

**RESOLVING BUSINESS DISPUTES  
THROUGH LITIGATION OR OTHER  
ALTERNATIVES: THE EFFECTS OF  
JURISDICTIONAL RULES AND  
RECOGNITION PRACTICE<sup>φ</sup>**

*Willibald Posch\**

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I. INTRODUCTION

The rules on jurisdiction and recognition practice in the various U.S. jurisdictions on the one hand and in the European States on the other hand differ in several aspects. Therefore, their impact on transatlantic business transactions and the litigation resulting from those transactions may be significant. There is no doubt that in a globalized economy differences

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<sup>φ</sup> This article is based on a presentation made at the *Conference on Transatlantic Business Transactions—Choice of Law, Jurisdiction and Judgments*, which was held in Barcelona, Spain, June 1-3, 2003. The Conference was co-sponsored by the Association of American Law Schools and the European Law Faculties Association.

\* J.D. Professor of Law, University of Graz/Austria

between domestic rules governing jurisdictional issues and the recognition of foreign judgments may hamper the functioning of international trade and commerce. Unification of the rules on conflict of jurisdiction in civil and commercial matters, as provided within the European Union by the recent "Council Regulation Brussels Nr. 1"<sup>1</sup>, appears to not only be necessary for an internal market within a trade union or within a large nation consisting of a plurality of jurisdictions such as the United States of America. A uniform set of rules on jurisdiction and the recognition and enforcement of foreign judgments would also be necessary for the resolution of conflicts in cross-border business relations between independent states adhering to different traditions and concepts of international civil procedure laws.

It has been well-known for some time to practitioners specializing in the field of international business transactions that a reduction of the differences in the domestic laws on civil procedure would face great or even insurmountable difficulties. In the course of the negotiations on a global Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters within the institutional framework of the Hague Conference on Private International Law, these difficulties became apparent. In particular, it was the conflict between the members of the U.S. delegation and the delegates of the Member States of the European Union that prevented any substantial approximation of the differing views on key issues of the envisaged Convention.

Originally, the negotiations on a global "Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments" (Judgment Convention) had been initiated by the United States in the early 1990s,<sup>2</sup> and at the 18th session of the

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1. Council Regulation 44/2001 of 22 Dec. 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 12) 1. This regulation replaces the Brussels Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters and entered into force on March 1, 2002. Many of the rules of the Regulation comply with the respective rules of the Convention. For a brief description of the case law of the European Court of Justice on the Convention, see, for example, JOHN O'BRIAN & RAYMOND SMITH, *CONFLICT OF LAWS*, 2d ed. (1999) 223-56, 291-305.

2. *Comp. Arthur T. von Mehren, Recognition of United States Judgments Abroad and Foreign Judgments in the United States: Would an International Convention*

Hague Conference in October 1996, the delegations decided to put the Judgment Convention on the agenda for the 19th session in June 2001. However, the preliminary draft convention of 1999<sup>3</sup> that formed the basis for deliberations during the 19th session had been rigorously rejected by the head of the U.S. delegation, Jeffrey Kovar. Kovar asserted that “the project . . . stands no chance of being accepted in the United States” because of “fatal defects in the approach, structure, and details of the text.”<sup>4</sup>

From the U.S. perspective, an important aim of the Judgment Convention was the facilitation of the enforcement of decisions of U.S. courts abroad, particularly in Europe, since the enforcement of decisions rendered by European courts is easier in most U.S. jurisdictions and does not depend on the requirement of reciprocity as it does in the majority of the European States.<sup>5</sup> Contrary to that, several delegations of the European States argued in favor of the elimination of certain rules of U.S. federal and state civil procedure law which led to what Europeans believe to be an exorbitant exercise of jurisdiction by U.S. courts. In detail, the Europeans were particularly opposed to the ongoing U.S. practice of recognizing merely “doing business in an American State” as a sufficient basis for exercising U.S. jurisdiction.

Obviously, the diverging expectations of the U.S. and European delegations could not coincide, since the position of the Europeans complies with the domestic laws in most European States, which deny jurisdiction based on “doing

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*Be Useful?*, 57 RABELS ZEITSCHRIFT [RABELSZ.] 449 (1993), with Haimo Schack, *Perspektiven eines weltweiten Anerkennungs und Vollstreckungsübereinkommens* [*Perspectives of a World-Wide Acknowledgment and Enforcement Convention*], Zeitschrift für Europäisches Privatrecht [ZEUP] 306 (1993).

3. *Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, adopted by the Special Commission on 30 October 1999*, Hague Conference on Private International Law, at <http://www.hcch.net/e/conventions/draft36e.html> (Oct. 30, 1999).

4. Arthur T. Von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-Wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 192 (2001) (quoting a letter by Jeffrey Kovar, dated Feb. 22, 2000).

