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COMMUNITY COMPETENCE FOR MATTERS OF JUDICIAL
COOPERATION AT THE HAGUE CONFERENCE ON PRIVATE
INTERNATIONAL LAW: A VIEW FROM THE UNITED STATES

Ronald A. Brand

I. INTRODUCTION

The Amsterdam Treaty's introduction of Article 65 into the European Community Treaty took little time to achieve practical importance. In fact, the questions were practical as early as they were theoretical. A 1992 request by the United States that the Hague Conference on Private International Law negotiate a global convention on jurisdiction and the recognition of civil judgments resulted in a laboratory for the new-found competence of the Community. Thus, negotiations already underway—which included delegations from all 15 EU Member States—were affected significantly by the transfer of competence from those states to the Community institutions for matters under consideration at The Hague.

The transfer of competence for judicial cooperation resulted in tensions internal to the Community and at the same time changed the dynamics at the Hague Conference, where other delegations were left for several years to consider just what the source of authority was for potential conclusion of a global treaty that would be effective in the Community. This article traces the history of the negotiations at The Hague, considers the parallel changes on the same issues within the Community, and reviews from a U.S. perspective the resulting cross-currents. While the evolution of Community competence concurrent with ongoing negotiations at The Hague caused uncertainty for negotiators, it also served to highlight the developing role of the European Union as a player in an area previously untouched by Community institutions on an external basis. It also tested the global role of the Hague Conference as a traditionally Euro-centric organization that now must expand its reach in

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order to remain viable when private international law for Europe will be developed in Brussels. Finally, it accented further the differences in conceptual approaches to judicial jurisdiction, especially between the United States and continental civil law systems. In doing so, it demonstrated that Community competence for external relations in judicial cooperation requires special attention to the relationship between the United States and the European Union.

II. THE HAGUE NEGOTIATIONS AND CHANGING COMPETENCE IN EUROPE

In May of 1992, the United States proposed that the Hague Conference on Private International Law take up the negotiation of a multilateral convention on the recognition and enforcement of judgments. In October of 1992, a Working Group at The Hague "unanimously recognized the desirability of attempting to negotiate multilaterally through the Hague Conference a convention on recognition and enforcement of judgments." The Seventeenth Session of the Hague Conference, in May of 1993, decided to study the matter further through a Special Commission Session. In June of 1994, a Special Commission of the Hague Conference recommended that the question be included in the Agenda for the future work of the Conference at its Eighteenth Session, and in June of 1995, the Special Commission on General Affairs and Policy of the Conference recommended to the Eighteenth Session of the Hague Conference (held in October 1996) that the proposal for a judgments convention be adopted as one of the works of that Session.

At the Eighteenth Session of the Hague Conference, it was decided "to include in the Agenda of the Nineteenth Session the question of jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters." The formal negotiations began in June 1997. Additional

3. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, SEVENTEENTH SESSION FINAL ACT 17 (1993).
6. Preliminary Results of the Work of the Special Commission Concerning the Proposed
negotiating sessions were held in March 1998, November 1998, and June 1999. At the session in October 1999, a Preliminary Draft text of the Convention emerged through traditional Hague Conference procedures that involved inclusion of provisions that received support of a majority of the delegations present and voting.\(^7\)

A Diplomatic Conference originally was contemplated to take place in the fall of 2000. This course was altered, however, after the letter in February 2001 from Jeffrey Kovar, Assistant Legal Adviser for Private International Law at the U.S. State Department, to the Secretary General of the Hague Conference,\(^8\) detailing substantial problems with the Preliminary Draft Convention text. At a meeting of the Hague Conference Special Commission on General Affairs and Policy in May of 2000, it was decided to delay the diplomatic conference, and to divide it into two parts.\(^9\) The first two week session was scheduled for June 2001, with the final session to be at a later date.\(^10\) This resulted in informal meetings in Washington in October 2000, in Basel in December 2000, in Geneva in January 2001, in Ottawa in February 2001, and in Edinburgh in April 2001, all designed to prepare for the consensus process chosen to apply at the June 2001 session of the diplomatic conference.

