2023

# Jurisdiction Over Non-EU Defendants: The Brussels I Article 79 Review

Ronald A. Brand
*University of Pittsburgh School of Law*, rbrand@pitt.edu

# V.

## The Global Perspective

# Jurisdiction Over Non-EU Defendants: The Brussels I Article 79 Review

**RONALD A BRAND**

## I. Introduction

Article 79 of the Brussels I (Recast) Regulation requires that the European Commission report in 2022 on the possible application of the direct jurisdiction rules of the Regulation to all defendants and not just to defendants domiciled in EU Member States.[1] This issue was set aside in the Recast of the Brussels I Regulation in 2011, when the Commission recommendation for such a change was rejected by the Parliament and Council. As a result, the Recast Regulation continues to allow each Member State to discriminate by applying otherwise prohibited bases of jurisdiction to cases involving non-EU defendants. Article 79 provides the opportunity to revisit the matter with the benefit of a decade of experience under the Recast Regulation. It also provides the opportunity to address the manner in which the Recast Regulation discriminates as well in it its rules on recognition and enforcement of judgments.

In this chapter I consider the possible extension of the internal direct jurisdiction rules to external defendants from a perspective external to the European Union. In doing so, I consider developments both within and outside of Europe in the law of jurisdiction and the recognition of foreign judgments. I begin with background on the 2009 Commission proposal to apply the direct jurisdiction rules of the Brussels I (Recast) Regulation to all defendants. I then provide the context for my own thoughts based on the evolution of EU competence for matters of private international law, discussion of related developments in jurisdiction and judgments recognition law in the United States, and consideration of the global negotiations on jurisdiction and the recognition of judgments at the Hague Conference on Private International Law. I use this context in order to consider whether matters have changed in ways that might justify a different rule in 2022 than in 2012 for the European Union. I conclude with thoughts about whether any EU changes in this regard should come internally by Regulation, or externally through multilateral treaty negotiations. I focus this part on the ways in which such changes can

[1] Art 79: By 11 January 2022 the Commission shall present a report to the European Parliament, to the Council and to the European Economic and Social Committee on the application of this Regulation. That report shall include an evaluation of the possible need for a further extension of the rules on jurisdiction to defendants not domiciled in a Member State, taking into account the operation of this Regulation and possible developments at international level. Where appropriate, the report shall be accompanied by a proposal for amendment of this Regulation.

properly eliminate discrimination against non-EU defendants in Member State courts in both jurisdiction and the recognition and enforcement of judgments.

## II. Article 79[2]

Article 5(1) of the Brussels I (Recast) Regulation states that '[p]ersons domiciled in a Member State may be sued in the courts of another Member State only by virtue of the rules set out in Sections 2 to 7 of this Chapter'. Thus, the Regulation provides an exhaustive set of jurisdiction rules for suits brought in the courts of a Member State against defendants who are domiciled in another Member State. No other bases of jurisdiction are available in such cases.

Article 8(1) provides that '[i]f the defendant is not domiciled in a Member State, the jurisdiction of the courts of each Member State shall, subject to Article 18(1), Article 21(2) and Articles 24 and 25, be determined by the law of that Member State'. Thus, as a general rule, except when there is exclusive jurisdiction under Art 25, or a choice of court agreement under Art 26, jurisdiction over a person not domiciled in a Member State is determined under a Member State's law excluding the Regulation.

In the Recast process, the European Commission published a proposal[3] for revision of the Brussels I Regulation.[4] One of the significant changes recommended in the proposal was in the original Art 4(2) (now Art 3(2)), where the Commission Proposal would have provided that '[p]ersons not domiciled in any of the Member States may be sued in the courts of a Member State only by virtue of the rules set out in Sections 2 to 8 of this Chapter'. This would have applied the jurisdictional rules of the Brussels I Regulation to all defendants in EU Member State courts, and not just to defendants domiciled in another Member State,[5] making them the complete and exhaustive set of rules of direct jurisdiction for defendants domiciled outside the forum state.

The Commission Proposal was reviewed by a Committee of the European Parliament in early 2011,[6] resulting in a June 2012 'proposal as proposed by the Presidency as a compromise with a view to the adoption of a general approach by the Council (Justice and Home Affairs)'.[7] That proposal was endorsed by the Council at its meeting on June 7–8, 2012.[8]

[2] For a more detailed discussion of related issues, see RA Brand, 'Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments' (2013) 358 *Recueil des cours of the Hague Academy of International Law* 13, 45–48.

[3] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), (COM (2010) 748/3 final, 14.12.2010).

[4] Regulation No 44/2001, as amended by Regulations Nos 1496/2002, 1791/2006 and 1103/2008.

[5] Commission Proposal (n 3), Art 4(2).

[6] Committee on Legal Affairs of the European Parliament, 'Draft Report on the proposal for a regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)' (COM(2010)0748 – C7-0433/2010–2010/0383(COD), Rapporteur: Tadeusz Zwiefka, 28.6.2011) ['Legal Affairs Committee Report'].

[7] Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast) – First reading, (10609/12 JUSTCIV 209 CODEC 1495, 1.6.2012) ['President's Compromise Proposal'].

[8] Council of the European Union, Press Release, 3172nd Council meeting, Justice and Home Affairs, Brussels, (7 and 8 June 2012, 10760/12, PR CO 34), 17.

The President's Compromise Proposal, as endorsed by the Council, rejected the position in the Commission proposal that would have extended the jurisdiction rules in the Brussels I Regulation to application in cases against defendants domiciled outside the European Union. Instead, it selectively extended certain of the Regulation's jurisdictional rules to cases involving defendants not domiciled in the European Union. These changes to the Regulation included:

1) The Art 18(1) rule that a consumer may bring a suit in the consumer's home state against a party to a contract *no matter where that party is domiciled*.
2) The Art 19(2) rule that an employee may bring a suit against their employer in the state in which the employee carries out their work *no matter where the employer is domiciled*.
3) The Art 22 rule providing that all of the bases for exclusive jurisdiction apply to all defendants, *no matter where they are domiciled*.
4) The Art 25(1) rule now extending jurisdiction to all parties to an agreement choosing a court within a Member State, and not just to agreements that include a party who is domiciled in a Member State.