5. For example, Austria requires the reciprocity with respect to enforcement of decisions of foreign courts.

business” without any causal connection between the subject matter of a dispute and the place of the business activity. European judges and lawyers are simply not familiar with the practice of U.S. federal courts, which accept jurisdiction for actions concerning claims that have no other contact to the forum than defendant’s doing business there. Such long-arm statutes are not only the law in New York, which is the most important forum state for transatlantic litigation, but also in several other states.<sup>6</sup> In contrast thereto, the relevant rules on jurisdiction in international cases of the European States favor the “transacting business approach,” which requires a causal connection.

From these divergent positions, it was of no surprise that the Second Commission of the Hague Conference in its 19th session in June 2001, could not reach a common position with regard to a number of questions, particularly on the issue of under what conditions to exercise jurisdiction. As a result, the deliberations of that session resulted in serious disagreement and an obvious impasse.<sup>7</sup> Exactly one year later, the Permanent Bureau of the Hague Conferences set up an informal working group to continue the efforts of preparing a text on jurisdiction and the recognition and enforcement of foreign judgments in civil and commercial matters. Quite recently, this informal working group on the judgments project presented a draft text on choice-of-forum agreements for civil or commercial matters<sup>8</sup> that met nearly unanimous approval at a session of the Special

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6. See N.Y. C.P.L.R. § 301 (McKinney 2002); *In re Ski Train Fire in Kaprun*, Austria on Nov. 11, 2000, 230 F. Supp. 2d 376, 381 (S.D.N.Y. 2002) (holding that New York subjects a foreign corporation to general jurisdiction if it is “doing business” in the state); see also *Aerotel Ltd. v. Sprint Corp.*, 100 F. Supp. 2d 189, 191 (S.D.N.Y. 2000) (interpreting N.Y. C.P.L.R. § 301).

7. See Rolf Wagner, *Die Bemühungen der Haager Konferenz für Internationales Privatrecht um ein Übereinkommen über die gerichtliche Zuständigkeit und ausländische Entscheidungen in Zivil- und Handelssachen* [The efforts of the Hague Conference on International Private Law for a Convention on Jurisdiction and Foreign Judgments in Matters of Civil and Commercial Law], 21 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRAX] 533 (2001).

8. Hague Conference on Private International Law, *Preliminary Result of the Work of the Informal Working Group on the Judgments Project: Hague Conference on Private International Law, Special Comm. on Gen. Affairs and Policy*, Hcch Prel. Doc. 8 (Mar. 2003), <ftp://ftp.hcch.net/doc/genaff-pd08e.pdf>.

Commission on General Affairs and Policy of the Conference in early April 2003.

Somehow, this paper may serve as an illustration of the limited chance that transatlantic negotiations may be successful in creating a common position in key questions of jurisdiction and recognition.

The fundamental transatlantic disagreement is not just a recent development, however: Already about two decades ago, the so-called “jurisdiction conflict with the United States of America” formed the topic of a conference held in Munich<sup>9</sup> which centered on the “doing business in the U.S.” issue. In his key contribution, Rolf Stürner referred to cases like *In re Anschuetz*,<sup>10</sup> *Laker Airways Ltd. v. Sabena, Belgian World Airlines*,<sup>11</sup> *Matter of Marc Rich & Co.*,<sup>12</sup> *In Re Grand Jury 81-2 (Deutsche Bank)*,<sup>13</sup> and numerous other cases to support his conclusion that “U.S. law extensively dominates the transatlantic legal relationship.”<sup>14</sup>

Therefore, the problem with which we are dealing today is not an entirely new one. Because of the globalization process in trade and commerce, the global liberalization of cross-border sales of goods and supply of services under GATT and GATS, and the increasing use of electronic means of communication in international transactions, a just and predictable solution of the various problems emerging from transatlantic litigation has become even more urgent.

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9. See ROLF STÜRNER ET AL., *DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN VON AMERIKA* THE JURISDICTION CONFLICT WITH THE UNITED STATES OF AMERICA (Walther J. Habscheid ed., 1986).

10. 754 F.2d 602 (5th Cir. 1985) (dealing with third party products liability claims).

11. 731 F.2d 909 (D.C. Cir. 1984) (dealing with bankruptcy and antitrust claims).

12. 707 F.2d 663 (2d Cir. 1983) (dealing with tax fraud claims).

13. 550 F. Supp. 24 (W.D. Mich. 1982) (dealing with the presentation of documents in an anticorruption case).