The two weeks of diplomatic conference in June of 2001 resulted in a second full text draft, the "Interim Text."\(^11\) This text is much longer than the Preliminary Draft Convention text of October 1999, including numerous alternatives, variations and bracketed language in many provisions.\(^12\) It thus

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\(^7\) The text of the Preliminary Draft Convention is available at http://www.hcch.net/e/conventions/draft36e.html.


\(^10\) Conclusions of the Special Commission of May 2000, supra note 9, at 10.


\(^12\) Bracketed language in a Hague Conference document indicates that no decision has been reached on the inclusion or exclusion of that language.
provides a lengthy catalogue of negotiating positions, but is not particularly useful in working toward a final convention.

While this process was going on in The Hague, the European Community was moving forward on deepening cooperation among its Member States, and increasing competence of Community institutions. While private international law specialists were representing the Community Member States at the Hague in June of 1997, their trade law counterparts were meeting in the Amsterdam Treaty process to draft language that would change the role of those specialists. Whether the trade specialists ever consulted the private international law specialists on these changes is not clear. What is clear is that the language of the Treaty of Amsterdam has changed dramatically the role of national private international law specialists in the Hague negotiations.

The transfer of internal competence for matters of judicial cooperation to Community institutions is described well by Wilderspin and Kotuby in the other articles in this symposium. The implications of that competence for external relations became a matter of tension in the Hague negotiations, with national delegations often claiming it would not change their roles, and Community observers quietly preparing for that change. The result was a shift in negotiating dynamics after the Treaty of Amsterdam entered into force on May 1, 1999. While Article 65 provides only internal competence for matters of judicial cooperation, the completion of the “Brussels I” Regulation in December of 2000 completed this shift by asserting internal competence in a

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14. Treaty Establishing the European Community (Consolidated Text) art. 65 (ex. art. 73m), 1997 O.J. C 340 at 173, 203 (Nov. 10, 1997). This article provides as follows:

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

(a) improving and simplifying
   —the system for cross-border service of judicial and extrajudicial documents;
   —cooperation in the taking of evidence;
   —the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.
manner that absorbed external competence as well for the Community institutions.\textsuperscript{15}

The opportunity existed after the June 2001 meeting to consult informally and reach agreement on a course that could lead to a successful result of the Hague negotiations. This led to a decision in a meeting in The Hague in April 2002 to proceed with negotiations that would focus on a more modest convention limited to enforcement of choice of court clauses in business-to-business relationships.\textsuperscript{16}

III. THE MIXED CONVENTION APPROACH TO A TREATY ON JURISDICTION AND JUDGMENTS

The assumption early in the Hague negotiations to work toward a "mixed" convention was significant in that it set the stage for a new type of convention that did not yet exist in practice. Single (sometimes referred to as "simple") conventions on the recognition of judgments deal only with indirect jurisdiction and apply only to the decision of the court asked to enforce a foreign judgment.\textsuperscript{17} Thus, the recognizing court considers the jurisdiction of the court issuing a judgment in deciding whether to recognize the judgment of the originating court. Double conventions, like the Brussels and Lugano Conventions,\textsuperscript{18} not only deal with recognition, but also provide direct jurisdiction rules applicable in the court in which the case is first brought—thus addressing the matter from the outset and preempting the need for substantial indirect consideration of the issuing court’s jurisdiction by the


court asked to recognize the resulting judgment. The mixed convention is a variation on the double convention, providing rules for both jurisdiction and the recognition of judgments, but not purporting to be exhaustive in its lists of required and prohibited bases of jurisdiction. It does not cover the entire field, but rather leaves some bases of jurisdiction available under national law.