Notably, the President's Compromise Proposal continued the discrimination against defendants not domiciled in the European Union which is maintained in Art 6 by allowing additional bases of jurisdiction under national law to be applied against non-EU defendants.

## III. The Context for Article 79

In order to understand the review required under Art 79, it is helpful to understand three other matters: (1) the evolution of EU competence for matters of private international law; (2) the corresponding evolution of the jurisprudence on jurisdiction and judgments recognition in the United States; and (3) the history of multilateral negotiations on issues of jurisdiction and judgments recognition at the Hague Conference of Private International Law. These matters overlap in time, particularly from the beginning of the jurisdiction and judgments project at the Hague Conference to the current time, with each having impact on the others. Both the European Union and the United States have played major roles in the Hague Conference negotiations.

### (a) The Evolution of Private International Law in Europe[9]

#### *(1) Competence for Rules of Private International Law*

When the six original Member States created the European Economic Community in 1957, they understood that private international law was important to the free

[9] For a more detailed discussion of this issue, see RA Brand, 'Of Magnets and Centrifuges: The US and EU Federal Systems and Private International Law' in: N Ringe and JJM Spoon (eds), *Comparative Regional Integration and Multilevel Governance: The European Union and Beyond, Essays in Honor of Alberta Sbragia*, (ECPR Press, 2020), www.papers.ssrn.com/sol3/papers.cfm?abstract_id=3505601; see also

movement of goods, services, capital, and people.[10] They demonstrated this when they included Art 220 in the original Treaty of Rome, declaring that the Member States of the Community should negotiate a further treaty on the mutual recognition of judgments.[11] Acting on this provision, in 1968 the Member States concluded the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Convention).[12]

The conclusion of the Treaty of Amsterdam in 1997 effectively moved competence for private international law matters from the Member States to the institutions of the European Community.[13] This was accomplished in its Art 61 (providing that 'the Council shall adopt … measures in the field of judicial cooperation in civil matters as provided for in Article 65'),[14] and Art 65 (stating that such authority would cover service of process, taking of evidence, the recognition of judgments, rules of conflict of laws and jurisdiction, and rules of civil procedure).[15] Those institutions responded by moving the sources of private international law from the Member States – largely found in codes of private international law – to the EU institutions, using regulations and directives in order to govern these matters through centralised EU law.[16]

While there originally were questions about the extent to which the Treaty of Amsterdam moved competence from Member States to the EU institutions, the matter was settled in 2003 with the *Lugano Convention* opinion of the European Court of Justice.[17] The Opinion presented questions regarding a challenge to the competence of

RA Brand, 'External Effects of Internal Developments: A US Perspective on Changing Competence for Private International Law in Europe' in S Bariatti and G Venturini (eds), *Liber Amicorum Fausto Pocar: New Instruments of Private International Law* (Giuffrè, 2009) 163–79.

[10] For a discussion of the rationale for including private international law rules under the rubric of a trade law regime, see RA Brand, 'Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law' in J Bhandari and AO Sykes (eds), *Economic Dimensions in International Law* (CUP, 1998), 592.

[11] Treaty Establishing the European Community, Art 293 (ex Art 220) (calling for the Member States to 'enter 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').

[12] European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, ('Brussels Convention', 27 September 1968, 41 OJ Eur Comm C 27/1, 26 January 1998), consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the 1996 accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden.

[13] Treaty of Amsterdam, signed on 2 October 1997, and entered into force on 1 May 1999.

[14] TEC (n 11), Art 61 (ex Art 73i).

[15] TEC (n 11), Art 65 (ex Art 73m).

[16] The centralisation of European private international law after the Treaty of Amsterdam has been dramatic, both in regard to the internal law of the EU and in regard to external legal developments. Regulations have been adopted establishing rules on insolvency; recognition and enforcement of judgments in civil and commercial matters; taking of evidence; judicial cooperation; recognition and enforcement of family law judgments; uncontested claims; common payment procedures; small claims procedure; applicable law for non-contractual obligations; service of documents; applicable law for contractual obligations; jurisdiction, applicable law, and recognition of judgments in maintenance obligation matters; applicable law for divorce and separation; and matters of succession, among others.

[17] Opinion 1/03, Request by the Council of the European Union for an Opinion pursuant to Art 300(6), EC Official Journal C 101/1 26 April 2003, [2006] E.C.R. I-1145; see 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 J Meeusen, M Pertegás and G Straetmans (eds), *Enforcement of International Contracts in the European Union* (Intersentia, 2004), 99–100.

the European Community to enter into a treaty with EFTA Member States (the Lugano Convention) that would parallel the rules the then-recent Brussels I Regulation had established for jurisdiction and the recognition of judgments when a case involved a defendant from another Member State. In the *Lugano Convention* Opinion, the Court followed the 1999 Opinion of the European Council Legal Service, which had stated that 'once the Community has exercised its internal competences adopting positions by which common rules are fixed [pursuant to Art 65 of the TEC], 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'.[18] Based on the 1971 *ERTA/AETR* decision,[19] as further developed in the *Open Skies* judgments of 2002,[20] the court stated that 'whenever 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',[21] 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'.[22] 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'.[23]

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. This evolution of EU competence for private international law affects both internal and external competence. The development of external competence was reflected on the international level when, in 2005, the Statute of the Hague Conference on Private International Law was amended to allow membership by a Regional Economic Integration Organization (REIO), ie, by the European Union.[24] EU Membership in the Hague Conference became effective on 4 March 2007.[25] This external competence of the European Union has been explicitly claimed as well through EU Regulations dealing with procedures for external negotiation regarding matters

[18] See A Borrás, 'The Effect of the Adoption of Brussels I and Rome I on the External Competences of the EC and the Member States', 99–100.

[19] Case 22/70 *European Rail Transport Agreement*.

[20] Cases C-467/98, C-468/98, C-469/98, C-471/98, C-472/98, C-475/98, and C-476/98 *Open Skies*.

[21] Case C-467/98 *Open Skies*, para 82.

[22] ibid.

[23] ibid.

