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# Comparative Method and International Litigation

Ronald A. Brand\*

Unlike most of the other subjects in the law school curriculum, Comparative Law is not a body of rules and principles. It is a *method*, a way of looking at legal problems. Strictly speaking, the term Comparative Law is a misnomer. It would be more logical to speak of the Comparative Method.<sup>1</sup>

## I. INTRODUCTION

If we apply comparative method to international litigation, what lessons may we learn? I suggest the answer depends on the *where*, the *what*, and the *how*. *Where* we stand when we look at the law matters. *What* law we look at matters. *How* we look at the law matters. Thus, I begin by revealing *where* I stand when I apply a comparative look at international litigation, *what* law I look at through this method, and *how* I propose to look at that law.

Each of us has the perspective of a participant in a given legal system. That perspective constitutes the *where* and is a common factor in comparative analysis. In addition to being trained in and practicing in the U.S. legal system, I have had the privilege of being involved for over twenty-five years in the work of the Hague Conference on Private International Law (“HCCH”). I have been a member of the U.S. Delegation to the Hague Conference for the Working Groups, Special Commissions, and Diplomatic Sessions that produced both the 2005 Hague Convention on Choice of Court Agreements and the 2019 Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters. For the first half of that period of time, until the conclusion of the 2005 Convention, I had the further privilege of working closely with one of the great comparative method scholars of the now-past generation, Professor Arthur von Mehren.<sup>2</sup> While I was never able to take a formal course with Arthur, our work together that culminated in the Choice of Court Convention was, for me, the equivalent of a most wonderful seminar—as it was for many of those who shared the opportunity to work

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1. RUDOLF B. SCHLESINGER ET. AL., *COMPARATIVE LAW* (3d ed. 1970). While I was not fortunate enough to study “Comparative Law” under Rudi, he was my professor for Civil Procedure—a basic course in U.S. law, during which every one of his students came to understand the importance of comparative method for studying the law. In the 1960s and early 1970s, the vast majority of students at Cornell Law School took Professor Schlesinger’s course in Comparative Law in their second year of law school, quite often reporting that it was in that course that they really came to understand U.S. civil procedure. Unfortunately, mandatory retirement policies of the time resulted in Professor Schlesinger leaving Cornell after my first year of law school, and my Comparative Law course (albeit a good one) was not the course taught by Professor Schlesinger. Taking my lead from Rudolph Schlesinger, I chose to title my comments using “comparative method” rather than “comparative law.”

2. Elaine McArdle, *Arthur T. von Mehren: A Comparative Scholar Beyond Compare*, HARVARD LAW TODAY (Apr. 23, 2006), <https://today.law.harvard.edu/arthur-t-von-mehren-1922-2006/>.

with Arthur on that project. Beginning with Arthur's initial paper,<sup>3</sup> the project originally aimed at producing a global convention on jurisdiction and judgments recognition resulted in the 2005 and 2019 Conventions. This allowed me to see the process of comparative development of the law in a very special way. It is from that vantage point that this Article must be understood.

I turn next to *what* law I propose to study comparatively. The panel from which this Article originated had three speakers assigned three topics: litigation, arbitration, and mediation. It might be logical given these topics to compare each of these three areas of the law with the other two. That is not my approach here.

Though I have taught a course titled transnational litigation, my bread and butter has been a course in international business transactions ("IBT"). But, in part because of my "seminar" with Professor von Mehren during the Hague negotiations, my IBT course is largely built around rules of jurisdiction, applicable law, and the recognition and enforcement of judgments. These are the three pillars of private international law, making up what in the United States is taught under the rubric of conflict of laws. The law of jurisdiction, applicable law, and judgments recognition is probably most often taught in a litigation context, and that would perhaps be most appropriate given my topic and title. Nonetheless, that law has as much or more importance to the transaction planning lawyer as to the litigator, and it affects my focus here for comparative study of developments both in the Hague Conference process and in national (and regional) legal systems during the negotiation of the two treaties with which I have been involved.

One factor that is perhaps most important to the transactional use of the law, which then becomes quite relevant at the litigation stage, is party autonomy: the extent to which the law allows, and the extent to which private parties take advantage of, their ability to determine where jurisdiction exists to hear a dispute, as well as what law will apply to that dispute. Party autonomy is important to private international law, and state limitations on party autonomy often determine the ability of private parties to enter into mutually beneficial relationships.

Finally, a word about the *how* in my comparative analysis. This really is the *method* question. At its most basic level, comparative method in the study of law brings us to the question: "How does the law of country X compare to the law of country Y?" Such an approach can be very useful, both in enhancing one's understanding of the law of either country being compared and in understanding assumptions fundamental to any legal system. My approach here, however, is a bit different and results from where I stand when I engage in this comparative analysis. I thus will look not only at domestic law, but also at treaties and other international legal instruments—the comparative evolution of the *law*. Moreover, I will look at and compare legal systems as well as legal rules—the comparative evolution of the institutions that *make* the law.

When considering the 2005 and 2019 Hague Conventions, it is useful first to engage in a comparison of the most influential legal systems at the start of the negotiations. The differences resulting from that comparison ultimately affected the focus of the negotiations and the text of the resulting legal instruments and thus are examined in Section II. In Section III, I then discuss the development over the

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3. Arthur T. von Mehren, Recognition Convention Study: Final Report, accompanying Letter of May 5, 1992 from Edwin D. Williamson, Legal Adviser, U.S. Department of State, to Georges Droz, Secretary General, The Hague Conference on Private International Law (May 5, 1992) (distributed with Hague Conference document L.c. ON No. 15 (92)).

relevant time of the European Union (“E.U.”) legal institutions that affected the law on jurisdiction and the recognition of foreign judgments, followed in Section IV by a comparison of developments in the law itself in both the E.U. and the U.S. Finally, in Sections IV and V, I compare the law in the two legal systems and provide conclusions based on those comparisons, including thoughts about how the institutions and laws in the two systems affected negotiations at the Hague Conference.

## II. THE CONTEXT: THE HISTORY OF THE HAGUE CONFERENCE NEGOTIATIONS<sup>4</sup>

### *A. From the First Request to the 2005 Choice of Court Convention*

In order to understand more clearly *where* I stand when I view the law of international litigation, it is necessary to provide a brief history of the negotiations at the HCCH on matters of jurisdiction and judgments recognition.