14. STÜRNER ET AL., *supra* note 9, at 10 (translated by author).

## II. JURISDICTION

A possible explanation for the difficult relationship between European and U.S. rules of jurisdiction, recognition, and enforcement of foreign court decisions whether on the federal or state level — may be found in the significant differences between the two legal traditions with regard to the exercise of jurisdiction. Many European observers have the impression that the U.S. federal and state courts examine the jurisdiction issue from a perspective that centers on the question of whether the defendant's factual connections to the forum state, *viz.* either an activity of the defendant or the effects of the defendant's activities in the forum state, may be sufficient for exercising jurisdiction over him. Sometimes this feature of modern U.S. jurisdictional law is explained by referring to the historical fact that originally, the mere physical presence of persons and things was considered to be the basis for exercising judicial power.<sup>15</sup>

Due to changing circumstances and a practice that is altogether favorable to the plaintiff, defendants who happen to have a "minimum contact" with a U.S. jurisdiction may be sued in its courts provided that the due process requirements of the 5th and 14th Amendments to the U.S. Constitution are not violated. Thus, the criteria of "fairness" and "reasonableness" have become crucial to the jurisdiction issue and may result in the denial of jurisdiction, as would the finding that a more convenient forum exists elsewhere. Nevertheless, in the eyes of European practitioners, the U.S. rules on jurisdiction, and particularly their "transient jurisdiction," appear to be exorbitant.

In contrast to the U.S. approach to jurisdiction, European national civil procedure laws and the Council Regulation Brussels Nr. 1,<sup>16</sup> which provides the respective rules for lawsuits between parties from different E.U. Member States,<sup>17</sup> focus

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15. Consider the famous statement of Justice Oliver Wendell Holmes, Jr., which is often quoted by Europeans: "The foundation of jurisdiction is physical power . . ." *McDonald v. Mabee*, 243 U.S. 90, 91 (1917).

16. Council Regulation 44/2001, *supra* note 1.

17. Denmark is not bound by the rules for lawsuits in the Council Regulation Brussels Nr. 1. *Id.* art. 1.

rather on the normative contacts which the legal relationship on which the lawsuit is based may actually have to a national jurisdiction. Notwithstanding their inapplicability to transatlantic cases,<sup>18</sup> the rules of the Council Regulation Brussels Nr. 1 may serve as an example for the way in which the courts in Europe approach the jurisdictional issue.

The general rule on jurisdiction of the Council Regulation Brussels Nr. 1 is that persons domiciled in a Member State shall be sued, irrespective of their nationality, in the courts of that Member State.<sup>19</sup> The rule “*actor sequitur forum rei*” is a vested principle of the European national civil procedure laws and complies with the rules of general jurisdiction in U.S. state laws insofar as the requirement of the defendant’s domicile in a state is concerned. However, the isolated aspect of a defendant’s “doing business,” even if intensive and sustained, cannot qualify as sufficient to justify the exercise of general jurisdiction by the courts of a E.U. Member State. In some domestic laws, however, the mere fact that a person owns property there may qualify for jurisdiction.<sup>20</sup>

In addition to the general rule of Article 2, which focuses on the domicile of the defendant, Council Regulation Brussels Nr. 1 provides rules on specific jurisdiction in Articles 5 to 7, beginning with a series of jurisdictions subject to plaintiff’s choice. Thus, a person domiciled in one Member State may be sued in another Member State, in particular, in the courts for the place of performance of a contractual obligation under dispute (*e.g.* in the case of sales of goods, at the place in a Member State where the goods were delivered or ought to have been delivered; or, in the case of supply of services, at the place in a Member State where the services were supplied or should have been supplied).<sup>21</sup> Further, an action may be brought against such a person “in matters relating to tort, *delict* or

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18. Article 22 of the Council Regulation — which provides for exclusive jurisdiction regardless of domicile — and Article 23 of the Council Regulation — which deals with choice of forum clauses — are exceptions to this statement.

19. See Council Regulation 44/2001, *supra* note 1, art. 2(1).

20. See *Gerichtsstand des Vermögens*, JURISDIKTIONS NORM [JN] § 99 (Aus.). This jurisdictional basis, however, is inconsistent with Council Regulation 44/2001.

21. Council Regulation 44/2001, *supra* note 1, art. 5(1).

*quasi-delict*,<sup>22</sup> in the courts for the place where the harmful event occurred or may occur;<sup>23</sup> in the case of “a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.”<sup>24</sup>

The last of the examples of a “specific jurisdiction” to which a plaintiff may resort under the Council Regulation Brussels Nr. 1 demonstrates the difference between the European and U.S. approaches to jurisdiction very clearly: In order to bring a claim before a court of the state where “a branch, agency or other establishment” of a defendant corporation is located, it is necessary that the dispute arises out of the operations of that specific “branch, agency or other establishment.” What is necessary under European law is a substantial connection between the legal basis of the claim and the business activities in the Member State where a lawsuit is initiated. Based on their national rules on jurisdiction, as well as on the Council Regulation Brussels Nr. 1, European lawyers will adhere to the concept of a “transacting business-jurisdiction.”<sup>25</sup>

Therefore, it is not surprising that in the small European country where the author of this contribution lives, two recent decisions on jurisdiction by the U.S. District Court for the Southern District of New York have given rise to harsh criticism and bewilderment.<sup>26</sup> The claims were raised by relatives of eight U.S. citizens who had been killed in a ski train fire in the

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22. These are the French notions for non-contractual (tortious) liability for intentional and negligent causation of harm. BLACK'S LAW DICTIONARY 439 (7th ed. 1999).