[24] Hague Conference on Private International Law, Final Act, C, approved by Members on 30 September 2006 and entered into force on 1 January 2007, amending Art 3(1) of the Statute to provide that 'The Member States of the Conference may, at a meeting concerning general affairs and policy where the majority of Member States is present, by a majority of the votes cast, decide to admit also as a Member any Regional Economic Integration Organisation which has submitted an application for membership to the Secretary General. References to Members under this Statute shall include such Member Organisations, except as otherwise expressly provided. The admission shall become effective upon the acceptance of the Statute by the Regional Economic Integration Organisation concerned'.

[25] See Hague Conference on Private International Law Membership Status, www.hcch.net/index_en.php?act=conventions.status&cid=29.

such as applicable law,[26] and procedures for external negotiation regarding jurisdiction and the recognition of judgments in family law matters.[27] It has also been demonstrated in negotiations at the Hague Conference generally, where the EU speaks on behalf of all Member States in the negotiation of new multilateral instruments.

## *(2) Jurisdiction*

Of course, in the area of direct jurisdiction in the courts of EU Member States, the transition from the 1968 Brussels Convention, to the 2001 Brussels I Regulation, to the 2012 Brussels I (Recast) Regulation, demonstrates both the evolutionary process of moving from Member State to EU competence and the way in which judicial jurisdiction has been structured in a formal manner intended to create as much predictability as possible. With the rule of general jurisdiction focused on the domicile of the defendant in Art 4(1) of the Brussels I (Recast) Regulation, and the special jurisdiction rules found principally in Art 7, the structure is basically clear.

A defendant domiciled in an EU Member State may always be sued in that state, for any matter arising anywhere in the world. In addition, that defendant may be sued in the courts of another Member State if the criteria of one of the provisions of Art 7(1)–(7) are met. While the rule of general jurisdiction is based entirely on the strength of the connection between the forum state and the defendant, the rules of special jurisdiction found in Art 7 are based primarily on a relationship between the forum state and the claim (eg, the place of performance of a contract under Art 7(1), and the place 'where the harmful event occurs' for torts under Art 7(2)). In some cases, those special jurisdiction rules require no other connection between the forum state and the defendant. This sets up particularly interesting comparisons with the corresponding development of the law of judicial jurisdiction in the United States.[28]

The aspect of the Brussels I (Recast) Regulation that plays an important role in the Art 79 requirement of a review is the manner in which the Regulation discriminates against defendants not domiciled in EU Member States. Art 5 of the 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. 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 European Union law. Art 6 then operates to discriminate against defendants domiciled outside the European Union by specifically allowing jurisdiction based on those exorbitant national law bases of jurisdiction, and by extending them to all plaintiffs domiciled in the state in which the action is brought.

Article 79 of the Brussels I (Recast) Regulation brings into question whether it is appropriate to engage in the type of jurisdictional discrimination that would have been removed by the 2011 Proposal of the European Commission. As noted below, that discrimination contrasts with the personal jurisdiction rules applicable in US courts,

[26] Regulation No 662/2009, 25–30.
[27] Regulation No 664/2009, 46–51.
[28] See below notes 34–72 and accompanying text.

which provide protection to defendants from outside the forum state, whether those defendants are from other US states or from foreign States.[29]

What Article 79 does not do is require any consideration of the rules of recognition and enforcement of judgments found in the Brussels I (Recast Regulation). But those rules as well provide for discrimination in favor of defendants from other Member States as compared with defendants from outside the European Union. It is thus useful to think about whether those rules should also be reconsidered in the Art 79 review process.

### *(3) Judgments Recognition*

Article 36 of the Brussels I (Recast) Regulation provides that '[a] judgment given in a Member State shall be recognised in the other Member States without any special procedure being required'. Article 45 then provides for limited bases for non-recognition. Except for judgments in certain consumer, employment, and insurance cases, Art 45(3) prevents the recognising court from reviewing the jurisdiction of the court of origin.

Article 5(3) of the Regulation, by reference to Art 75(1), determines jurisdictional provisions in the Member States that go beyond the list of bases specifically authorised in the Regulation 'shall not be applicable as against' persons domiciled in a Member State. Because the exercise of such a jurisdictional basis against a defendant domiciled in another Member State is prohibited, no further provision is required to prevent the recognition of a judgment based on such jurisdiction. The Regulation thus addresses condemned bases of jurisdiction in a direct manner in the originating court, rather than in an indirect manner in the recognising court. A review of the substance of the original decision by the recognising court is prohibited, and the reviewing court is bound by the findings of fact in the originating court, including those on which jurisdiction was based.

Article 6 allows a defendant not domiciled in a Member State to be subject to suit based on otherwise prohibited national grounds of jurisdiction. Such a judgment rendered against a non-EU defendant is required to be recognised and enforced in all other Member States under the basic Art 36 rule.

The Brussels I (Recast) Regulation does not contain rules governing the recognition and enforcement of judgments from courts outside the European Union. Absent the benefits of a treaty or an EU Regulation, such a foreign judgment is governed by national rules of recognition and enforcement. This usually means that a new action must be brought on the judgment in order to obtain recognition (*exequatur*), with the resulting local judgment of recognition being the one for which enforcement is sought.[30] The prerequisites for judgment recognition generally are statutorily regulated.

[29] ibid.

[30] A significant change in the internal European recognition of judgments resulting from the 2012 Recast Regulation is the abolishment of the requirement of an *exequatur* (declaration of enforceability). Rather than require such a separate declaration by the recognising court prior to enforcement, the Recast provides that '[a] judgment given in a Member State which is enforceable in that State shall be enforceable in another Member State without the need for a declaration of enforceability being required', Art 39. With the Recast, it is up to the party against whom recognition and enforcement is sought to seek refusal of recognition of the judgment, Art 45(1).

While the Brussels I (Recast) Regulation does not have rules for the recognition and enforcement of judgments from courts in non-EU Member States, its jurisdictional rules do affect non-EU defendants in the process of recognition and enforcement. A judgment from another EU Member State is not subject to jurisdictional review because the jurisdictional analysis when an EU-domiciled defendant is involved must occur in the court of origin under the Brussels I (Recast) Regulation, and any contest of jurisdiction must occur in that court (subject to ultimate review by the Court of Justice of the European Union).[31] For non-EU-domiciled defendants, there simply is no such jurisdictional protection in EU Member State courts because other national law bases of jurisdiction may still apply, but the resulting judgment is subject to the requirement for recognition and enforcement in other Member State courts under Art 36. This discrimination in recognition and enforcement would, of course, change if the rules of direct jurisdiction in the Regulation applied to *all* defendants in Member State courts. Thus, the Art 79 Review does affect recognition and enforcement as well as direct jurisdiction.