In 1992, the United States proposed to the Hague Conference that it take up the negotiation of a multilateral convention on the recognition and enforcement of judgments.<sup>5</sup> After consideration by a Working Group in October of 1992,<sup>6</sup> the Seventeenth Session of the Hague Conference referred the matter to Special Commission in May of 1993,<sup>7</sup> and in October of 1996, it was decided to include the matter on the Agenda of the Nineteenth Session of the Hague Conference.<sup>8</sup> Formal negotiations then occurred at Special Commission meetings in June of 1997,<sup>9</sup> March of 1998,<sup>10</sup> and November of 1998.<sup>11</sup> The November 1998 session produced a draft document, which was considered further during two weeks in June and one week in October of 1999, resulting in a Preliminary Draft Convention text.<sup>12</sup>

4. See RONALD A. BRAND & PAUL M. HERRUP, *THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS (ADVENTURES IN TREATY INTERPRETATION)* 6–10 (2008).

5. Letter of May 5, 1992 from Edwin D. Williamson, Legal Adviser, U.S. Department of State, to Georges Droz, Secretary General, The Hague Conference on Private International Law (May 5, 1992) (distributed with Hague Conference document L.c. ON No. 15 (92)).

6. *Conclusions of the Working Group Meeting on Enforcement of Judgments*, HCCH, Doc. L.c. ON No. 2 (93).

7. Peter H. Pfund, *HCCH: Final Act of the 17th Session, Including the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption*, 32 I.L.M. 1134 (1993).

8. HCCH, *Proceedings of the Eighteenth Session 30 September to 19 October*, Annex to the Minutes of the Opening Session 21 (1999), <https://assets.hcch.net/docs/9a3b542c-4d99-403a-9fbd-c40f537b6ff0.pdf>.

9. Catherine Kessedjian, *Synthesis of the Work of the Special Commission of June 1997 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters*, HCCH, Prel. Doc. No. 8 (Nov. 1997), <https://assets.hcch.net/docs/ecc45930-f5a1-4bd1-b94c-420c44a05954.pdf>.

10. See Catherine Kessedjian, *Synthesis of the Work of the Special Commission of March 1998 on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters* 11, HCCH, Prel. Doc. No. 9 (July 1998), [https://assets.hcch.net/upload/wop/jdgm\\_pd9.pdf](https://assets.hcch.net/upload/wop/jdgm_pd9.pdf).

11. HCCH, *Special Commission on International Jurisdiction and the Effects of Foreign Judgments in Civil and Commercial Matters* 1, Working Document No. 144 (Nov. 1998), <https://assets.hcch.net/docs/11be05729-3132-43be-89c3-82be3fdb2224.pdf>.

12. The text of the Preliminary Draft Convention is available at <http://www.hcch.net/e/conventions/draft36e.html>.

The Diplomatic Conference, originally contemplated for fall 2000, was delayed after concerns expressed by the U.S. This resulted in a decision to split the Diplomatic Conference into two parts. The first part of the Conference was held in June 2001, resulting in a new Interim Text.<sup>13</sup> Problems in reaching substantial agreement resulted in a decision in April of 2002, by Commission I of the Nineteenth Session of the Conference, to establish an informal working group to consider the best path forward. In March 2003, that group produced a draft text of a choice of court convention.<sup>14</sup> After further Special Commission sessions, a Diplomatic Conference, held as Commission II of the Twentieth Session of the HCCH in June of 2005, completed the 2005 Convention on Choice of Court Agreements.<sup>15</sup>

The Hague Convention on Choice of Court Agreements went into effect for Mexico and the E.U. (for twenty-seven of its Member States) on October 1, 2015;<sup>16</sup> for Singapore on October 1, 2016; for Montenegro on August 1, 2018; and for Denmark on September 1, 2018.<sup>17</sup> The People's Republic of China, Ukraine, and the U.S. have signed but have not ratified the Convention.<sup>18</sup>

The Choice of Court Convention contains three basic rules: Article 5 provides that a court chosen in an exclusive choice of court agreement shall have exclusive jurisdiction; Article 6 provides that a court not chosen shall defer to the chosen court; and Article 8 provides that the courts of all contracting states shall recognize and enforce judgments from a court chosen in an exclusive choice of court agreement, subject to an explicit list of bases for non-recognition found in Article 9.<sup>19</sup> Thus, the 2005 Convention is both a jurisdiction convention—limited to one basis of jurisdiction, consent to exclusive dispute settlement in the courts of one state—and a judgments convention—providing for circulation of judgments from cases based on exclusive choice of court agreements.

### *B. Further Work and the Judgments Convention*

In October 2011, the Council on General Affairs and Policy of the Hague Conference established an Experts' Group to consider the resumption of the Judgments Project.<sup>20</sup> There was a desire on the part of some delegations to return

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13. Commission II: Jurisdiction and Foreign Judgments in Civil and Commercial Matters, *Summary of the Outcome of the Discussion in Commission II of the First Part of the Diplomatic Conference 6–20 June 2001*, Interim Text (June 20, 2001), [https://assets.hcch.net/upload/wop/jdgm2001draft\\_e.pdf](https://assets.hcch.net/upload/wop/jdgm2001draft_e.pdf).

14. HCCH, *Preliminary Result of the Work of the Informal Working Group on the Judgments Project*, Prel. Doc. No. 8 (Mar. 2003) (corrected), [https://assets.hcch.net/upload/wop/genaff\\_pd08e.pdf](https://assets.hcch.net/upload/wop/genaff_pd08e.pdf).

15. HCCH: *Final Act* [of the Twentieth Session] (June 30, 2005), <https://assets.hcch.net/upload/finalact20e.pdf>. The Final Act included a modification to the Hague Conference Statute allowing Regional Economic Integration Organizations (the E.U.) to become Members of the Conference. The text of the Choice of Court Convention, and a documentary history, are available on the Hague Conference website at <https://www.hcch.net/en/instruments/specialised-sections/choice-of-court>.

16. *Id.*

17. *Id.*

18. *Id.*

19. For a more complete discussion of the Choice of Court Convention, see BRAND & HERRUP, *supra* note 4.

20. See *The Judgments Project*, THE WORLD ORG. FOR CROSS-BORDER CO-OPERATION IN CIVIL & COMMERCIAL MATTERS (2020), <https://www.hcch.net/en/projects/legislative-projects/judgments>.

to the original project and again draft a convention that would deal both with direct jurisdiction in the court of origin and with the recognition and enforcement of judgments.<sup>21</sup> In 2012, the Council split these two objectives when it established a Working Group to prepare proposals for a judgments convention and directed the Experts' Group to give further study to a separate jurisdiction convention.<sup>22</sup> The Working Group completed a Proposed Draft Text of a judgments convention in 2016, and the Council established a Special Commission to move the text forward.<sup>23</sup> The Experts' Group was instructed to move forward on a jurisdiction convention only after the Judgments Convention text was concluded.<sup>24</sup> Special Commission meetings for a Judgments Convention were held in June 2016, February 2017, November 2017, and May 2018. A Diplomatic Session began on June 18, 2019 and concluded on July 2 with the signing of the Final Act creating the Hague Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters.<sup>25</sup>

### III. THE CONTEXT: THE DEVELOPMENT OF E.U. LEGAL INSTITUTIONS FROM 1992 TO 2019

Like Rudolf Schlesinger and Arthur von Mehren, I will here consider the traditional comparative method distinction between common law and civil law legal systems. While other types of legal systems do, of course, exist, and should be considered in any comprehensive general study, the negotiations at the Hague Conference demonstrated a predominance of importance of the U.S. common law legal system and the European civil law legal system. While other civil law states tended to line up behind continental Europe on most issues, it was not always true, however, that other common law states lined up behind the U.S. In particular, the United Kingdom ("U.K."), as a late-joining Member State of the European Economic Community (later called the "European Community" and now the "European Union"), tended to align more closely with its continental European civil law partners in the legal instruments that initially were written before the U.K. joined the European experiment.

