Fourteenth Amendment. See Pennoyer v. Neff, 95 U.S. 714 (1877); see also Friedrich K. Juenger, American Jurisdiction: A Story of Comparative Neglect, 65 U. COLLO. L. REV. 1, 4-7 (1993) (condemning the constitutionalization of judicial jurisdiction).
set forth in Article 18(2) of the June 2001 Draft, as well as in earlier drafts, are uncontroversial from the perspective of the United States.\textsuperscript{101} Jurisdiction based solely on the presence of the defendant's property in the forum state; nationality, domicile, habitual or temporary residence or presence of the plaintiff; nationality, temporary residence or presence of the defendant, as well as service of writ upon the defendant; unilateral designation of the forum by the plaintiff; and the signing of a contract from which the dispute arises would fall within (or come close to) the unconstitutional zone.\textsuperscript{102}

But there is one aspect of the prohibited jurisdiction that remains unacceptable from the American side and that is the inclusion of general “doing business” jurisdiction in the exorbitant category. Article 18(2)(e), though now in brackets, still identifies as one of the prohibited grounds of jurisdiction “[the carrying on of commercial or other activities by the defendant in that State, [whether or not through a branch, agency or other establishment of the defendant] except where the dispute is directly related to those activities.]”\textsuperscript{103} The fact that all of subsection (e) is now in brackets—unlike earlier drafts\textsuperscript{104}—suggests that there may be some room for compromise.

From the start, the attempt to articulate an overall definition of prohibited jurisdiction—resulting in Article 18(1) of the June 2001 Draft—has been difficult. Article 18(1), which contains language of particular significance in brackets, provides: “Where the defendant is habitually resident in a Contracting State, the application of a rule of jurisdiction provided for under the national law of a Contracting State is prohibited if there is no substantial connection between that State and [either] the dispute [or the defendant].”\textsuperscript{105} At the June negotiations, some delegates wished to delete the entire paragraph,\textsuperscript{106} and

\begin{footnotes}
\footnote{101. Paragraph (2) identifies particular examples of exorbitant jurisdiction. See June 2001 Draft, supra note 4, at art. 18(2). Paragraph (3) provides for an exception for some subset of human rights cases. See id. at art. 18(3).}
\footnote{102. Service of a summons on the defendant due to temporary presence in the state—so-called “tag” jurisdiction—was upheld by the Supreme Court of the United States in \textit{Burnham v. Superior Court of California}, 495 U.S. 604 (1990). However, \textit{Burnham} was a domestic U.S. case and did not involve jurisdiction over a foreign defendant. The Restatement (Third) of the Foreign Relations Law of the United States (published prior to \textit{Burnham}) suggests that such transitory presence is not an appropriate basis for jurisdiction under international law. See \textit{Restatement}, supra note 11, at § 421 cmt. e.}
\footnote{103. See June 2001 Draft, supra note 4, at art. 18(2)(e).}
\footnote{105. See June 2001 Draft, supra note 4, at art. 18(1).}
\footnote{106. As explained in a footnote, the reason that some delegates wanted to delete the entire paragraph was that they sought to “emphasise [sic] the basic concept . . . that there be a limited number of required bases of jurisdictions that are generally accepted,” another group of “juris-}
\end{footnotes}
others wanted to omit the words in brackets. If the brackets are removed and the words in brackets remain, a national rule of jurisdiction with a substantial connection to the defendant would fall within the gray zone. Presumably, then, the “doing business” jurisdiction—at least in some circumstances—would be permitted even if recognition of a judgment would not be required. However, if the bracketed language comes out of Article 18(1), this substantial area of judicial jurisdiction now permitted under American law—the “doing business” jurisdiction—would be prohibited under the Convention.