In applying the *exequatur* process in national courts to judgments from courts outside the European Union, there are two basic approaches in national law. Each of these approaches generally provides for non-recognition based on a list of concerns similar to those found in Art 45 of the Brussels I (Recast) Regulation (public policy, lack of proper notice, fraud, inconsistent judgments subject to recognition, etc). The difference lies in the approach to indirect jurisdiction – ie, the way in which the reviewing court considers the original (direct) jurisdiction of the court of origin. In the first approach, Member States, such as Germany and Italy, make no distinction between the rules of direct and indirect jurisdiction.[32] This means that a foreign judgment is tested (indirect jurisdiction) by the same rules as apply to bring an action brought originally in the recognising court (direct jurisdiction).

A second approach involves a separate set of rules of indirect jurisdiction by which the judgment from a foreign court is tested, with that set of rules generally being much narrower than the direct jurisdiction rules in the state of the recognising court.[33] This results in a type of discrimination by which a foreign judgment in which the facts in the court of origin would have satisfied a recognising state basis of direct jurisdiction (ie, the case could have been brought in the courts of the recognising state under similar jurisdictional facts) will be denied recognition and enforcement because it does not meet the narrower test of the rules of indirect jurisdiction. This 'jurisdiction gap' results in clear discrimination against judgments from outside the European Union.

[31] Brussels I (Recast) Regulation, Art 45(3).

[32] See, eg section 328(I) of the German Code of Civil Procedure ('The judgment of a foreign court shall not be recognized (1) if the courts of the State to which the foreign court belongs have no jurisdiction under German law'), translation from IP Weems, Enforcement of Money Judgments Abroad FRG-29 (1993) and Article 64(1)(a) of Law 218/1995, Italy ('the authority rendering the judgement had jurisdiction pursuant to the criteria of jurisdiction in force under Italian law').

[33] For further discussion of such jurisdiction gaps, with specific reference to the law of the United Kingdom, see RA Brand, 'The Hague Judgments Convention in the United States: A "Game Changer" or a New Path to the Old Game?' (2021) 82 *U Pitt L Rev* 847, 866–74.

## (b) The Evolution of US Law on Jurisdiction and Judgments Recognition

### *(1) Jurisdiction*

The type of jurisdiction governed in the European Union by the Brussels I Regulation is known in US jurisprudence as personal or *in personam* jurisdiction. Most often, personal jurisdiction in US courts is obtained by demonstrating a relationship between the forum state, the defendant, and the cause of action.[34] Like in Europe, when the relationship between the forum state and the defendant is strong (ie, when the defendant's domicile is in the forum state), then the relationship to the claim can be weaker (or even non-existent). On the other hand, when the relationship between the forum state and the defendant is not continuous and systematic such that it makes the defendant 'at home', then the relationship with the claim becomes more significant. Nonetheless, as explained below, a relationship with the defendant must still be present because jurisdiction in US courts is a matter of federal Constitutional law based on due process protections of the person – in this case, the defendant – against actions by the state.

Whether a case is brought in state or federal court, analysis of personal jurisdiction in U.S. courts generally involves a two-step process. The first step is the application of the state 'long-arm statute', to determine whether statutory jurisdiction *in personam* jurisdiction exists.[35] These statutes differ, but generally can be categorised as list-type provisions, providing specific bases of jurisdiction,[36] and the constitutional limits statutes, providing that a court in the state can exercise *in personam* jurisdiction to the limits of the Due Process Clause.[37]The process of applying a list-type long-arm statute is similar to the application of the jurisdictional rules of the Brussels I Regulation.

The second step in the United States is the constitutional analysis by which it is determined whether the exercise of jurisdiction allowed by state statute in the particular case is within the limits of the Due Process Clause. Because it usually is a state long-arm statute that is being considered, it is the Fourteenth Amendment with which courts are most often concerned.

The Due Process Clauses of both the Fifth and Fourteenth Amendments are written as limitations on the federal and state governments.[38] As such, they protect all persons

[34] For a more detailed discussion, see RA Brand, 'Transaction Planning Using Rules of Jurisdiction and the Recognition and Enforcement of Judgments' (2013) 358 *Hague Academy Collected Course* 12, 49–95.

[35] Jurisdiction in the federal courts is governed by Rule 4(k) of the Federal Rules of Civil Procedure. This Rule provides three principal jurisdictional authorisations: (1) Rule 4(k)(1)(A) authorises a district court to borrow the jurisdictional powers of state courts in the state where it is located; (2) Rule 4(k)(1)(D) confirms the availability of any applicable federal statute granting personal jurisdiction; and (3) Rule 4(k)(2) grants district courts personal jurisdiction to the limits of the [Fifth Amendment] due process clause in certain federal question cases. See GB Born and PB Rutledge, *International Civil Litigation in US Courts* 4th edn (Aspen, 2007) 193. This most often results in the federal court 'borrowing' the state statute under Rule 4(k)(1)(A): ibid at 172–97.

[36] See, eg, 42 Pa Cons Stat Ann § 5322.

[37] See, eg, Cal CivProc. Code Ann § 410.10.

[38] US Const amends V & XIV. The Fifth Amendment, ratified on 15 December 1791, provides a limitation on the federal government, stating that 'No person shall be … deprived of life, liberty, or property, without due process of law'. The Fourteenth Amendment, ratified on 9 July 1868, provides a limitation on state governments, stating that 'No State shall … deprive any person of life, liberty, or property, without due process of law'.

(and not just citizens or those domiciled in the United States) from excessive exercises of governmental authority. In their application to judicial jurisdiction, this means the Due Process Clauses restrict the extent to which courts may exercise jurisdiction over a defendant. Because the plaintiff is considered to have consented to jurisdiction by bringing the case, it is the defendant who is entitled to due process in any determination affecting their life, liberty, or property. Thus, unlike the Brussels I (Recast) Regulation, these protections exist for *all* defendants, and not just for defendants domiciled in the United States. The resulting protections for defendants have been developed through the jurisprudence of the United States Supreme Court applying concepts of due process to judicial jurisdiction.