A comparison of the development of the law of jurisdiction and the law of judgments recognition, as well as developments in legal institutions, from 1992 until 2019 demonstrates both convergence and divergence in legal systems. Those developments help us understand the choices made in the course of the negotiation of both the 2005 and 2019 Conventions and consider what steps, if any, might be appropriate following the 2019 Convention.

#### *A. The E.U. Picture in 1992*

When the Hague negotiations began in 1992, "Europe" as an entity was not a player in the negotiations themselves. The original six Member States of the

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21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters was the Final Act of the Diplomatic Session. Available at <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> (last visited Mar. 28).

European Economic Community,<sup>26</sup> established under the Treaty of Rome in 1958, had been joined by Denmark, Ireland, and the United Kingdom in 1971, Greece in 1980, and Spain and Portugal in 1984.<sup>27</sup> These were the Member States when the Treaty of Maastricht on European Union (“TEU”) was signed on February 7, 1992 and then entered into force on November 1, 1993.<sup>28</sup> They were all Member States of the HCCH when the jurisdiction and judgments negotiations began in 1992 and, along with the sixteen states destined to join the E.U. later,<sup>29</sup> participated as individual Hague Conference Member States in the negotiations.<sup>30</sup>

### *B. The Evolution of E.U. Competence<sup>31</sup>*

In order to understand the development of the law of jurisdiction and judgments recognition in Europe during the course of the Hague negotiations, it is also necessary to understand the evolution of European institutions—particularly during that period, but also dating back to the creation of the European Economic Community (“EEC”). When the EEC was created in 1957, the original six Member States realized that private international law plays an important role in, and thus overlaps with, trade law. This realization is demonstrated in particular in Article 220 of the Treaty of Rome, a treaty otherwise focused primarily on the development of rules to enhance the free movement of goods, services, capital, and people.<sup>32</sup> Article 20 declared that the Member States of the Community should:

[E]nter into [further] negotiations with each other with a view to securing for the benefit of their nationals . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.<sup>33</sup>

A decade later, the EEC Member States concluded the 1968 Brussels Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,<sup>34</sup> carrying out the mandate contained in Article 220

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26. Belgium, France, Germany, Italy, Luxembourg, and The Netherlands. THE HISTORY OF THE EUROPEAN UNION, [https://europa.eu/european-union/about-eu/history\\_en](https://europa.eu/european-union/about-eu/history_en) (last visited Mar. 3, 2020).

27. *Id.*

28. *Id.*

29. Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovak Republic, and Slovenia joined in 2004; Bulgaria and Romania joined in 2007; and Croatia joined in 2013. *Id.*

30. For the dates on which each of these states became a Member of the Hague Conference, see *Status Table*, Statute of the HCCH, <https://www.hcch.net/en/instruments/conventions/status-table/?cid=29> (last updated Mar. 4, 2020).

31. Portions of this Section are based on Ronald A. Brand, *Of Magnets and Centrifuges: The U.S. and E.U. Federal Systems and Private International Law*, in *COMPARATIVE FEDERALISM, INSTITUTIONAL COMPLEXITY, AND POLICY CHOICE* (Jae-Jae Spoon & Nils Ringe eds., forthcoming 2020).

32. Treaty of Rome, art. 220, Mar. 25, 1957, 294 U.N.T.S. 126.

33. *Id.* at art. 293 (ex art. 220) [hereinafter TEC] (establishing the European Community). The current version of the Treaty of Rome, the Treaty that established the European Community, can be found at O.J. 321E/37, 29 Dec., 2006, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.CE.2006.321.01.0001.01.ENG&toc=OJ:C:2006:321E:TOC>.

34. European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention), concluded September 27, 1968, 41 O.J. 27/1 (EC) (consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the 1996 accession of the



the Treaty of Rome.<sup>35</sup> The Brussels Convention recognized the importance of jurisdictional decisions in the process of recognition of judgments, ultimately providing for both rules of direct jurisdiction in the court of origin and rules on the recognition and enforcement of judgments rendered in other EEC Member States.<sup>36</sup>

The Treaty of Amsterdam, concluded in 1997,<sup>37</sup> provided in Article 61 that “the Council shall adopt . . . measures in the field of judicial cooperation in civil matters as provided for in Article 65.”<sup>38</sup> Article 65 then stated that this authority existed for purposes of service of process, taking of evidence, the recognition of judgments, rules of conflict of laws and jurisdiction, and rules of civil procedure.<sup>39</sup> Thus, while Article 220 of the Treaty of Rome had addressed one element of private international law (the recognition of foreign judgments) by prodding the Member States to take an international law (treaty) approach to the matter, the Treaty of Amsterdam addressed the full package of private international law, transferring competence for these issues from the Member States to the E.U. institutions, and addressing the result through internal E.U. legislation.<sup>40</sup>

The Treaty of Amsterdam led to the creation of a number of regulations and directives that moved private international law rules from Member State codes of private international law to E.U. regulations and directives.<sup>41</sup> While there was debate about whether this process of centralized *internal* rules of private international law would also apply to the development of rules regarding *external* relations, that doubt was eliminated with the 2003 *Lugano Convention* opinion of the European Court of Justice, which held that authority for such matters resided exclusively with the institutions in Brussels—at least for the jurisdiction and judgments matters dealt with in the revised Lugano Convention.<sup>42</sup> A 1999 Opinion of the European Council Legal Service stated:

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Republic of Austria, the Republic of Finland, and the Kingdom of Sweden) [hereinafter Brussels Convention].

35. TEC, *supra* note 33, at art. 293.

36. For a discussion of the rationale for including private international law rules under the rubric of a trade law regime, see Ronald A. Brand, *Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law*, in *THE ECONOMIC ANALYSIS OF INTERNATIONAL LAW* 592 (J. Bhandari & A. O. Sykes eds., 1998). For a more personal description of the evolutionary developments in the E.U. on this matter, see Brand, *supra* note 31.

37. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1.

38. TEC, *supra* note 33, at art. 61 (ex art. 73i).

39. *Id.* at art. 65 (ex art. 73m).

40. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities, and Certain Related Acts, *supra* note 37.

41. See Aude Fiorini, *The Evolution of European Private International Law*, 57 INT’L & COMP. L.Q. 969, 973 (2008).

42. See generally Case 1/03, Opinion pursuant to Article 300(6) EC, 2003 E.C.R. I-1145. The opinion procedure under Article 300(6) is used occasionally and is separate from the normal “case” procedure by which most matters reach the European Court of Justice. The Lugano Convention originally was developed to extend the rules of the Brussels Convention beyond the confines of the European Community to the Member States of the European Free Trade Association (EFTA). Completed in 1988, its provisions generally track those of the Brussels Convention, setting up a parallel regime for jurisdiction and judgments recognition. As most of the EFTA Member States have not joined the E.U., the importance of the Lugano Convention has been diminished. It remains in effect for relationships between E.U. Member States and Iceland, Norway, and Switzerland. With the changes to internal rules brought about by the Brussels I Regulation, parallel changes were proposed to the Lugano Convention. Because competence for those rules internally had shifted in the interim from the E.U. Member States to the Community institutions, there was lack of clarity on whether the Member States or the Community held the external competence to become a party to the Lugano Convention. This question was submitted



[O]nce the Community has exercised its internal competences adopting positions by which common rules are fixed [pursuant to Article 65 of the ECT], the Community competence becomes exclusive, in the sense that the Member States lose the right to contract, individually and even collectively, obligations with third countries which affect the said rules.<sup>43</sup>

Relying upon this language, as well as the 1971 *ERTA/AETR* decision,<sup>44</sup> as further developed in the *Open Skies* judgments of 2002,<sup>45</sup> the Court stated that:

[W]henver the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts<sup>46</sup> . . . [and t]he same applies, even in the absence of any express provision authorising its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation in a given area.<sup>47</sup> . . . [Thus, t]he conclusion of the new Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters . . . falls entirely within the sphere of exclusive competence of the European Community.<sup>48</sup>

The *Lugano Convention* Opinion laid to rest any claim of remaining competence with the Member States for external relations on matters of jurisdiction and the recognition and enforcement of judgments, as well as, effectively, for any other area of private international law and judicial cooperation covered by TEC Article 65.

### C. E.U. Competence and the Hague Negotiations

At the Hague Conference, this evolution of competence transfer played out in the way the text of the Choice of Court and Judgments Conventions were negotiated. While the Hague process had begun in the early 1990's with each current and future E.U. Member State playing an active and separate role in the negotiations, this changed as competence moved to the E.U. institutions.

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to the European Court of Justice for clarification). See also Case 01/03 Opinion pursuant to Article 300(6), 2003 E.C.R. I-1145 at ¶¶ 17–19 (an explanation of the Lugano Convention); A. Borrás, *The Effect of the Adoption of Brussels I and Rome I on the External Competences of the EC and the Member States*, in ENFORCEMENT OF INTERNATIONAL CONTRACTS IN THE EUROPEAN UNION 99–100 (J. Meeusen & M. Pertegas, G. Straetmans eds., 2004).

43. See Borrás, *supra* note 42.

44. Case 22/70, Judgment of 31 Mar. 1971, Comm'n v. Council [1971] E.C.R. 263 (European Rail Transport Agreement (ERTA/AETR) Case) (“AETR” is the French acronym).

45. Case C-467/98, Comm'n v. Denmark, 2002 E.C.R. I-9519; Case C-468/98 Comm'n v. Sweden, 2002 E.C.R. I-9575; Case C-469/98, Comm'n v. Finland, 2002 E.C.R. I-9627; Case C-471/98, Comm'n v. Belgium, 2002 E.C.R. I-9681; Case C-472/98 Comm'n v. Luxembourg, 2002 E.C.R. I-9741; Case C-475/98, Comm'n v. Austria, 2002 E.C.R. I-9797; Case C-476/98, Comm'n v. Germany, 2002 E.C.R. I-9855.

46. Case C-467/98, Comm'n v. Denmark, 2002 E.C.R. I-9519, I-9556–57, ¶ 82.

47. *Id.*

48. *Id.*

Interestingly, the private international law experts in the Hague Conference seemed quite unaware of any planned transfer of competence being negotiated by the trade lawyers in Brussels.<sup>49</sup> The “observers” from the European Commission who had sat in the back of the room became European Council personnel sitting primarily with the delegation of the Member State then holding the Presidency of the Council, and ultimately (after the *Lugano* Opinion) to European Commission personnel sitting with the Member State holding the Presidency, but controlling the negotiations.<sup>50</sup> Each morning, the E.U. Member State and E.U. institution delegates would “coordinate” before negotiations began to determine who would speak on what issues and what their position would be. Thus, what began with as many as twenty–eight Hague Conference Member States espousing as many as twenty–eight positions (although generally in line with one another) turned to a single voice representing the entire E.U.

The Final Act of June 30, 2005, which concluded the Hague Convention on Choice of Court Agreements, also included an amendment to the Statute of the HCCH, authorizing Conference membership not only by states but also by Regional Economic Integration Organizations (i.e., by the European Union).<sup>51</sup> This allowed the E.U. to become a party to the Choice of Court Convention directly, as well as a Member of the Hague Conference, making the Convention effective in all of the E.U. Member States (except Denmark and the United Kingdom).<sup>52</sup> When the later negotiations began on a Judgments Convention, the E.U. delegates represented the E.U. as a full Member of the Hague Conference.

One of the results of this evolution in competence was a very close correlation between the internal E.U. rules on jurisdiction and judgments recognition found in the Brussels I Regulation and the proposals made by the E.U. (and its Member States) for rules in the conventions being negotiated at the Hague Conference. Thus, for comparison purposes, it is useful to follow the development of the law on both jurisdiction and judgments recognition in the E.U. and the U.S. during the period of the negotiations. Such a process of comparative study is also useful in assessing whether, after completion of a Choice of Court Convention and a Judgments Convention, it makes sense to return to efforts to adopt global rules on direct jurisdiction as well.

#### *D. The Evolution of E.U. Legal Instruments on Jurisdiction and Judgments Recognition*

The 1968 European Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Brussels I Convention) responded to Article 220 of the Treaty of Rome by setting forth rules in Member State courts applicable to jurisdiction in cases involving foreign defendants and to the recognition of judgments from the courts of other Member States.<sup>53</sup> This set of rules for both direct jurisdiction and judgments recognition has

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49. See Brand, *Of Magnets and Centrifuges*, *supra* note 31.