Traditionally, courts in the United States have exercised jurisdiction when a defendant conducts systematic and continuous activities within the forum state, even when the claim is unrelated to the activity. If foreign enterprises have a permanent establishment in the United States, jurisdiction is obtainable in the United States under existing law even with respect to a claim that arises outside the United States. If the European option in the June 2001 Draft is adopted, the United States would have to agree to abandon this type of general jurisdiction against foreign defendants from Convention States, whether or not enforcement abroad is ever sought. And it should be noted that in many situations these multinational enterprises will have assets in the United States, and foreign enforcement would not even be necessary.

It is true, as the Nygh-Pocar Report explains, that “there is a significant margin of uncertainty” as to when a general jurisdiction basis such as “doing business” applies because of “the difficulty of determining the quality and quantity of activity which is needed in order to found jurisdiction . . . .” That problem also exists as a matter of domestic American law because if defendants’ activities in the forum state are too attenuated, general “doing business” jurisdiction will be found unconstitutional.

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Many major multinational enterprises—such as Siemens, Phillips, Daimler-Chrysler, and Novartis—have permanent establishments in the United States. Notwithstanding that such companies have formally incorporated and maintained their principal place of business and legal headquarters outside of the United States, from the American point of view, they do have an established presence in the United States. Particularly when American citizens or habitual residents are injured—even with respect to a claim originating outside the United States—there does not seem to be great unfairness in allowing the resident plaintiff to sue such a defendant in plaintiff's home state. In the Report of the American Law Institute on International Jurisdiction and Judgments (for which I am co-Reporter along with Professor Andreas Lowenfeld), the following example is used. A habitual resident of the United States, traveling in Europe, ingests a pharmaceutical manufactured by Novartis and has an adverse reaction. She returns home to the United States and wishes to bring suit against the manufacturer. Under U.S. law, she would have no difficulty maintaining the action because the defendant has extensive business activities in the United States; enforcement of a resulting judgment would be relatively easy in the United States because the defendant would have substantial assets in the United States. Thus, the law of the United States treats foreign defendants who carry on extensive business activities in the United States as if they were an American-based company.

Such equivalence is not peculiar to American jurisprudence. An overseas company that carries on business within England is subject to jurisdiction there even if the claim has no connection with the English activity. For example, in South India Shipping Corp. Ltd. v. Export-Import Bank of Korea, a foreign bank was held subject to suit in England where it was found to have an “established place of business” from which it conducted external relations with other banks and carried out preliminary work. The Court of Appeals explained that to exercise jurisdiction in such a case was to put such a foreign company on the same footing as an English company in making it subject to suit.

112. See Silberman, Comparative Dimension, supra note 17, at 404.
113. See Dicey & Morris, supra note 54, at 296-300.
Japan has a similar rule. In *Goto v. Malaysian Airline System*, suit was brought in Japan against Malaysian Airlines by the widow of a Japanese resident who was traveling between points in Malaysia when his plane crashed. The Japanese Supreme Court sustained jurisdiction on the basis of the defendant's branch office in Japan. *Goto* involved an airline accident between points in Malaysia and, therefore, was outside the scope of the Warsaw Convention, the international convention covering suits arising out of accidents in international air carriage. Thus, the case was decided on the basis of Japanese domestic law. It is interesting to note in this context that the recent amendment to the Warsaw Convention would extend jurisdiction to the State in which the passenger is a “principal and permanent resident”—the so-called “fifth forum”—if the “carrier operates services for the carriage of passengers by air” in that State.

Thus, the position that an injured plaintiff should be entitled to bring suit in the State of his or her place of residence when the defendant carries on substantial activity in that State hardly seems extreme or uniquely American, albeit inconsistent with the scheme of the Brussels/Lugano Conventions. For example, Brussels/Lugano rejects jurisdiction based on the establishment of a branch office, unless the dispute arose out of the operations of the branch. The argument against jurisdiction rests on a desire both to achieve certainty and to

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116. Other possible fora under the Warsaw Convention are the territory of a Contracting State that is the domicile or principal place of business of the carrier, a place of business of the carrier through which the contract has been made, or the place of destination. See Convention of the Unification of Certain Rules Regarding International Transport with Additional Protocol, Oct. 12, 1929, art. 28, 137 L.N.T.S. 11 [hereinafter Warsaw Convention].