Soon after the ratification of the Fourteenth Amendment with its Due Process Clause, in the 1877 case of *Pennoyer v Neff*,[39] the Supreme Court applied a territorial approach to jurisdiction over a defendant,[40] looking for the presence of the defendant within the territory, stating that 'every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory', and 'no State can exercise direct jurisdiction and authority over persons or property without its territory'.[41] This territorial approach follows a defendant domiciled in a forum state, even when they are outside the territory of that state. Thus, in *Milliken v Meyer*,[42] the court held that a defendant domiciled in Wyoming who was served personally in Colorado, was properly subject to the jurisdiction of the courts of Wyoming on the basis of domicile.[43] This established a principle similar to the general jurisdiction rule found in Art 4 of the Brussels I (Recast) Regulation, that a defendant will always be subject to jurisdiction at his or her domicile.

When the Supreme Court responded over time to concerns about modern methods of communication and transportation, and to the development of corporations as legal persons, there was an appearance that they were expanding concepts of jurisdiction within the Due Process framework. Thus, in *International Shoe Co v Washington*,[44] an action was brought in a Washington State court, by the State of Washington Office of Unemployment Compensation, to collect delinquent contributions from a Delaware corporation which had its offices in Missouri. Drawing on both *Pennoyer v Neff* and *Milliken v Meyer*, the court emphasised the importance of a nexus between the defendant and the forum state.[45] While *Pennoyer* represented the historical focus on the presence of the defendant within the jurisdiction as a 'prerequisite to its rendition of

[39] 95 US 714 (1877). Rightly or wrongly, *Pennoyer v Neff* linked American jurisdictional law with the Fourteenth Amendment's Due Process Clause, and however questionable that linkage may be, it has become part of American conventional wisdom'. FK Juenger, 'Constitutionalizing German Jurisdictional Law' (1996) *American Journal of Comparative Law* 521 (book review).

[40] 'The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, in illegitimate assumption of power, and be resisted as mere abuse'. 95 US at 720.

[41] ibid at 722.

[42] 311 US 457 (1940).

[43] ibid at 462 ('Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. Substituted service in such cases has been quite uniformly upheld where the absent defendant was served at his usual place of abode in the state … as well as where he was personally served without the state'.)

[44] 326 US 310 (1945).

[45] ibid at 316.

a judgment personally binding him',[46] *Milliken* demonstrated that something less was necessary. In *International Shoe*, the court developed this line further, stating that due process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'.[47]

The need for rules accommodating the fiction of the corporate personality led the court to focus on the conduct of those acting on behalf of the corporation.[48] It noted two variables in determining the constitutionality of jurisdiction over non-resident defendants. The first is the extent and intensity of the defendant's activities in the forum state, and the second is the connection between those activities and the cause of action.[49] 'Continuous and systematic' activity supports general jurisdiction over a defendant, allowing a court to consider actions against the defendant whether or not they arise out of those activities.[50] A 'single isolated' contact, on the other hand, will (at most) support only specific jurisdiction, and the action must arise out of the contact. Finding that the activities of the defendant in the State of Washington were 'systematic and continuous', and resulted 'in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state', and that the obligation sued upon 'arose out of those very activities',[51] the court found it to be 'evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice' to permit jurisdiction.[52]

The distinction in the United States between general and specific jurisdiction was first explicitly suggested by Professors Arthur T von Mehren and Donald T Trautman, in their 1966 article, 'Jurisdiction to Adjudicate: A Suggested Analysis'.[53] That distinction was then developed judicially by the Supreme Court in *Helicopteros Nacionales de Colombia, SA v Hall*.[54] In a wrongful death action brought in Texas state court against a Colombian corporation, when a helicopter crash in Peru resulted in the deaths of four US citizens, Justice Blackmun's opinion for the court stated that, '[w]hen a controversy is related to or "arises out of" a defendant's contacts with the forum, the court has said that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of *in personam* jurisdiction'.[55] Thus, specific jurisdiction required that the cause of action in litigation 'arise out of', and thus be directly related to, the activities of the defendant within the forum state.[56] The court expressed the alternative general

[46] ibid (citing *Pennoyer v Neff*, 95 US 714, 733 (1877)).
[47] ibid at 313 (quoting from *Milliken v Meyer*, 311 US 457, 463 (1940)).
[48] ibid at 316.
[49] ibid at 316–20.
[50] ibid at 317.
[51] 326 US at 320.
[52] ibid.
[53] 79 Harv L Rev 1121, 1144–1164 (1966).
[54] 466 U.S. 408 (1984).
[55] 466 US at 414.
[56] ibid at 415.

jurisdiction by stating that, '[e]ven when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and the foreign corporation'.[57] Under general jurisdiction, so long as the contacts are 'continuous and systematic', they may support jurisdiction even though the cause of action does not 'arise out of' the contacts.[58] The *Helicopteros* court found the cause of action at issue not to have arisen out of the contacts with Texas, thereby avoiding a discussion of specific jurisdiction. It then ruled that general jurisdiction did not exist under the Due Process Clause.[59]

Throughout this development of the application of the Due Process Clauses to personal jurisdiction, it was generally assumed that certain corporations are so ubiquitous that general jurisdiction existed over them in every US state because those corporations were engaged in continuous and systematic activity everywhere. This was true in *World-Wide\Volkswagen Corp v Woodson*,[60] a products liability lawsuit brought in Oklahoma based on an automobile accident which occurred in that state when an automobile sold in New York to New York residents was being driven through Oklahoma. The plaintiff sued both the New York regional distributor and the New York retail dealer from whom the car had been purchased. Both of these defendants successfully challenged the jurisdiction of the Oklahoma court. The plaintiffs also sued the manufacturer and Audi NSY Auto Union Aktiengesellschaft, but those defendants did not challenge the issue of jurisdiction on appeal, apparently because they assumed the existence of general jurisdiction through continuous and systematic activity in or directed at Oklahoma.[61]