50. *Id.*

51. *Id.*

52. *Id.*

53. See Council 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1998 O.J. (C 27) 3, 5–25 (consolidated version).

largely carried forward into the 2001 Brussels I Regulation and the 2012 Brussels I (Recast) Regulation.

#### IV. THE CONTEXT: E.U. AND U.S. LAW ON JURISDICTION AND THE RECOGNITION OF JUDGMENTS

As the discussion above indicates, there was dramatic evolution of the context for the rules on jurisdiction and judgments within Europe during the course of the Hague negotiations that led to the Choice of Court and Judgments Conventions. Understanding that context aids in understanding the developments in the law itself, to which I now turn.

##### *A. Jurisdiction*

##### *1. The European Union*

The current system of European Union law governing jurisdictional rules, in particular when a case involves a defendant from another E.U. Member State, provides a mostly civil law comparison with U.S. jurisdiction rules. That system is now codified in a Community Regulation commonly referred to as the Brussels I (Recast) Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.<sup>54</sup> The Brussels I (Recast) Regulation amended the Brussels I Regulation of 2001 and became effective on January 10, 2015.<sup>55</sup> The jurisdictional rules are found in Chapter II of the Regulation, with Chapter III covering issues of recognition and enforcement.<sup>56</sup>

The jurisdictional rules found in Chapter II of the Brussels I (Recast) Regulation begin with the rule of general jurisdiction found in Article 4: “persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.”<sup>57</sup> This provides the foundation of jurisdiction under the Brussels system. The important personal nexus is domicile, and a defendant may be sued in his state of domicile on any claim, no matter where that claim arose.<sup>58</sup>

Article 5 of the Brussels I (Recast) Regulation limits the available bases of jurisdiction when suing a defendant domiciled in a Member State to those found in Chapter II of the Regulation.<sup>59</sup> It also (by reference to an Annex) specifically prohibits suit on bases of jurisdiction that exist in Member States but are considered to be exorbitant under E.U. law.<sup>60</sup> Article 6 then operates effectively to discriminate

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54. See generally Regulation (E.U.) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1, 1–32 (current codification of E.U. law governing jurisdiction rules that is sometimes referred to as the “Brussels Ibis Regulation”).

55. *Id.*

56. *Id.* at 7–17.

57. *Id.* at 7.

58. *Id.*

59. *Id.*

60. See Regulation (E.U.) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2012 O.J. (L 351) 1, 7.

against defendants domiciled outside the E.U. by specifically allowing jurisdiction based on those exorbitant national law bases of jurisdiction and extending them to all plaintiffs domiciled in the state in which the action is brought.<sup>61</sup>

While the general jurisdiction rule in Article 4 is found at the beginning of the Brussels I (Recast) Regulation, the hierarchy of jurisdictional rules is not best understood by reading from the start to the end of the Regulation. Rules found early in the Regulation often can be trumped by rules located at a later point in the text. The general hierarchical structure of the convention is as follows:

1. Article 24 provides for exclusive jurisdiction in certain types of cases, usually dealing with property rights that are territorial in nature and creating jurisdiction in the state in which the property is located or created. If such exclusive jurisdiction exists, then no other rule need be consulted.
2. Articles 10–23 provide special rules designed to protect the party considered to be at a negotiating disadvantage in insurance (Arts. 10–17), consumer (Arts. 17–19), and employment (Arts. 10–23) contracts. These rules generally allow the “weaker” party to sue in its home court and prohibit pre-dispute choice of court agreements.
3. Article 25 provides respect for party autonomy (except in insurance, consumer, and employment contracts) by stating that, when one or more of the parties is domiciled in a Member State, the court chosen by agreement of the parties shall have exclusive jurisdiction.
4. If neither the exclusive jurisdiction rules of Article 24, nor the “prorogation” rule of Article 25, applies, and the matter does not involve an insurance, consumer, or employment contract, then jurisdiction always exists under Article 4 in the courts of the state of the defendant’s domicile.
5. Articles 7–9 provide “special jurisdiction” rules that allow suit to be brought in a forum additional to that of the defendant’s state of domicile. Article 8(1) deals with jurisdiction over multiple defendants and authorizes jurisdiction over a foreign defendant domiciled in the E.U. without other connection to the forum state, so long as one of the other defendants is subject to jurisdiction under another provision of the Regulation. Article 9 is limited to jurisdiction over claims involving the use or operation of a ship.

The structure of the Regulation makes Article 7 the most important source of special jurisdiction rules that authorize jurisdiction in a court other than one in the state in which the defendant is domiciled. This, of course, generates a certain level of forum shopping by allowing the plaintiff a choice of where to bring the suit if any one or more of the seven separate jurisdictional provisions of Article 7 applies. Each of those seven provisions generally requires a connection between the forum

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61. *Id.*

state and the cause of action. They provide for special jurisdiction in matters of contract; tort; civil claims in criminal proceedings; recovery of cultural objects; disputes arising out of a branch, agency of establishment; trusts; and cargo salvage.<sup>62</sup>

The Brussels I (Recast) Regulation thus creates a relatively clear set of rules when a European defendant is involved. They begin with general jurisdiction at the state of the domicile of the defendant and add special jurisdiction rules based on fairly rigid court–claim connections. The rules found in the Brussels I (Recast) Regulation are, for the most part, the same as those which existed under the Brussels I Convention at the outset of the Hague negotiations in 1992. Like the Regulation, the rules of jurisdiction in most Member States are codified in a manner that is generally clear and centralized.

While the Regulation is exclusive and exhaustive (i.e., it provides the only jurisdictional rules available when a defendant is domiciled in another Member State, and no other basis of jurisdiction may be asserted as to those defendants), other basis of jurisdiction which exist in Member States (but which are thus considered to be exorbitant in the intra–European context) remain available for use against defendants domiciled outside the E.U.<sup>63</sup> In addition to these rules of exorbitant jurisdiction that remain applicable to external defendants under Articles 5 and 6, the other jurisdictional rules in the Brussels I Regulation generally exist in each Member State as applicable against non–Member State defendants—either as a result of effective restatement of those provisions or through blanket incorporation.<sup>64</sup> Thus, defendants from outside the E.U. are effectively subject to the rules of the Regulation, as well as additional plaintiff–friendly jurisdictional provisions of national law. Examples of some of the exorbitant jurisdiction rules excluded from application against defendants domiciled in E.U. Member States are Article 14 of the French Civil Code,<sup>65</sup> which provides for jurisdiction based on the nationality of the plaintiff, and Article 23 of the German Code of Civil Procedure,<sup>66</sup> which provides for general jurisdiction over a defendant as a result of the presence of any property of that defendant in the forum district (no matter what the value).