118. For example, the recent revision of the Warsaw Convention (though not yet in force) provides for jurisdiction in the State of the principal and permanent residence of the plaintiff if the defendant air carrier operates services there. It has been suggested that the *Goto* case and the Warsaw Convention situation are more compelling cases because defendants engage in the same business in the plaintiff's home State as they do in their home State and the place where the event occurred. If that turns out to be the basic objection to my proposal, it might be possible to limit the “doing business” jurisdiction to those situations where the defendant's business in the forum State bears some relationship to the defendant's business or activity that gives rise to the claim. However, the claim should not have to “arise from” the defendant's activity in the forum State.

119. See Brussels Convention, *supra* note 15, at art. 5(5); Brussels Regulation, *supra* note 10, at art. 5(5).
avoid forum shopping. In addition, given the availability of other types of special or "specific" jurisdiction under Brussels/Lugano, the assertion is that another State has a more legitimate interest in the dispute and is the more appropriate forum. Finally, the absence of any defined standard for "doing business" creates an impression that the foreign defendant may in fact have a relatively attenuated relationship with the forum.

An appropriate compromise might be to allocate this category of jurisdiction to the gray area. Then States that continue to find such jurisdiction objectionable would not have to enforce judgments that

120. In the context of foreign country defendants, the choice of a U.S. forum is also likely to mean a more significant exposure, due to systemic differences such as juries, discovery, and possibly even less favorable applicable law. See Twitchell, supra note 23, at 197-201 (explaining the particular burdens that general jurisdiction places on foreign defendants).

121. General jurisdiction in the United States was developed when specific jurisdiction was not yet fully available. It has thus been suggested that with the availability of specific jurisdiction, only a few cases in which the United States has a legitimate interest in providing a forum will be blocked. See 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 (1998); Clermont and Huang, supra note 70.

122. See Stein, Frontiers of Jurisdiction, supra note 93, at 385-86.

The doctrine permits the forum state to set standards of care, assess responsibility, and award damages in a matter in which it has no regulatory stake. While it may do so under the guise of applying another state's law, the judge and jury are drawn from the wrong political community. The forum is thus illegitimately appropriating the sovereign prerogative of another state.


123. Neither U.S. Supreme Court nor state case law has provided much guidance on this question. In Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984), the Colombian defendant (Helicol) purchased four million dollars worth of helicopters and equipment from a Texas company and sent prospective pilots and other personnel to Texas for training. The chief executive officer of Helicol went to Texas to negotiate a contract of transportation with a Peruvian consortium, the alter ego of a joint venture headquartered in Texas. Helicol received over five million dollars in payments from the consortium drawn on a Texas bank. Four U.S. plaintiffs, whose decedents were killed in Peru as the result of the crash of a helicopter owned by the defendant, Helicol, brought suit in Texas against the Columbian defendant. The Supreme Court of the United States found these contacts constitutionally insufficient to establish general jurisdiction.


Further attenuation occurs when general jurisdiction is based on the defendant's relationships and arrangements with other entities, which are said to constitute its presence in the forum. For a more extensive discussion of the "agency" cases, see Twitchell, supra note 23, at 188-90.

124. In response to prior Preliminary Hague Draft proposals, I have made this suggestion in other papers. See Silberman, Can the Hague Judgments Projects Be Saved?, supra note 9. Some
rest on general jurisdiction of that kind. At the same time, American (or other) courts that are able to enforce judgments against foreign defendants on the basis of forum assets will not have their own domestic rules for jurisdiction curtailed. Another modification to Article 18 that might appeal to both sides in the debate over general jurisdiction would be to narrow the area of general “doing business” jurisdiction on the prohibited list and permit general jurisdiction in those situations where the argument for such jurisdiction is the strongest. Article 18 could be modified to prohibit jurisdiction on the basis of the “carrying on of the commercial activity by the defendant when the activity did not give rise to the claim except where the defendant has a branch office or where the defendant’s activity in the forum is evidence of a substantial presence in the forum State, and the plaintiff is habitually resident in that State.”