23. Council Regulation 44/2001, *supra* note 1, art. 5(3).

24. Council Regulation 44/2001, *supra* note 1, art. 5(5). Similar rules are provided in national statutes on jurisdiction. See *Gerichtsstand der Niederlassung*, JN (Aus.) § 87.

25. Therefore, it was no surprise that the issue of a “generally doing business jurisdiction” caused the impasse during the preparations of a global Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters in The Hague. The Europeans wanted to put (generally) “doing business” as “exorbitant” on the black list, whereas the U.S. delegation insisted on making this ground as the basis for the exercise of jurisdiction generally accepted.

26. See *In re Ski Train Fire*, 230 F. Supp. 2d at 391–92; *In re Ski Train Fire in Kaprun, Austria* on Nov. 11, 2000, 230 F. Supp. 2d 392, 395, 402–03 (S.D.N.Y. 2002) (denying motions to dismiss for lack of personal jurisdiction).

Austrian Alps and were advanced against two foreign companies that had been involved in the installation of the electric equipment of a ski train which burst into flames on the underground transportation line in an Austrian ski resort killing 155 people. Jurisdiction was affirmed on the grounds that the defendants were “doing business” in the United States.

A court in a Member State of the European Union would not find international jurisdiction on such grounds, but would leave the adjudication of such claims to the courts of the state where the accident occurred. Only if the cause of the accident alleged to be a product manufactured by the defendant within the borders of that state would there be, according to the interpretation of the Article 5 Nr. 3 of the former Brussels Convention on Jurisdiction and the Enforcement of Judgments<sup>27</sup> by the European Court of Justice, special jurisdiction at the forum in the place of manufacture, because the “harmful event” is deemed to have occurred there as well.<sup>28</sup>

Whereas, if compared with the rules of U.S. law, the European rules on jurisdiction are significantly more restrictive in accepting merely doing business as the basis for the affirmation of jurisdiction, they are more generous in accepting the joinder of multiple defendants as a ground for special jurisdiction. U.S. courts would not exercise jurisdiction in proceedings instituted against a plurality of defendants, one of which is domiciled in the forum state, merely on the basis of the close connection which the claim against the resident might have with the claims against the other defendants.<sup>29</sup>

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27. *Comp. the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters*, art. 5, § 3, 1998 O.J. (C 27) 1 *with* Council Regulation 44/2001, *supra* note 1, art. 5(3) (illustrating analogous provisions between the two works).

28. *See* Case 21/76, *Handelskwerkerij G.J.Bier B.V. v. Mines de Potasse d’Alsace S.A.*, 1976 E.C.R. 1735, [1977] 1 C.M.L.R. 284, 300–01; Case C-364/93, *Marinari v. Lloyds Bank*, 1995 E.C.R. I-2719 (recognizing that the provision includes both the place where the damage occurred and the place of the event giving rise to it).

29. *Comp. Council Regulation 44/2001, supra* note 1, art. 6(1) (providing jurisdiction against a person domiciled in a Member State, “if he is one of a number of defendants in the courts of the place where any one of them is domiciled, 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”), *with*

Notwithstanding its restrictive interpretation by the European Court of Justice,<sup>30</sup> Article 6 Nr. 1 of the Council Regulation Brussels Nr. 1 would, therefore, not be considered by U.S. judges to be consistent with the due process requirements of the U.S. Constitution.

The European rules on jurisdiction have also determined how to take into account the position of typically weaker parties in a lawsuit by providing protection to insured persons vis-à-vis insurers, to consumers vis-à-vis businessmen, or to employees vis-à-vis their employers. Thus, differentiations are made by Council Regulation Brussels Nr. 1, whereas the U.S. law adheres to traditional common law concepts such as contracts or torts and examines the jurisdictional issue for all contract cases and all tort cases in the same way.<sup>31</sup> The specific provisions of the Council Regulation Brussels Nr. 1 on “Jurisdiction in matters relating to insurance,”<sup>32</sup> “Jurisdiction over consumer contracts,”<sup>33</sup> and “Jurisdiction over individual contracts of employment”<sup>34</sup> aim at the protection of the weaker party through rules of jurisdiction which are more favorable to the interests of consumers or employees than are the general rules.

These differences in approaches to jurisdiction may have no impact on the attitude of European practitioners who search for ways to avoid jurisdiction of a U.S. court in cases resulting from transatlantic business activities. However, the opposition of European practitioners and lawmakers to the application of ambiguous concepts such as “minimum contacts” and “generally doing business” as a basis for enabling U.S. courts to exercise jurisdiction becomes more understandable in the light of the so-called “American rule.”

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Council Regulation 44/2001, *supra* note 1, art. 6(2) (regulating other cases of “jurisdiction based on connection of fact” which would not easily be recognized by U.S. courts).

30. See Case 189/87, *Kalfelis v. Bankhaus Schröder, Münchmeyer, Hengst and Co.*, 1988 E.C.R. 5565 (requiring a connection between the various actions brought by the same plaintiff against different defendants).