## 2. Jurisdiction: The United States

Compared to the European Union, jurisdictional rules in the United States have seen rather dramatic change from 1992 to the present. In order to understand those changes, a brief bit of background is helpful.

The question of personal jurisdiction in U.S. courts begins with the application of state “long–arm” statutes that, like the Brussels regime in Europe, set out the basic rules of jurisdiction in each state. Even in federal court, the jurisdiction statute

62. *Id.*

63. *Id.*

64. See, e.g., Andrea Girardina, *Law Reforming the Italian System of Private International Law*, 35 INT’L LEGAL MATERIALS 760 n.218 (1996) (English trans.) (information regarding Articles 3 and 4 of the 1995 law).

65. CIVIL CODE art. 14 (Fr.). See also CIVIL CODE art. 14 (Belg.); C. CIV. art. 14 (Lux.) (which provide for similar rules as the French Code); Kevin M. Clermont & John R.B. Palmer, *Exorbitant Jurisdiction*, 58 ME. L. REV. 474, 483 (2006) (“The French are not alone in basing their brand of exorbitant jurisdiction on the plaintiff’s nationality.”).

66. BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], § 23 (Ger.), translation at [https://www.gesetz-im-internet.de/englisch\\_zpo/englisch\\_zpo.html#p0075](https://www.gesetz-im-internet.de/englisch_zpo/englisch_zpo.html#p0075) (last visited May 5, 2020).

of the state in which the federal district court sits governs personal jurisdiction in most cases as a result of the Federal Rules of Civil Procedure “borrowing” the state statute.<sup>67</sup> This prevents different jurisdictional results when a case may be brought in either state or federal court.

If there is jurisdiction under the state statute, then the court follows with a determination of whether that jurisdiction nonetheless complies with the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution. The Due Process Clauses provide limitations on the federal and state governments. They exist to protect individuals from excessive exercises of governmental authority.<sup>68</sup> In a discussion of judicial jurisdiction, this means that Due Process restricts the extent to which courts may exercise jurisdiction over a defendant.<sup>69</sup>

In the 1877 case of *Pennoyer v. Neff*,<sup>70</sup> the U.S. Supreme Court determined that the Fourteenth Amendment Due Process Clause—the one most often applied in cross-border litigation—requires a territorial approach to personal jurisdiction over a defendant, looking first to whether the defendant is within the territory of the forum state.<sup>71</sup> Later Supreme Court cases developed the contours of Due Process jurisdictional analysis. In 1940, *Milliken v. Meyer*<sup>72</sup> determined that domicile within the forum state was alone sufficient to establish general jurisdiction, whether or not the defendant was currently present within the state. In the 1945 case of *International Shoe Co. v. Washington*,<sup>73</sup> the Court recognized that the development of the corporate form of legal person, along with modern methods of transportation and communication, required the recognition that corporations may well be “present” in multiple states when they were engaged in continuous and systematic business activity in each of those states so as to create the minimum contacts necessary to satisfy due process. In the 1980 case of *World-Wide Volkswagen Corp. v. Woodson*,<sup>74</sup> the Court reasserted due process as a limitation on jurisdiction where the defendant had neither presence within the forum state nor any activities in or directed at that state. In the 1984 case of *Helicopteros Nacionales de Colombia, S.A. v. Hall*,<sup>75</sup> the Court for the first time clearly delineated between general and specific jurisdiction, and in 1985 the Court applied the due process minimum contacts analysis to contractual relationships in *Burger King Corp. v.*

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67. Jurisdiction in the federal courts is governed by Rule 4(k) of the Federal Rules of Civil Procedure. This Rule provides three principal jurisdictional authorizations: Rule 4(k)(1)(A) authorizes a district court to borrow the jurisdictional powers of state courts in the state where it is located; Rule 4(k)(1)(C) confirms the availability of any applicable federal statute granting personal jurisdiction; and Rule 4(k)(2) grants district courts personal jurisdiction to the limits of the Fifth Amendment due process clause in certain federal question cases. GARY B. BORN & PETER B. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN U.S. COURTS* 193 (4th ed. 2007). This most often results in the federal court “borrowing” the state statute under Rule 4(k)(1)(A). *Id.* at 193–219.

68. See *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (finding that “history reflects the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta[,] . . . was intended to secure the individual from the arbitrary exercise of the powers of government.”).

69. See Ronald A. Brand, *Due Process, Jurisdiction, and a Hague Judgments Convention*, 60 U. PITT L. REV. 661 (1999).

70. 95 U.S. 714 (1877).

71. *Id.* at 722.

72. 311 U.S. 457 (1940).

73. 326 U.S. 310 (1945).

74. 444 U.S. 286 (1980).

75. 466 U.S. 408 (1984).



*Rudzewicz*.<sup>76</sup> This common law development of jurisdictional rules meant that the law was never as clear or as centralized as was the case with jurisdictional rules in Europe. It resulted in an evolutionary development of limitations on jurisdiction through a focus on the defendant's activity in and directed at the forum state, as well as the relationship between that activity and the cause of action in the specific case.

The most dramatic change in U.S. law on jurisdiction has been the narrowing of the concept of general jurisdiction, due largely to two U.S. Supreme Court decisions in 2011 and 2014.<sup>77</sup> In the *Goodyear*<sup>78</sup> and *Daimler*<sup>79</sup> cases, Justice Ginsburg, writing in each case for a unanimous Court, limited the earlier concept of jurisdiction over a legal person resulting from that entity's continuous and systematic activity within the forum state to activity that demonstrates the defendant is "at home" in that state—a concept equivalent to that of domicile for a natural person. Interestingly, Justice Ginsburg's opinions in these cases included reference to the Brussels I jurisdictional framework in the E.U.<sup>80</sup>

When it is specific jurisdiction, not general jurisdiction, that is involved, recent Supreme Court jurisprudence is not so clear. In *J. McIntyre Machinery, Ltd. v. Nicastrò*,<sup>81</sup> decided the same day as *Goodyear* in 2011, the Court maintained significant limitations on jurisdiction over foreign defendants, requiring more than just a connection between the injury to the plaintiff and the cause of action. The court maintained a requirement of a clear connection between the defendant and the forum state, with Justice Ginsburg relegated to a dissent in which she argued for the much broader special jurisdiction approach found in the E.U.<sup>82</sup>

### 3. Jurisdiction and the Hague Negotiations

When the Hague negotiations began in the early 1990s, most other Hague Conference Member States had as one of their primary goals changing what they saw as a very expansive rule of general jurisdiction in the U.S. This change was accomplished, but not through negotiations. The U.S. Supreme Court unilaterally gave those states what they wanted in its *Goodyear* and *Daimler* decisions.

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76. 471 U.S. 462 (1985).

77. *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *Goodyear v. Brown*, 564 U.S. 915 (2011).