Cases in which foreign defendants have extensive and substantial activities in the forum State represent the strongest claims for general jurisdiction. The exception could follow the English rule, which appears to require an “established place of business;” alternatively, as I suggest, it could embrace a more flexible standard that would still demand that the activity in the forum State be “substantial and continuous.” Where the foreign defendant’s relationship with the forum is more attenuated, there is a less compelling claim for jurisdiction, and jurisdiction in such cases would remain on the prohibited list. From the European or “Brussels” perspective, this narrower area of prohibited general jurisdiction should be acceptable. To the extent that a broader category of general jurisdiction continues to be disfavored, enforcement of judgments based on such jurisdiction would remain within the prerogative of the enforcing forum. As a result, even if the line between the black and gray zones of jurisdiction is less than crys-

125. I have also offered this proposal before. See Silberman, Can the Hague Judgments Projects Be Saved?, supra note 9. The proposal does not contain an express reference to subsidiary corporations, but the activities of subsidiaries should be included here when the relationship of the subsidiary is so closely linked to the multinational enterprise by common ownership and control so as to be fairly regarded as a mere department or alter ego of the multinational enterprise. See Obligations of a Company Belonging to an International Group and Their Effect on Other Companies of that Group, in 65-I Annuaire de L’Institut de Droit International 191-326 (1993); Obligations of Multinational Enterprises and their Member Companies, in 66-II Annuaire de L’Institut de Droit International 463-73 (1996). I have attracted some supporters for this alternative. See Twitchell, supra note 23, at 210.

126. The argument is that such a foreign defendant’s level of activity is like that of an “insider.” Cf. Lea Brilmayer et al., A General Look at General Jurisdiction, 66 Tex. L. Rev. 721 (1988). See also Stein, Frontiers of Jurisdiction, supra note 93, at 381-86.
tal clear, the interest of other countries would be preserved to a limited degree at the enforcement stage.

The interests of the United States would also be protected by the proposed modification to Article 18. Under the proposal, general "doing business" jurisdiction would be permitted where the interests of the United States are the strongest—cases brought by habitually resident plaintiffs in a forum where the defendants have an extensive presence. However, general jurisdiction would be prohibited in two categories of cases where it now exists. One category involves plaintiffs not habitually resident in the United States; the other relates to a possible increase in the level of commercial activity that would now be required. As to the first, although it is true that formal jurisdiction does not turn on the residency or domicile of the plaintiff, most cases with a pattern of foreign plaintiff, foreign defendant and unrelated cause of action would be likely to force dismissal on grounds of forum non conveniens even if technical jurisdiction were sustained. Thus, any change to existing U.S. law would be minimal. With respect to the second category—the level of activity necessary for general jurisdiction—the proposed modification may in fact accurately capture the developing American jurisprudence in this area. The Supreme Court itself, in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, has imposed limits on the level of activity that will support general jurisdiction. And in *Asahi Metal Industry Co. v. Superior Court*, the Supreme Court superimposed a "reasonableness" standard on the exercise of judicial jurisdiction with particular regard to foreign defendants. In thinking about the constitutional limitations on gen-

127. The federal courts and most states in the United States recognize the doctrine of forum non conveniens. See generally GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 298 (3d ed., Kluwer 1996).

128. There is some suggestion that the Supreme Court may view the "doing business" jurisdiction as applicable only to corporations and not to individuals. In *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), where the Supreme Court upheld the constitutionality of "tag" jurisdiction, Justice Scalia's opinion, joined by three other Justices, dropped the following footnote: "It may be that whatever special rule exists permitting 'continuous and systematic' contacts, to support jurisdiction with respect to matters unrelated to activity in the forum applies only to corporations, which have never fitted comfortably in a jurisdictional regime based primarily upon 'de facto power over the defendant's person.'" Id. at 610 n.1 (internal citations omitted).