Under the mixed convention approach, there would exist a list of required bases of jurisdiction and a list of prohibited bases of jurisdiction. Judgments founded on required bases of jurisdiction would be entitled to recognition under the convention. \(^\text{19}\) Courts should not exercise jurisdiction founded only on bases on the prohibited list. For a few other situations, some exceptions to recognition would apply. Any jurisdictional basis not included on one of the two lists would be permitted, but a resulting judgment would not be entitled to recognition under the convention. Instead, such judgments would be subject to review in the recognizing court in the manner applicable in the absence of a treaty.

The benefit of a mixed convention in the negotiation process is that it allows the Hague member states to build up a convention from the status quo, and does not require agreement on a comprehensive set of jurisdictional rules that cover and connect the entire field of possibilities. It also allows the use of a consensus process more likely to produce a convention acceptable to the largest number of states. \(^\text{20}\) It therefore allows some areas of disagreement and experimentation to continue while at the same time locking in progress that can be achieved. A mixed convention also allows certain issues that are unresolved in any single national legal system to remain outside the convention and subject to later conventions or protocols should an acceptable approach be developed. This is particularly important in regard to jurisdiction for matters involving intellectual property rights and electronic commerce; issues for which no legal system has yet developed a satisfactory, fixed set of rules, and for which it would be presumptuous to believe a global solution could be found and then imposed by treaty within the near future. \(^\text{21}\)

While the negotiating process began with discussion of a mixed convention, it was not until June of 1999 that the Special Commission voted

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specifically to adopt the mixed convention model. The intervening seven-year ambivalence of focus resulted in the primary development of double convention language. Thus, even in the June 2001 Interim Text, which purports to follow a mixed convention approach, the words often are those of a double convention. Given that the negotiations prior to June 2001 were conducted by majority vote, and that fifteen of the member states voting on specific articles during the process were Member States of the European Union—and others were states eager to become Member States of the EU—it is not surprising that the Draft and Interim Text language looks much like that of the Brussels and Lugano Conventions in force in the EU states. It also is not surprising that the EU states would prefer a convention that looks as much as possible like the sets of rules they customarily apply in similar cases within their regional system. The problem is that such an approach has led to great difficulty in developing a convention that will work on a global basis. In particular, the resulting text led to many problems for the United States, which has a jurisdictional system based on constitutional limitations that result in a different focus than do the rules of the civil law-oriented Brussels system.

IV. PROBLEMS ON THE WAY TO A MIXED CONVENTION

After the creation of the October 1999 Preliminary Draft Convention Text, there were at least four significant problems:

1) the majority vote process of the Hague Conference had created a document that largely mirrored the Brussels and Lugano Conventions;

2) the Brussels Convention approach to language was largely unacceptable to the United States (as well as other states), in part because it failed to take into account the due process jurisprudence that would make it work in the U.S. system;


3) efforts to force all bases of jurisdiction into either the required or the prohibited list created unnecessary "canonization" and "demonization" of jurisdictional bases; and
4) the text dealt with issues not yet resolved even in national legal systems, such as jurisdiction in cases arising from electronic commerce, intellectual property rights, and the application of new technology to commercial relationships.

These problems were addressed in form with the decision in May of 2000. At that point, however, four new dimensions to the negotiations had emerged:

1) a decision had been made to operate on the basis of consensus, at least through the June 2001 portion of the Diplomatic Conference (which was a substantial departure from traditional Hague Conference majority vote procedures);
2) competence for judicial cooperation in both internal and external matters had been transferred from the European Community Member States to the Community institutions;
3) the Diplomatic Conference had been split into at least two sessions, with the first session scheduled but the second session left open on the calendar; and
4) there was no consensus working text—the Preliminary Draft Convention text had been arrived at by majority vote on individual provisions, sometimes over substantial objection by a dissenting delegation.