78. *Goodyear*, 564 U.S. at 919.

79. *Daimler*, 571 U.S. at 122.

80. *Id.* at 141 ("In the European Union, for example, a corporation may generally be sued in the nation in which it is 'domiciled,' a term defined to refer only to the location of the corporation's 'statutory seat,' 'central administration,' or 'principal place of business.'").

81. 564 U.S. 873.

82. *Id.* at 909 (Ginsburg, J., dissenting) ("The Court's judgment also puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world. Of particular note, within the European Union, in which the United Kingdom is a participant, the jurisdiction New Jersey would have exercised is not at all exceptional. The European Regulation on Jurisdiction and the Recognition and Enforcement of Judgments provides for the exercise of specific jurisdiction 'in matters relating to tort . . . in the courts for the place where the harmful event occurred.'").

*B. Judgments Recognition**1. The European Union*

Internally, the Brussels I system has made the free circulation of judgments a rather simple matter. Article 35(1) of the Brussels I (Recast) Regulation states: “A judgment given in a Member State shall be recognized in the other Member States without any special procedure being required.”<sup>83</sup> Because control of jurisdiction is accomplished in the court of origin, through Chapter II of the Regulation, no rules of indirect jurisdiction are required in order to test the incoming judgment. Any challenge to the jurisdiction in the court of origin must be raised in that court.

For judgments from outside the E.U., the law remains that of each Member State. This results in de-centralization and a variety of approaches. Germany and Italy, for example, incorporate their direct rules of jurisdiction as their indirect rules of jurisdiction.<sup>84</sup> Thus, any jurisdictional basis that is good for bringing a case within the jurisdiction is also good for testing a judgment from abroad. The United Kingdom, on the other hand, has a much longer list of jurisdictional bases for bringing an original action against a foreign defendant than it allows for testing judgments from foreign courts. Each Member State controls its rules for judgments from outside the E.U.<sup>85</sup>

*2. The United States*

In the U.S., internal judgments recognition among the states is governed by the Full Faith and Credit Clause found in Article IV of the United States Constitution.<sup>86</sup> Section 1 of that Article provides: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”<sup>87</sup> Implemented through 28 U.S.C. § 1738, this provision extends to all judgments from within the U.S., whether from state or federal courts.

For external judgments, U.S. judgments recognition law began as federal common law, evolved to state common law, and is now largely found in one of two uniform acts that have been adopted in more than two-thirds of the states.<sup>88</sup> In the 1895 case of *Hilton v. Guyot*,<sup>89</sup> the Supreme Court applied general principles of international law to determine that, as a matter of federal law, a French judgment would be judged through a comity analysis that begins by giving deference to the foreign decision. While the Court held the judgment was not entitled to recognition because of a lack of reciprocity with France, that element of the decision has largely

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83. Commission Regulation 1215/2012, art. 36, 2012 O.J.

84. See Ronald A. Brand, *New Challenges in the Recognition and Enforcement of Judgments* (Univ. of Pitt. Legal Studies Research Paper No. 2018–29), <https://ssrn.com/abstract=3246053>.

85. For further elaboration on the E.U. Member State rules regarding the recognition of external judgments, see Ronald A. Brand, *The Circulation of Judgments Under the Draft Hague Judgments Convention*, SSRN (2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3334647](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3334647).

86. U.S. CONST. art. IV, § 1.

87. *Id.*

88. Ronald A. Brand, *Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments*, 74 U. PITT. L. REV. 491 (2013).

89. 159 U.S. 113 (1895).

been ignored, with a comity analysis being applied in both state and federal courts.<sup>90</sup> After *Erie Railroad v. Tompkins*,<sup>91</sup> the substantive law of judgments recognition has largely become state law. The National Conference of Commissioners on Uniform State Laws promulgated two judgments recognition laws for adoption by the states: the 1962 Uniform Foreign Money–Judgments Recognition Act<sup>92</sup> and the 2005 Uniform Foreign–Country Money Judgments Recognition Act.<sup>93</sup> The second is largely an update of the earlier Act, with one or the other of the two Acts now adopted in more than two–thirds of the states.

## V. THE COMPARISON

A comparison is possible for both the legal structure and the resulting rules for judgments recognition in the E.U. and the U.S.

### A. Comparing E.U. and U.S. Legal Systems

On the structural side, the E.U. system internally for both jurisdiction and for judgments recognition is centralized and predictable with code–type rules found in the Brussels I (Recast) Regulation. Externally, the matter is more dispersed and diverse, with each Member State having its own set of rules for both jurisdiction and judgments recognition, unhindered by E.U. regulation.

In the U.S., internal matters of both jurisdiction and judgments recognition are a constitutional matter, with jurisdiction governed by the Due Process Clauses and judgments recognition governed by the Full Faith and Credit Clause of Article IV. For jurisdiction, the same constitutional principles protect foreign nation defendants as protect foreign state defendants. Both the Fifth and Fourteenth Amendment Due Process Clauses apply to “persons,” not citizens, so they extend their protections to those beyond our borders for jurisdictional purposes.<sup>94</sup>

External judgments recognition in the U.S. is like that in Europe in that it is governed by state law, without central coordination except to the extent that a treaty may apply. In the U.S., judgments recognition has common law origins that have been replaced in most states by uniform statutes. Unlike in Europe, however, because federal courts in the U.S. have subject matter jurisdiction in diversity cases involving a foreign party<sup>95</sup> and apply state substantive law in such cases, it is often in federal court decisions that we find the interpretation and application of state law on judgments recognition.

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90. See, e.g., *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972).

91. 304 U.S. 64 (1938).

92. UNIFORM FOREIGN–COUNTRY MONEY JUDGMENTS RECOGNITION ACT (UNIF. LAW COMM’N 1962).

93. UNIFORM FOREIGN–COUNTRY MONEY JUDGMENTS RECOGNITION ACT (UNIF. LAW COMM’N 2005).

94. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

95. 28 U.S.C. § 1332(a)(2) (2011).

*B. Comparing E.U. and U.S. Law*

For the comparison of the law, it is useful to separate jurisdiction and judgments recognition.

*1. Jurisdiction*

Internally, the E.U. jurisdictional rules applicable to foreign defendants from other Member States consist of a simple focus on the domicile of the defendant for purposes of general jurisdiction and a set of special jurisdiction rules based on a connection between the court and the claim. Externally, the rules are diverse and non-uniform, with jurisdictional bases that other Member States consider to be exorbitant, and thus prohibited in their use as against defendants from other Member States, but available for use against defendants domiciled outside the E.U.