31. See Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 156 (1992).

32. Council Regulation 44/2001, *supra* note 1, art. 8–14.

33. *Id.* art. 15–17.

34. *Id.* art. 18–21.

According to this rule, the costs of the proceedings are allocated pro rata, irrespective of the result of the lawsuit, whereas the European civil procedure laws prefer a “winner takes all” rule. Because the unsuccessful party does not need to compensate the winning party for its litigation costs, it is — with the exception of frivolous lawsuits — always expensive when the jurisdiction of a U.S. court is exercised over a European party, or even when the question of whether jurisdiction shall be exercised by a U.S. court is raised. The fact that a party must always expect high fees for corporate lawyers whenever a lawsuit is filed in a U.S. federal or state court may cause potential defendants from Europe to settle the dispute, even if their chances to win the case are good to excellent. The somewhat dubious practices of certain U.S. trial lawyers,<sup>35</sup> especially in product liability cases involving personal injury, who promise successful proceedings in U.S. courts and extraordinarily high amounts of compensation payments<sup>36</sup> to their potential clients from Europe is the combined consequence of the U.S. rule and the contingency fee practice of members of the U.S. Trial Lawyers Association.<sup>37</sup>

Another argument for Europeans to avoid proceedings in a U.S. court is the involvement of a jury in lawsuits at common law. According to the 7th Amendment to the U.S. Constitution, “where the value in controversy exceeds \$20, the right of trial by jury shall be preserved” in federal courts. In practice, this means that in proceedings before a U.S. court the plaintiff nearly always requests a jury. The potential European defendants who

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35. Austrians were exposed to a rather rude occurrence of “ambulance chasing” after the ski train fire in Kaprun by Mr. Ed Fagan, a trial lawyer from New York who had been criticized for his conduct in the so-called “Holocaust cases” prior to the accident in Kaprun. See Barry Meier, *Lawyer in Holocaust Case Faces Litany of Complaints*, N.Y. TIMES, Sept. 8, 2000, at A1.

36. In comparison, the European practice is to award significantly lower amounts in damages.

37. This statement does not refer to spectacular class actions, such as the “Swiss Bank cases” resulting from the Holocaust. Here, the Alien Tort Claims Act, 28 U.S.C. § 1350 (granting U.S. federal courts jurisdiction for “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States”), is an undisputed basis for jurisdiction. The application of the ATCA may have been excessive in recent years. See, e.g., William Glaberson, *U.S. Courts Become Arbiters of Global Rights and Wrongs*, N.Y. TIMES, June 21, 2001, at A1.

lack sufficient experience with the role and function of juries in proceedings of private law (especially in products liability cases) fear, however, that the U.S. lay judges may not always be impartial if they have to deliver a verdict in a case where the interests of a U.S. party and a European party are in conflict. For Europeans, it is common belief that a member of a U.S. jury, even if carefully selected, will usually be inclined to sympathize with the U.S. plaintiffs rather than with the foreign defendants. This fear that a court may be biased against out-of-state defendants is not new: It was obviously one of the reasons why federal diversity jurisdiction was established.

As recent statistical findings indicate, however, this fear may be exaggerated, because in most litigation in U.S. courts, a “foreigner effect” appears to be at work in favor of foreign litigants.<sup>38</sup> Nevertheless, the opposite belief is deeply rooted among European businessmen and lawyers, and gives rise to accepting proposals for settlements even in cases where a verdict in favor of the foreign party is predictable. This view is consonant with the tentative explanations of the high rate of success of foreign litigants by the authors of *Xenophilia in American Courts*,<sup>39</sup> that due to “foreigners’ aversion to American courts” lawsuits are only launched or entered by foreigners in “unusually strong cases.”<sup>40</sup>

### III. FORUM SELECTION (PROROGATION OF JURISDICTION)

The national civil procedure laws<sup>41</sup> of the European States as well as uniform European Law on Jurisdiction, and the Recognition and Enforcement of Foreign Decisions in Civil and Commercial Matters have always recognized the possibility of an agreement by the parties on the forum where to adjudicate their disputes. For some time it has been the case — and it is still common practice — that jurisdiction clauses, as well as choice-of-law clauses (or arbitration clauses), constitute an

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38. See Kevin M. Clermont & Theodore Eisenberg, *Xenophilia in American Courts*, 109 HARV. L. REV. 1120, 1122–23 (1996).

39. *Id.* at 1132–33.

40. *Id.* at 1143.

41. See JN (Aus.) § 104.

integral part of any international business contract, and the drafters of international business contracts are usually prepared to include such clauses in their agreements.

Consequently, Article 23 of the Council Regulation Brussels Nr. 1 provides that the parties (of whom one must be domiciled in a E.U. Member State) may agree “that a court or the courts of a Member State shall have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship” and in such a case, the chosen court or courts shall have exclusive jurisdiction, unless the parties have agreed otherwise.