130. See Access Telecom, Inc. v. MCI Telecomm. Corp., 197 F.3d 694 (5th Cir. 1999) (rejecting general jurisdiction over Mexican company on the ground that activities of the foreign defendant fell short of due-process requirements, but finding specific jurisdiction over the defendant on the basis of claims that arose from defendant's Texas activity).


132. The "reasonableness" prong of the *Asahi* test has not been limited to foreign defendants. See Silberman, *Two Cheers, supra* note 81, at 760; Stephen B. Burbank, *Practice and Procedure:
eral jurisdiction, particularly with respect to foreign defendants, the residency of the plaintiff is an important factor. The modification proposed here for Article 18 is consistent with the kinds of limits on jurisdiction implicit in Asahi, but the proposed rule has the advantage of offering a clearer and more definitive standard.

A compromise along similar lines has been offered to resolve an impasse on another category of prohibited jurisdiction. The European Union has consistently insisted on eliminating “tag” jurisdiction; for most purposes the United States has been agreeable, but groups interested in pursuing litigation against war criminals, human rights violators, and Holocaust profiteers did not want to give up the possibility of bringing suit in the United States, where “tag” jurisdiction might offer the only opportunity. That compromise, as it appears in the June 2001 Draft, although still in brackets, would permit the assertion of jurisdiction, founded only on personal service in the forum, for an action claiming damages under national law based on conduct that constitutes: (a) genocide, a crime against humanity or a war crime; or (b) a serious crime under international law, provided that the State has exercised its criminal jurisdiction over that crime in accordance with an international treaty to which it is a party and the claim is for damages arising from that crime. Cases in this category would fall within the gray zone of jurisdiction—permitted under na-


133. See, e.g., Metropolitan Life Insurance Co. v. Roberston-Ceco Corp., 84 F.3d 560 (2d Cir. 1996), where the Second Circuit Court of Appeals applied the Asahi “reasonableness standard”—developed in the context of a specific jurisdiction case—to a case of general jurisdiction. One judge on the three-judge panel dissented, urging that the reasonableness inquiry be confined to the specific jurisdiction context until instructed otherwise by the Supreme Court. Id. at 577. But the panel majority in Metropolitan used the “reasonableness” test to protect an American defendant from suit in a sister state; the claim for imposing a reasonableness standard is considerably stronger in international litigation that involves a foreign country defendant.


135. See June 2001 Draft, supra note 4, at art. 18(3). This exception in the June 2001 version is narrower than the provision in the prior October 1999 Draft, which consisted of two variants, one of which included violations of fundamental rights established under international law. For a discussion of the October 1999 provision, see Nygh & Pocar, Report of the Special Commission, supra note 29, at 80-81.

136. A footnote indicates that the entire section (the whole of proposed paragraph 3) “is included in the text within square brackets to facilitate future discussion.” June 2001 Draft, supra note 4, at art. 18 n.124.

137. Language in brackets would tie the definition to that in the Statute of the International Criminal Court.

138. In the June 2001 Draft, sub-paragraph (b) “only applies if the party seeking relief is exposed to a risk of a denial of justice because proceedings in another State are not possible or cannot reasonably be required.” June 2001 Draft, supra note 4, at art. 18.
tional law but not required to be recognized or enforced in other Convention States. One difference between the human rights compromise and the suggestion for a “doing business” compromise is that in the human rights cases there is no requirement that the plaintiffs be habitual residents of the forum State.