In the U.S., rules of jurisdiction are ultimately tested against the Due Process Clauses, regardless of whether the defendant is from within or without the U.S. That has not, however, led to clarity of analysis or predictability of results. Recent decisions have seen the U.S. concept of general jurisdiction evolve to be largely in line with the European concept of domicile as the principal test. This means that activity-based concepts of general jurisdiction focused on continuous and systematic activity within the forum state have narrowed to a simple place of “home” or domicile test. At the same time, however, rules of specific jurisdiction have continued to provide broader protection for foreign defendants than is available in Europe through the requirement of a three-way nexus connecting the forum state with both the defendant and the cause of action, with the principal focus being on the forum state-defendant connection.

*2. Judgments Recognition*

In Europe, the law of judgments recognition is both centralized and predictable for purposes of internal judgment circulation. For external judgments, however, the law is more diverse, based on Member State law generally found in code-type rules. There are a variety of approaches, with some Member States<sup>96</sup> applying the same tests for both direct jurisdiction in their own courts and indirect jurisdiction analysis of the foreign decision. Other Member States<sup>97</sup> allow much broader bases of direct jurisdiction while maintaining narrow bases for purposes of indirect jurisdiction.

In the U.S., internal judgments recognition is both easy and predictable, based on Constitutional principles uniformly interpreted and applied. External judgments recognition, while based on state law, has become highly uniform, primarily through the evolution of uniform acts. Substantively, the result has been a quite liberal regime of judgments recognition throughout the U.S.

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96. Brand, *New Challenges in the Recognition and Enforcement of Judgments*, *supra* note 84, at 20.

97. *Id.*

### *C. Comparative Method and the International System*

The success of the 2005 and 2019 Hague Conventions will depend on how widely the ratifications and accessions become for each of them. With the twenty-eight Member States of the E.U., Mexico, Montenegro, and Singapore now parties, the 2005 Convention has a foundation for growth in this regard. While the 2019 Convention has been hailed as a “game changer,”<sup>98</sup> whether that assessment will prove true remains subject to the level of ratification and accession. If both the E.U. and the U.S. become parties to both Conventions, many more states will likely join in.

In terms of legal rules, both Conventions will result in a move from divergent laws to uniform rules, including a rule calling for uniform interpretation in each Convention.<sup>99</sup> The 2005 Convention<sup>100</sup> is simple at its core, with the following rules:

Article 5: “The court or courts of a Contracting State designated in an exclusive choice of court agreement shall have jurisdiction.”

Article 6: “A court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings.”

Article 8: “A judgment given by a court of a Contracting State designated in an exclusive choice of court agreement shall be recognised and enforced in other Contracting States.”

The 2019 Convention<sup>101</sup> evidences similar simplicity at the core:

Article 4: “A judgment given by a court of a Contracting State (State of origin) shall be recognised and enforced in another Contracting State.”

Article 5: “A judgment is eligible for recognition and enforcement if one of the following requirements is met.”

Article 7: Bases for non-recognition of a judgment.

The apparent simplicity of the 2019 Convention is potentially misleading with the thirteen separate tests of indirect jurisdiction given in Article 5(1).<sup>102</sup> Whether that list, which diverges from those states which engage in a simple mirror-image

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98. *Gamechanger for Cross-Border Litigation in Civil & Commercial Matters to be Finalized in the Hague*, HCCH (June 18, 2019), <https://www.hcch.net/en/news-archive/details/?varevent=683>.

99. Convention on Choice of Court Agreements, concluded June 30, 2005, 44 I.L.M. 1294; Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, concluded on February 1, 1971, 1144 U.N.T.S. 249.

100. Convention on Choice of Court Agreements, concluded June 30, 2005, 44 I.L.M. 1294.

101. Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=137> (last visited Mar. 28).

102. *Id.* For a discussion of the complexity created by the large list of indirect jurisdiction rules, see Brand, *Circulation of Judgments*, *supra* note 85.

approach to direct and indirect jurisdictional bases, will lead to uniformity of practice, remains to be seen.

## VI. CONCLUSIONS

A comprehensive comparative study of international litigation would require a book rather than an article. The discussion above is more limited. It reflects the perspective of my involvement for more than twenty-five years in the negotiations at the HCCH that have resulted in the 2005 Choice of Court Convention and the 2019 Judgments Convention. This involvement identifies both *where* I stand when I engage in this study and *what* I have considered in the process. Using the negotiations and their results as context provides an opportunity to consider both the law as it existed at the beginning and the end of those negotiations, as well as the legal systems and institutions that were important to the negotiations. It also demonstrates that the evolution of legal systems and institutions has been as important as the evolution of the law itself.

From where I stand, what I have chosen to observe for purposes of this limited study, and how I have considered both the evolution of the law and the legal systems involved, I come to several conclusions. First, other Hague Conference Member States entered the Hague negotiations in the early 1990's hoping to get a convention that allowed a clear path to transactional planning so that businesses from those states could avoid U.S. jurisdiction, particularly general jurisdiction. While they did not achieve that goal through negotiations, the United States Supreme Court has unilaterally provided that result in its *Goodyear* and *Daimler* decisions. Thus, changes in U.S. law, and considerations of the institutions in which those changes were hoped for and those institutions in which they did occur, demonstrate that sometimes the law evolves in ways other than those in which we might expect.

Second, the comparison of legal systems demonstrates developments in the E.U. have made it a civil law magnet system, in part because it is the traditional legal system model for most of the other Hague Conference Member States throughout the world. This is facilitated further by the fact that the law of jurisdiction and judgments recognition in the E.U. (at least internally) is predictable, centralized, and easily adapted to treaty text. The U.S. common law system, on the other hand, presents a decentralized, fragmented system that relies largely on evolving case law that is not easily adapted to treaty text.

Third, the U.S. and E.U. legal systems met in the Hague negotiations with different starting points and different agendas for change through the treaties being negotiated. Nevertheless, both desired, encouraged, and achieved progress in enhancing private party autonomy and freedom of contract. When combined with legal developments on choice of law in the E.U. and at the Hague Conference,<sup>103</sup> the 2005 and 2019 Hague Conventions are part of a movement toward honoring party autonomy and freedom of contract as a fundamental rule of private international law.

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103. See, e.g., Convention on Choice of Court Agreements, art. 5, concluded June 30, 2005, 44 I.L.M. 1294; Hague Conference on Private International Law, Principles on Choice of Law in International Commercial Contracts, adopted March 19, 2015, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>; Regulation (EC) No. 593/2008 of the European Parliament and of the Council of June 17, 2008, On the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L. 177) 10.



Finally, continuing differences in U.S. and E.U. law on special/specific jurisdiction make a direct jurisdiction convention unlikely, unless there would be global acceptance of U.S. concepts of due process (or a convention without the United States). Moreover, with the 2005 and 2019 Conventions, there is little, if any, need for a convention on direct jurisdiction.