Prior to the breakthrough decision of the U.S. Supreme Court in *M/S Bremen v. Zapata Off-Shore Co.*,<sup>42</sup> U.S. courts obviously refused to accept the derogatory effect of a forum selection by the parties to an international contract, because this choice collided with the power of the courts to adjudicate a case for which they clearly had jurisdiction under the common law or pursuant to a statutory provision. Meanwhile, however, the rules on the validity of contractual choice-of-forum clauses have been consolidated in the United States.<sup>43</sup>

Whereas the validity of a choice-of-forum clause is still subject to a test of its reasonableness and fairness under U.S. law, the parties in Europe have to observe certain formal requirements when they enter an exclusive agreement on prorogation. According to Article 23 of the Council Regulation Brussels Nr. 1, the agreement must either be in writing or evidenced in writing, or “in a form which accords with the practices which the parties have established between themselves.”<sup>44</sup> Alternatively, it may also be

in a form which accords with a widely known and regularly observed usage of international trade or commerce of which the parties are or ought to have

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42. 407 U.S. 1 (1972).

43. See William M. Richman, *Carnival Cruise Lines: Forum Selection Clauses in Adhesion Contracts*, 40 AM. J. COMP. L. 977, 981 (1992) (explaining the United States Supreme Court’s reasoning in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) which distinguishes it from the *Bremen* decision).

44. Council Regulation 44/2001, *supra* note 1, art. 23(1)(b) (stating that a durably recorded communication by electronic means is equivalent to writing).

been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.<sup>45</sup>

In Europe, there are no fundamental objections or legal obstacles against the power of the parties to contractually agree on the forum that will decide a conflict emerging from the performance of their contractual duties and on the law that should apply thereto, and the U.S. position has become more flexible regarding this issue. This is indicated by the nearly unanimous approval of the preliminary result of the informal working group on the judgments project established by the Special Commission on General Affairs and Policy of the Hague Conferences in March 2003.<sup>46</sup>

If compared with the original project of a Global Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters, the preliminary document of the working group is limited to a rather narrow, but important issue, *viz.* to the choice-of-forum clauses in business-to-business cases.

The document follows the structure and adopts, to a certain degree, the wording of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards and may, therefore, be more easily acceptable to U.S. practitioners and politicians. It relies on the concept of exclusivity of a choice of forum by the parties.

If, according to its key article, Article 4, the parties to an international civil or commercial contract to which the Convention shall apply

have agreed in an exclusive choice of court agreement that a court or the courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or the courts of that

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45. *Id.* art. 23(1).

46. Hague Conference on Private International Law, *Preliminary Result of the Work of the Informal Working Group on the Judgments Project: Hague Conference on Private International Law, Special Comm. on Gen. Affairs and Policy*, Hcch Prel. Doc. 8 (Mar. 2003), <ftp://ftp.hcch.net/doc/genaff-pd08e.pdf>.

Contracting State shall have jurisdiction, unless the court finds that the agreement is null and void, inoperative or incapable of being performed.<sup>47</sup>

The parties may choose a court located in a neutral state without any factual or legal connection to the case. The binding effect of such an agreement may be limited, however, by a reservation according to Article 15, stating that “[u]pon ratification of this Convention, a State may declare that its courts may refuse to determine disputes covered by a choice of court agreement if, except for the choice of court agreement, there is no connection between that State and the parties or the dispute.”<sup>48</sup> In principle, an exclusive choice of court agreement must be respected, but according to Article 5, “a court in a Contracting State other than the State of the chosen court shall decline jurisdiction or suspend proceedings, unless that court finds that the agreement is null and void, inoperative or incapable of being performed,” or unless all relevant elements of the dispute and the relationship of the parties including the habitual residence of the parties are connected with that Contracting State.<sup>49</sup>

The proposed Convention avoids going further into jurisdiction issues, probably in order to reach at least a minimum result. It found widespread approval among delegates from jurisdictions of the civil law tradition as well as representatives of the common law countries, such as the United States, the United Kingdom, and Canada. Even China supported the proposal as useful, because it would adopt the well-established system of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 for the choice of public courts. It may be expected that at least this small part of the complex questions of jurisdiction will become generally accepted uniform law in the near future, thereby enhancing transnational, and especially transatlantic, business.

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47. *Id.* According to art. 1, (2), it shall not apply to consumer transactions and employment contracts. *Id.*

48. *Id.* art. 15.

49. *Id.* art. 5. The Convention does not include a provision determining the law governing the question of substantive validity of a choice-of-forum agreement.

As indicated, presently there are numerous actual, potential, or imaginary reasons for a European party to a transatlantic business transaction to attempt escaping the threat of being sued in a U.S. court. Such a party will usually try to convince the other party from across the Atlantic Ocean to agree to the jurisdiction of a neutral forum in Europe, as well as to the application of the law of the selected forum. Most likely, the European party will only be successful in convincing his transatlantic partner to agree to such a suggestion if he or she has significant bargaining power, and if the conclusion of the contract is of higher importance to, and more urgent for, the U.S. partner.