C. The Lis Pendens and Forum Non Conveniens Provisions

The provisions on forum non conveniens and lis pendens, as reflected in the June 2001 Draft, represent a middle ground between the Anglo-American common law approach and that of Brussels/Lugano. As Professor Stephen Burbank explained, it illustrates “enlightened comparative procedural lawmakers.” Like earlier drafts, the June 2001 Draft addresses both lis pendens—that is, the possibility of staying an action in deference to another previously commenced action—and declinations of jurisdiction (akin to forum non conveniens).

The basic controversy about declinations of jurisdictions—forum non conveniens in Anglo-American parlance, which the civil law tradition generally rejects and the common law world increasingly embraces—have not yet been completely resolved. The June 2001 Draft includes—as did earlier drafts—a narrow provision for declining jurisdiction in “exceptional circumstances.” The Nygh-Pocar Report makes clear that Article 22 of the Hague Draft is different than the doctrine of forum non conveniens, and a forum may defer jurisdiction only if the other court actually assumes jurisdiction. Moreover, the conditions for the exercise of this discretion are much stricter than American concepts of forum non conveniens—in particular, the specific requirement that the initial forum be one that is clearly inappropriate.

139. See June 2001 Draft, supra note 4, at art. 21 (addressing lis pendens); id. at art. 22 (addressing forum non conveniens).
140. See Burbank, supra note 56, at 203, 206.
141. See June 2001 Draft, supra note 4, at art. 21.
142. See id. at art. 22. This Article is entitled “Exceptional Circumstances for Declining Jurisdiction.”
146. Under Article 22, Paragraph 1, the court may suspend its proceedings if in that case “it is clearly inappropriate for that court to exercise jurisdiction and if a court of another State has
Apart from its more general application of *forum non conveniens*, the United States has no formal *lis pendens* doctrine, either in domestic or international litigation;\(^{147}\) by contrast, the Brussels Convention/Regulation has a strict first-seised rule for the “same causes of action” and gives discretion only to a court second-seised to stay proceedings or to decline jurisdiction when related actions are brought in courts of different Member States.\(^{148}\) Like Brussels, the June 2001 Draft includes an article on *lis pendens* that applies to “proceedings based on the same causes of action” and adopts in general a first-to-file (first-seised) rule.\(^{149}\) But lessons learned from Brussels have led to modifications in the Hague version: the first-seised rule does not apply to actions requesting determinations of nonliability;\(^{150}\) and a court second-seised may proceed if the plaintiff has failed to pursue the action or if the court has not rendered a decision within a reasonable time.\(^{151}\) In addition, the Hague *lis pendens* rule departs from a rigid first-seised rule and includes a limited discretion, authorizing the court first-seised to decline to proceed if there is a more appropriate forum elsewhere.\(^{152}\) Like the more general provision for “declining jurisdiction” in Article 22, however, the circumstances for the exercise of that discretion must be “exceptional.”

The Hague Draft provisions on *lis pendens* and declinations of jurisdiction—along with the inclusion of the gray area for assuming jurisdiction—have moved the proposed Convention away from the model of Brussels/Lugano from which it originated. The discretion built into the Hague is particularly appropriate given the wide disparity of potential parties to this worldwide effort and the absence of any supranational tribunal to preside over its implementation. The Hague jurisdiction and is clearly more appropriate to resolve the dispute.” June 2001 Draft. supra note 4, at art. 22. The Report of the Special Commission stresses that the fact that another forum may be “clearly more appropriate” does not necessarily mean that the forum seised is itself “clearly inappropriate.” See Nygh & Pocar, Report of the Special Commission, supra note 29, at 90.


149. See June 2001 Draft, supra note 4, at art. 21(1).

150. See id. at art. 21(6).

151. See id. at art. 21(3).

152. See id. at art. 21(7).
Draft of these provisions reflects the blending of the quite different regimes of its constituents.