The assumption of widespread general jurisdiction over multinational corporations met an abrupt change in 2011 with the decision in *Goodyear Dunlop Tires Operations, SA v Brown*.[62] A products liability action was brought in a North Carolina state court, based on an accident in France injuring North Carolina residents, against Goodyear Tire and Rubber Company (Goodyear USA), and three of its subsidiaries, located in Turkey, France, and Luxembourg.[63] All three foreign subsidiaries moved to dismiss for lack of jurisdiction. Because the accident took place in France, and the tires involved were manufactured and sold outside the United States, there was no specific jurisdiction. The only question was whether there was general jurisdiction over the foreign subsidiaries.[64] Justice Ginsburg, writing for a unanimous court, used language seeming to draw upon the Brussels I Regulation and its general jurisdiction rule based on domicile:

[57] ibid at 414.
[58] ibid at 414–15 (discussing *Perkins v Benguet Consolidated Mining Co*, 342 US 437 (1952), and *Keeton v Hustler Magazine, Inc*, 465 US 770, 779–80 (1984)).
[59] ibid at 418–19.
[60] 444 US 286 (1980).
[61] 444 US at 288 n 3.
[62] 564 US 915 (2011).
[63] 564 US at 918.
[64] 564 US at 919–20.

> *International Shoe* distinguished from cases that fit within the 'specific jurisdiction' categories, 'instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.' Adjudicatory authority so grounded is today called 'general jurisdiction.' For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.[65]

The court found the three European defendants not to be sufficiently 'at home' in North Carolina.[66] *Goodyear* thus brought a dramatic limitation to the concept of general jurisdiction as it had previously been applied in US courts.[67]

On the same day that *Goodyear* was decided, the court also decided *J McIntyre Machinery Ltd v Nicastro*,[68] a case dealing with specific jurisdiction. Justice Ginsburg, writing in dissent this time, suggested an expansion of US concepts of specific jurisdiction that would be comparable to the corresponding special jurisdiction rules in the Brussels I Regulation.[69] Her opinion implied that such a result would properly accompany the severe restriction of general jurisdiction brought about by the *Goodyear* decision by having less severe limitations on specific jurisdiction. A combination of opinions that makes it difficult to discern a clear rule going forward resulted in a majority of the court holding that jurisdiction did not exist in New Jersey for injury to a New Jersey resident caused by a metal-shearing machine manufactured by an English company in England, when that company did not sell its product directly in the United States, but rather through an independent distributor. Justice Ginsburg specifically referred to the Brussels I Regulation in her dissenting opinion, noting that the decision of the 'splintered majority' set the rules of jurisdiction in the United States at odds with the example of the approach taken in much of the rest of the world. The result, she noted, 'puts United States plaintiffs at a disadvantage in comparison to similarly situated complainants elsewhere in the world',[70] specifically when compared to Art 7(2) of the Brussels I Regulation, which allows jurisdiction at the place of injury.[71] The Supreme Court has addressed personal jurisdiction three more times after *Goodyear* and *Nicastro*, but those decisions have not altered the general thrust of the 2011 decisions.[72]

### *(2) Judgments Recognition*

Like the European Union, in the United States judgments from courts within the United States (both federal and state courts) circulate rather freely. This results from the Full

[65] 564 US at 924.

[66] ibid.

[67] For a representative discussion of this shift, see M Gardner, PK Bookman, AD Bradt, ZD Clopton and DT Rave, 'The False Promise of General Jurisdiction' (2022) *Alabama Law Review* 455.

[68] 564 US 873 (2011).

[69] 564 US at 909 n 16 (Ginsburg, J, dissenting).

[70] ibid.

[71] See Case 21/76 *Bier*, defining the place where the harmful event occurred as either 'the place where the damage occurred' or 'the place of the event which gives rise to and is at the origin of that damage'.

[72] *Ford Motor Co v Montana Eighth Judicial District Court*, 141 S Ct 1017, (2021); *Bristol-Myers Squibb Co v Superior Court of California*, 137 S Ct 1773 (2017); *Daimler AG v Bauman*, 571 US 117 (2014).

Faith and Credit clause in Article IV of the United States Constitution and the federal full faith and credit statute.[73] For judgments from outside the United States, whether the recognition action is brought in state or federal court, it generally is state law that governs. Nonetheless, that law is relatively uniform, with most states having adopted either the 1962 Uniform Foreign Money-Judgments Recognition Act[74] or the updated 2005 Uniform Foreign-Country Money Judgments Recognition Act.[75] Other states follow similar rules by applying common law principles, generally consistent with the interpretation found in the Restatement. The provisions of the Third Restatement on judgments recognition[76] were updated in the Fourth Restatement,[77] and basically now track the Uniform Acts.

Both the Uniform Acts and the Restatement make the United States a quite liberal country for the purposes of recognition and enforcement of foreign judgments. The basic structure for the analysis is as follows:

(a) A court will recognize a foreign country judgment that grants or denies recovery of a sum of money if the judgment is final, conclusive and enforceable in the state in which it was rendered.[78]
(b) A court must deny recognition if
    (1) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
    (2) the foreign court did not have personal jurisdiction over the defendant; or
    (3) the foreign court did not have jurisdiction over the subject matter.[79]
(c) A court may discretionarily deny recognition if
    (1) the defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;
    (2) the judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;
    (3) the judgment or the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state or of the United States;
    (4) the judgment conflicts with another final and conclusive judgment;
    (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;
    (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;

[73] 28 USC § 1738.
[74] Uniform Foreign Money-Judgments Recognition Act ('1962 Recognition Act').
[75] Uniform Foreign-Country Money Judgments Recognition Act, ('2005 Recognition Act').
[76] Restatement (Third) Foreign Relations Law §§ 481–83 (1987).
[77] Restatement (Fourth) Foreign Relations Law §§ 481–89 (2018).
[78] 2005 Recognition Act (n 75), § 3(a); Restatement (Fourth) (n 77) § 481.
[79] 2005 Recognition Act (n 75), § 4(b); Restatement (Fourth) (n 77) § 483.