If, however, no agreement on a neutral forum can be reached, in many cases an agreement on arbitration could be the cheapest and fastest solution for both parties.

#### IV. ARBITRATION

The common law was not only opposed to forum selection clauses, but for a long time it refrained from accepting the substitution of a regular court by an arbitral tribunal. This “non-ouster rule” had to give way to the new circumstances and practices of international trade and commerce. The first statute of a U.S. state accepting arbitration as an alternative method of dispute resolution was the New York Arbitration Act of 1920.<sup>50</sup> Other statutory provisions<sup>51</sup> and an International Convention — the Convention on the Recognition and Enforcement of Foreign Arbitral Awards — followed, when the United States, in an “important and — for it — unprecedented step”<sup>52</sup> became a party to the New York Convention.<sup>53</sup>

In the Member States of the European Union, the primary statutory basis for arbitration is still national civil procedure law, because according to its art. 1, (2)(d), the Council Regulation Brussels Nr. 1 does not apply to arbitration. For this

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50. N.Y. C.P.L.R. §§ 7501 *et seq.* (McKinney 1998).

51. *See, e.g.*, Federal Arbitration Act, 9 U.S.C. §§ 202 *et seq.*; UNIFORM ARBITRATION ACT (2002) (adopted by the majority of the U.S. states).

52. von Mehren, *supra* note 2, at 451.

53. This convention was ratified in New York on June 10, 1958, and entered into force on June 7, 1959.

reason, the Austrian Civil Procedure Code provides some twenty provisions on arbitral proceedings,<sup>54</sup> which deal with the substantial and formal requirements of an arbitration agreement, the proceedings before an arbitration tribunal, and the annulment of an arbitral award. The statutes of other nations provide for arbitration in a similar manner. In addition, Austria, like the vast majority of E.U. Member States, has ratified the New York Convention with regard to international arbitral awards.

Of particular complexity is the situation in which the two contracting parties have their places of business in two different states, because in such a situation several conventions and model laws exist that may be applicable. These sets of rules, such as the UNCITRAL Arbitration Rules<sup>55</sup> and the UNCITRAL Model Law on International Commercial Arbitration,<sup>56</sup> however, are not as widely accepted as the New York Convention.

In addition thereto, numerous institutions, such as the International Chamber of Commerce,<sup>57</sup> the American Arbitration Association<sup>58</sup> and certain other institutions like national chambers of commerce offer arbitration proceedings based on their own sets of rules. These institutions encourage parties to international business transactions to choose a neutral venue, where experienced and specialized arbitrators are neither bound to apply the law of one of the parties, nor to strictly apply the law of another state, and may resort to the *lex mercatoria* (law merchant) in order to find a just solution. In the end, the result

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54. ZIVILPROZESSORDNUNG [ZPO] (Aus.) §§ 577–99.

55. *Arbitration Rules of the United Nations Commission on International Trade Law*, G.A. Res. 98, U.N. GAOR, 31st Sess., U.N. Doc. 31/98 (1976) (stating that “rules for ad hoc arbitration that are acceptable in countries with different legal, social and economic systems would significantly contribute to the development of harmonious international economic relations.”).

56. *Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law*, G.A. Res. 72, U.N. GAOR, 40th Sess., U.N. Doc. A/RES/40/72 (1985) (establishing a “unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations.”).

57. INTERNATIONAL CHAMBER OF COMMERCE RULES OF ARBITRATION arts. 7, 14–15 (1998).

58. AMERICAN ARBITRATION ASSOCIATION ARBITRATION RULES arts. 6, 25 (2003).

may be more adequate than the decisions of a court, and it will often be reached faster and at a lower cost. In addition thereto, enforcement is easier because of the broad acceptance of the New York Convention.

At a time when the importance of arbitration is growing, the number of transatlantic disputes submitted to arbitration within the institutional and regulatory framework of institutions offering arbitral proceedings has been rising. Today, arbitration is widely accepted and practiced among businessmen engaged in international transactions on both sides of the Atlantic Ocean. Further, the New York Convention has recently served as a model for the Draft Convention on Choice-of-forum Agreements within the framework of the Hague Conferences.

#### V. RECOGNITION AND ENFORCEMENT

It is evident that a legal instrument of an internal market like the Council Regulation Brussels Nr. 1 must include rules that ascertain fast and simple recognition and enforcement of judgments from a Member State without requiring any specific procedure.<sup>59</sup> An internal market without national borders requires a borderless area of recognition and enforcement of court decisions irrespective of the location of the court rendering the verdict. However, even within a set of rules designed to unify the laws on international civil procedure of closely related and co-operating states within an economic and political Union, limits must be set to the recognition of decisions by the courts of another Member State. Therefore, recognition must be denied if it violates public policy in the Member State in which recognition is sought, and in other critical circumstances such as if a judgement by default has been rendered because the complaint has not been correctly served to the defendant, or if a judgment is irreconcilable with earlier judgments.