D. Can a Worldwide Hague Convention on Jurisdiction and Judgments Succeed?

The difficulties that the negotiators at the Hague have faced are largely the result of differences over appropriate jurisdictional reach, even if one believes that "jurisdiction" is just a masquerade for other criticisms about American litigation. Much has been learned from the efforts at the Hague. The range of countries and cultural and legal traditions make consensus on a wide range of required and prohibited bases of jurisdiction unfeasible. To that end, a retreat to a less ambitious convention should be welcomed. As this Article illustrates, there are a limited number of jurisdictional provisions where an allocation to either the required or prohibited list will engender little or no controversy. To the extent that consensus of that kind emerges, placement on the required or prohibited list is appropriate. However, as to those grounds on which there has been substantial opposition to a particular category of jurisdiction, that basis of jurisdiction should move to the gray list. This would mean that a judgment rendered on that ground would neither obligate enforcement in a Contracting State nor prevent enforcement by such State. It would also allow greater freedom by States to assert jurisdiction under their own domestic law regimes. Such an approach is reflected in the Draft Convention’s "human rights" compromise and in several of the alternatives dealing with choice of forum provisions in consumer and individual employment contracts. The modifications with respect to the general "doing business" jurisdiction proposed in this Article would further enlarge the area of permitted jurisdiction under national law. Indeed, a successful conclusion for the Convention is most likely if Convention States are accorded broad flexibility to develop their own jurisdictional regimes. Such an approach would also allow jurisdictional rules with respect to e-commerce and intellectual property to develop over time and would have the advantage of not restricting jurisdictional developments in these areas by creating an overly expansive list of prohibited jurisdiction.

153. For some of the difficulties presented by e-commerce and the internet, see Henry H. Perritt, Jr., Towards a Hybrid Regulatory Scheme for the Internet, 2001 U. Chi. Legal F. 215. For the impact of e-commerce on the Hague Judgments Project, see Haines, supra note 93. See also Stein, Jurisdiction in Cyberspace, supra note 97; Stein, Frontiers of Jurisdiction, supra note 93, at 389-99.

Even a limited convention would offer a foundation on which to build greater consensus about jurisdictional rules for transnational cases and international enforcement of judgments. The framework would then exist for a summary and expeditious international enforcement mechanism for cases grounded on a few “consensus” bases of jurisdiction. If foreign enforcement appeared to be necessary, lawyers would gravitate toward using one of the Convention’s accepted bases of jurisdiction. Lawyers could still bring suit using other bases of jurisdiction (as long as they were outside the prohibited list), but if they did so they would take their chances on having that judgment enforced elsewhere. The Convention could go even further by authorizing States to declare certain bases of gray area jurisdiction that would support judgments that their courts would regard as entitled to recognition. Such a provision would offer flexibility for maximizing recognition and enforcement between particular countries that share similar legal cultures and traditions with respect to jurisdictional regimes, and such declarations would create greater certainty with respect to enforcement and recognition.

A brief last word. Should the negotiations at the Hague derail, most will regard the Hague efforts as a great failure. Certainly, there will be disappointment all around with respect to the time, money, and energy spent and no formal product to show for it. But one should not lose sight of the important lessons that have been learned from the experience and the insights gained in attempting to understand the wide gap that separates common law and civil law approaches to these issues. Even a convention with quite limited parameters is a first step and is one worth striving for.

155. To cite one example, the efforts at the Hague have focused attention on the issue of recognition and enforcement of judgments and have stimulated the interest of the American Law Institute. The International Jurisdiction and Judgments Project of the ALI, which was initiated with a view to drafting proposed federal legislation to implement a successfully concluded Hague Convention, has turned its attention to drafting a federal statute on recognition and enforcement of foreign judgments in case the Hague negotiations fail. See American Law Inst., International Jurisdiction and Judgments Project: Discussion Draft (Mar. 29, 2002). For more on the ALI Project, see Linda J. Silberman & Andreas F. Lowenfeld, The Hague Judgment Convention—And Perhaps Beyond, in Law and Justice in a Multistate World, supra note 3, at 121-35; Silberman & Lowenfeld, A Different Challenge, supra note 11, at 645-47.