(7) the judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or
(8) the specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law.[80]

Most notably, the mandatory ground for non-recognition based on personal jurisdiction requires that the court apply the same jurisdictional analysis to the foreign judgment (indirect jurisdiction) as it would apply to a case being brought originally in its own court (direct jurisdiction). Thus, there is no jurisdiction gap, and no resulting discrimination that limits the acceptable bases of jurisdiction in the foreign court of origin. The rules of direct jurisdiction for the purposes of bringing a case are the same as the rules of indirect jurisdiction by which a foreign judgment is tested for recognition purposes.[81]

## (c) Negotiations at the Hague Conference on Private International Law

The Jurisdiction and Judgments Project at the Hague Conference on Private International Law provides the global context for understanding the impact of differing rules on jurisdiction for EU and non-EU defendants in the courts of the EU Member States. This too is helpfully developed in a chronological manner, keeping in mind that the developments already highlighted for the European Union and the United States had an impact on the Hague negotiations both because each of them was a major player in those negotiations and because other States involved in the Hague negotiations have similar approaches to questions of jurisdiction and the recognition and enforcement of judgments.

In May of 1992, the United States proposed that the Hague Conference consider preparing a multilateral convention on the recognition and enforcement of judgments.[82] The matter was placed on the agenda of the Hague Conference in October 1996,[83] resulting in a Preliminary Draft Convention text in October 1999.[84] That text was revised again at the first part of a split Diplomatic Session in June 2001. An Interim Text created at that 2001 Session fared no better than the 1999 Preliminary Draft text.[85] Thus, in April 2002 it was decided to consider a more limited convention, including only those jurisdictional provisions on which substantial consensus existed, with the result

[80] 2005 Recognition Act (n 75), § 4(c); Restatement (Fourth) (n 77), § 484.

[81] Such a jurisdictional challenge in a judgment recognition action is the same for judgments from outside the United States as it is for judgments from inside the United States.

[82] Letter of 5 May 1992 from ED Williamson, Legal Advisor, US Department of State, to G Droz, Secretary General, The Hague Conference on Private International Law, distributed with Hague Conference document Lc ON No 15 (92).

[83] 'Final Act of the Eighteenth Session of the Hague Conference on Private International Law', 19 October 1996, at 21.

[84] Informational note on the work of the informal meetings held since October 1999 to consider and develop drafts on outstanding items, drawn up by the Permanent Bureau, Hague Conference on Private International Law, Prel Doc No 15 (May 2001) (containing the text of the Preliminary Draft Convention).

[85] Hague Conference on Private International Law, 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.

being a March 2003 Draft Text for a Convention on Choice of Court Agreements.[86] A further Special Commission considered that text, and the Convention on Choice of Court Agreements was concluded at a Diplomatic Session in June of 2005.[87]

The Hague Convention on Choice of Court Agreements came into effect for Mexico and the European Union (for 27 of its Member States) on October 1, 2015;[88] for Singapore on October 1, 2016; for Montenegro on August 1, 2018, and for Denmark on September 1, 2018.[89] The United Kingdom has given notice that it remains in effect for the United Kingdom subsequent to Brexit.[90] Israel, the People's Republic of China, the Republic of North Macedonia, Ukraine, and the United States have signed, but have not ratified, the Convention.[91] There is no indication that the United States will be able to move soon to ratification and implementation.[92]

The Choice of Court Convention contains three basic rules: Art 5 provides that a court chosen in an exclusive choice of court agreement shall have exclusive jurisdiction; Art 6 provides that a court not chosen shall defer to the chosen court; and Art 8 provides that the courts of all contracting states shall recognise 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 Art 9.[93] 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).

In October 2011, an Experts' Group was established to consider a resumption of the project in order to deal with those issues not addressed in the Choice of Court Convention.[94] The jurisdiction and judgments elements of the project were split in 2012, with a Working Group established to prepare proposals for a judgments convention and an Experts' Group directed to give further study to a separate jurisdiction convention.[95] The Working Group completed a Proposed Draft Text of a judgments convention in 2016, and Special Commission meeting were held in June 2016, February 2017, November 2017, and May 2018, with the Experts' Group instructed to move

[86] 'Preliminary Result of the Work of the Informal Working Group on the Judgments Project', Hague Conference on Private International Law, Prel Doc No 8 (March 2003) (corrected) for the attention of the Special Commission of April 2003 on General Affairs and Policy of the Conference.

[87] The text of the Final Act of the Twentieth Session, and a documentary history of the Choice of Court Convention project, are available on the Hague Conference website at: www.hcch.net/index_en.php?act=conventions.text&cid=98.

[88] On 31 January 2020, the United Kingdom notified the Depositary that 'the United Kingdom and the European Union have signed, ratified and approved a Withdrawal Agreement', which entered into force on 1 February 2020 (the 'Withdrawal Agreement'). The Withdrawal Agreement includes provisions for a transition period to start on the date the Withdrawal Agreement enters into force and end on 31 December 2020 (the 'transition period'). In accordance with the Withdrawal Agreement, during the transition period, European Union law, including the Agreement, will continue to be applicable to and in the United Kingdom. See status table www.hcch.net/index_en.php?act=conventions.status&cid=98.

[89] ibid.

[90] ibid.

[91] ibid.

[92] SB Burbank, 'A Tea Party at The Hague?' (2012) *Southwestern Journal of International Law* 101.

[93] For a more complete discussion of the Choice of Court Convention, see RA Brand and P Herrup, *The 2005 Hague Convention on Choice of Court Agreements* (CUP, 2008).

[94] www.hcch.net/en/projects/legislative-projects/judgments.

[95] ibid.

forward on a jurisdiction convention only after the judgments convention text would be concluded.[96] A Diplomatic Session adopted the 2019 Convention on Jurisdiction and the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters as its Final Text.[97] Costa Rica, Israel, the Russian Federation, Ukraine, the United States, and Uruguay have signed the Convention, but none has yet ratified.[98]

The basic structure of the Judgments Convention text is rather simple, but is then made complex through the set of connecting factors (some of which are similar to indirect bases of jurisdiction) by which a court is to determine whether a judgment may circulate under the Convention. Articles 1–3 set forth the scope of the Convention and provide definitions.[99] Art 4(1) provides the operative rule of the Convention, which requires that each Contracting State shall recognise and enforce judgments from other Contracting States and permits refusal only on those grounds expressly set out in the Convention. Article 5 then determines which judgments are 'eligible for recognition and enforcement' under the Convention by providing a list of bases of jurisdiction on which a judgment may have been founded. Thus, the court addressed for purposes of recognition and enforcement indirectly considers the connection on which the court of origin directly founded its judgment (or could have done so). Article 7 provides the general bases for non-recognition of a judgment, even if that judgment meets the requirements of Art 5. This list tracks closely the grounds for non-recognition found in the 2005 Hague Choice of Court Convention.[100]