According to Article 3 of the Council Regulation Brussels Nr. 1, certain jurisdictional rules of one Member State are not applicable with regard to persons domiciled in another Member State. Thus, a decision cannot be rendered against a defendant from another Member State pursuant to section 99 of the

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59. See Council Regulation 44/2001 *supra* note 1, arts. 32–52.

domestic Austrian Statute governing jurisdiction.<sup>60</sup> This provision allows the exercise of jurisdiction against a person merely because he owns property in Austria. If such a decision has been rendered by an Austrian court, it will not be automatically recognized by the courts of the other Member States. Pursuant to the Council Regulation, the Austrian provision is deemed to be exorbitant. However, the recognition of judgments rendered in a transatlantic dispute lies not within the scope of application of the European Regulation, but is subject to the rules of the domestic laws of the E.U. Member States.

As mentioned earlier, the enforcement of judgments by a U.S. court may create more serious problems in Austria than if the circumstances were switched. With regard to transatlantic executory titles, this is not only true for Austria. This is due to the absence of appropriate treaties between the European States and the United States on one hand,<sup>61</sup> and the absence of a U.S. federal law that provides a generous solution, similar to that of the Uniform Foreign Money-Judgments Recognition Act of 1962, which has already been enacted by a number of U.S. states, among them California and New York, on the other hand.

Whereas the reciprocity requirement has no statutory basis in U.S. federal law, it is a mandatory condition for the enforcement of foreign titles under the Austrian National Enforcement Act. For purposes of the Austrian Act, reciprocity is either guaranteed by a state treaty or by a regulation of the Federal Ministry of Justice.<sup>62</sup> With regard to the United States, neither instrument exists so far. Reasons for this restraint may be seen in the need to counterbalance the exorbitant “generally doing business” approach to jurisdiction and to prohibit excessive awards against Austrian defendants under the title of “punitive damages.” Other Member States of the European Union, such as Germany, do not adhere as strictly to formal

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60. JN (Aus.) § 99 .

61. von Mehren, *supra* note 2, at 451 n.4 (This is obviously attributable to the fact that the U.S. State Department “had declined as early as 1874 to use the treaty-making power in the area of Private International Law and the recognition and enforcement of judgments.”).

62. Exekutionsordnung [EO] (Aus.) § 79.

requirements as does Austria, but require “substantive reciprocity” instead: This means that if, in fact, the courts of a U.S. state recognize and enforce German money judgments, the German courts will act correspondingly.

## VI. CONCLUSIONS

Today, there is a common understanding among the specialists on both sides of the Atlantic Ocean that jurisdiction in the United States and in Europe is based on different assumptions. Whereas the exercise of jurisdiction in Europe is obviously governed by rather restrictive rules, the U.S. courts adhere to a broader jurisdictional basis the limits of which are not clearly determined, but rather narrowed down by the courts discretionarily applying doctrines such as *forum non conveniens*.<sup>63</sup>

The conclusion of a comparative analysis of the rules on personal jurisdiction in Europe, as stated in the Brussels Convention and Council Regulation Brussels Nr. 1, and those applied by U.S. courts that “jurisdictional practice in the United States is deficient both in fairness and predictability”<sup>64</sup> is probably excessively critical. Nevertheless, it is the jurisdictional issue that, on a purely legal level, causes the greatest problems for the draftsmen of a Global Convention on Jurisdiction and Recognition and Enforcement of Foreign Judgments, as well as for practitioners specializing in the field of transatlantic business transactions.

Recognition and enforcement, selection of forum, and arbitration provide no major practical problems. It is rather the conduct of U.S. lawyers who — probably being too numerous for the domestic market of legal services in the United States and searching for new fields of activity — sometimes resort to conduct which is fairly different from the behavior of attorneys in Europe, and often appears unfair to Europeans. On the basis

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63. For a recent statement on the application of *forum non conveniens*, see Robert C. Casad, *Jurisdiction in Civil Actions at the End of the Twentieth Century: Forum Conveniens and Forum Non Conveniens*, 7 TUL. J. INT'L & COMP. L. 91 (1999) and Douglas W. Dunham & Eric F. Gladbach, *Forum Non Conveniens and Foreign Plaintiffs in the 1990s*, 24 BROOK. J. INT'L L. 665 (1999).

64. Borchers, *supra* note 31, at 156–57.

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of the U.S. rule of allocating the costs of proceedings irrespectively of the outcome of the lawsuit, they often put psychological pressure on European businessmen and their counsels to settle a dispute by a compromise.

Thus, there are legal, and probably more importantly, sociological differences between the United States and Europe that are responsible for the jurisdiction conflict diagnosed some time ago by European scholars and evidenced by the impasse in the negotiations on a Global Convention on Jurisdiction, Recognition, and Enforcement of Foreign Judgments in The Hague. However, the recent accordance to a preliminary document on choice-of-forum agreements provides a somewhat promising perspective for the creation of fair and uniform rules on litigation emerging from transatlantic, and even global, business activities.