Like the Choice of Court Convention, the Judgments Convention did not exhaust the set of issues originally presented in the jurisdiction and judgments project. Thus, the Experts Group on jurisdiction continued its work and, in February 2021 recommended to the Council on General Affairs and Policy (CGAP) of the Hague Conference that a Working Group be established 'to develop draft provisions on matters related to jurisdiction in civil or commercial matters, including rules for concurrent proceedings'.[101] The recommendation included that the Working Group have 'an initial focus on developing binding rules for concurrent proceedings (parallel proceedings and related actions or claims)',[102] and 'explore how flexible mechanisms for judicial coordination and cooperation can support the operation of any future instrument on concurrent proceedings and jurisdiction in transnational civil or commercial litigation'.[103] CGAP followed the Expert's Group recommendation and, in October 2021, mandated that a Working Group be created on the bases recommended by the Expert's Group. An online Working Group meeting was held in February 2022, followed by a hybrid meeting in September 2022, at which initial drafting of a Convention on Parallel Proceedings was begun. Both the European Union and the United States remained important parties in these efforts.

[96] ibid.

[97] Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, www.hcch.net/en/instruments/conventions/specialised-sections/judgments.

[98] www.hcch.net/en/instruments/conventions/status-table/?cid=137.

[99] Hague Judgments Convention (n 97), Arts 1–3.

[100] Hague Convention on Choice of Court Agreements (n 87), Art 9.

[101] Aide-Mémoire of the Fifth (Online) Meeting of the Expert's Group on the Jurisdiction Project, February 2021, 39.

[102] ibid.

[103] ibid.

## IV. Concluding Thoughts

Article 79 of the Brussels I (Recast) Regulation directs the Commission to answer only one question: whether it is now appropriate to apply the closed system of direct jurisdiction in the courts of EU Member States to all defendants, and not just to defendants domiciled in other EU Member States. The above discussion suggests that the review should address two other important issues:

(1) whether changes should also be made in the Regulation in order to extend its rules on the recognition and enforcement of judgments to external judgments, and
(2) if such changes are recommended on either or both of the rules on jurisdiction and judgments recognition, whether those changes occur through internal EU legislation or through global negotiations at the Hague Conference on Private International law.

Much has changed in both the European Union and the United States on the law of jurisdiction and judgments recognition since the initial consideration of these matters at the Hague Conference in the early 1990s. Competence for private international law has shifted fully from the EU Member States to the EU institutions. That law is now centralised, coordinated, and comprehensive. This is best demonstrated in the evolution from the Brussels Convention to the Brussels I Regulation to the Brussels I (Recast) Regulation.

In the United States, the law on jurisdiction over foreign defendants changed dramatically in 2011 with the Supreme Court's *Goodyear* decision. The move from broad-based general jurisdiction founded on continuous and systematic presence through corporate conduct to very limited general jurisdiction only where a corporation is 'at home' places the United States squarely in line with the rules of general jurisdiction in the Brussels I system.

While rules of general jurisdiction have moved closer together, however, that has not happened to rules of special/specific jurisdiction. The *Nicastro* decision made clear that a contraction of US general jurisdiction would not be accompanied by a corresponding expansion of concepts of specific jurisdiction. Thus, US jurisdictional reach is much more limited than is EU jurisdictional reach, even if only the direct jurisdiction rules applicable to defendants domiciled in EU Member States are applied. When the additional national law bases of jurisdiction are included in the EU Member State courts as available against defendants from non-EU Member States, the differences between the US and EU systems remain rather dramatic.

The difference in special/specific jurisdiction rules results largely from the US focus on due process rights of the defendant; rights that are available to all persons, both domestic and foreign, and both natural and legal. The EU special jurisdiction rules that focus almost solely on the connection between the court and the claim provide a very different result, and tip the balance significantly in favour of plaintiffs (perhaps enhancing concepts of access to justice) while providing much less protection for defendants (limiting the availability of due process – something rather different from access to justice).

An amendment to the Brussels I (Recast) Regulation that unifies the jurisdiction rules by making them applicable to all foreign defendants, and not just those domiciled

in another Member State, would be a positive development in removing the discrimination that now exists against defendants domiciled outside the European Union. It would effectively extend due process to all defendants by removing the use of bases of jurisdiction the Member States themselves have determined to be unacceptable within the EU.

The opportunity should not be lost, however, to remove discrimination in judgments recognition law as well. As noted above,[104] the original Rome Treaty creating the European Economic Community, in its Art 220, clearly recognised the importance of unified rules on judgments recognition to the effective free movement of goods, services, capital, and people. Moreover, by combining rules on judgments recognition with rules on jurisdiction, the resulting Brussels Convention demonstrated a clear recognition of the importance of coordinating rules of jurisdiction and the recognition and enforcement of judgments. The further development of the European Union as a cohesive federal system for purposes of private international law makes it not only appropriate but important to take the next step in what has been a natural and organic evolutionary process.[105]

While much has happened at the Hague Conference on Private International Law, with the completion of the 2005 Convention on Choice of Court Agreements and the 2019 Convention on the Recognition and Enforcement of Judgments in Civil or Commercial Matters, the differences existing on a global basis, and particularly between the European Union and the United States, make the possibility of a global treaty on jurisdiction no more likely than was the case in 2001 when the transition away from that part of the goal was made. Had the rest of the US Supreme Court in 2011 followed Justice O'Connor's lead in *Nicastro* as they did in *Goodyear*, it may be that US and EU jurisdictional rules would be ready for coordination on a global stage. Unfortunately, that is not the case and any global possibilities on this front remain rather distant at best. This means it is most appropriate for the European Union to take those steps on rules for both jurisdiction and the recognition and enforcement of judgments internally. Article 79 of the Brussels I (Recast) Regulation provides that opportunity. It is an opportunity to remove discriminatory practices built into the Regulation and present a strengthened common front and example to the rest of the world.

[104] n 11 and accompanying text.

[105] See RA Brand, 'Recognition of Foreign Judgments as a Trade Law Issue: The Economics of Private International Law'.