Unfortunately, the Interim Text of June 2001 neither solved the problems of the Preliminary Draft Convention text nor responded adequately to the new dimensions in the negotiations. Through the inclusion of numerous alternatives and variations on many provisions, and the continued (and enlarged) use of bracketed text to indicate language on which agreement had not been achieved, the Interim Text was in fact more confusing than the October 1999 Preliminary Draft Convention text. Four delegations formally suggested that the negotiations focus on true consensus, building up a convention in areas of substantial agreement, and setting aside areas in which consensus was unlikely. But this remained no more than a Working Document not represented in the Interim Text.25

24. For a more complete discussion of this problem, see von Mehren, supra note 17.
V. Common Ground for Bridging Systemic Differences in Jurisdictional Rules

While over a decade of focus on a jurisdiction and judgments convention at The Hague has not resulted in a final treaty, it has demonstrated common ground upon which a successful convention might be built. Areas in which consensus on concepts (though not necessarily on language) is possible include rules that would approve of the exercise of jurisdiction (1) in the courts of the state chosen by agreement of the parties; (2) in the courts of the state of the defendant’s habitual residence; (3) for cases of physical tort, in the courts of the state in which the act causing injury occurred and in the state where the injury materializes, so long as in the latter case the defendant has engaged in conduct in that state and it is reasonable to assume jurisdiction; (4) in the courts of the state in which the defendant operates through a branch, agency, or establishment, so long as the claim arises out of the activity of the branch, agency, or establishment; and (5) for counterclaims in the court where the original action is brought under another accepted basis of jurisdiction.  

Beyond these bases, the rules of jurisdiction contained in the October 1999 and June 2001 texts are not the focus of sufficient agreement to warrant inclusion in a global convention. Even as to the five bases considered here, the level of consensus, and the problems of drafting, require careful consideration of just how far it is reasonable to go in a final convention. Certain of these provisions, if enshrined as required bases of jurisdiction in a mixed convention, will require the consideration of other provisions dealing with issues such as forum non conveniens, lis alibi pendens, and review of damages by the recognizing court. Thus, their inclusion brings additional problems in reaching a consensus text.

VI. Fundamental Differences in Approaches to Jurisdiction

While it may be an oversimplification, the world’s legal systems provide two fundamental approaches to basic concepts of jurisdiction. A combination of these approaches is found both in the Hague texts and in the Brussels I Regulation. One approach bases adjudicatory authority on a connection

26. For discussion of the level of agreement on these bases of agreement, see Ronald A. Brand, Concepts, Consensus and the Status Quo Zone: Getting to "Yes" on a Hague Jurisdiction and Judgments Convention, in TRILATERAL PERSPECTIVES ON INTERNATIONAL LAW (C. Charmody ed., 2002).
between the court and the party over whom jurisdiction is being exercised (the defendant). The second approach looks to a connection between the court and the claim.

Like the Brussels Regulation, the two Hague texts incorporate both of these approaches to jurisdiction. Articles 3 (habitual residence of the defendant) and 9 (branch, agency or establishment of the defendant) require a relationship between the court and the defendant. Article 4 (choice of court) also is related to the nexus between the court and the defendant, representing voluntary acceptance of the jurisdictional authority of the court by the defendant. Articles 6 (contracts), 7 (consumer contracts), 8 (employment contracts), 10 (torts or delicts), 11 (trusts), and 12 (exclusive jurisdiction) follow the second approach, focusing instead on a nexus between the court and the claim.

The connection between the court and the defendant is the preferred nexus in both the Hague texts and the Brussels Regulation, as well as the focus of U.S. jurisdictional jurisprudence. Article 3 of the Hague texts provides for jurisdiction in the courts of the state in which the defendant is habitually resident. Article 2 of the Brussels Regulation likewise provides for jurisdiction in the courts of the state in which the defendant is domiciled. In the Brussels context, Article 2 jurisdiction is referred to as the "general" rule of jurisdiction, with other rules (including the tort provision of Article 5(3)), referred to as "special" rules of jurisdiction.

Pursuant to Article 2 of the Convention, persons domiciled in a Contracting State are, subject to the provisions of the Convention, 'whatever their nationality, to be sued in the courts of that State.' Section 2 of Title II of the Convention, however, provides for

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27. This is the approach found in the "general" jurisdictional rule of Article 3 of the Brussels Convention (jurisdiction founded on the presence of the defendant, who is domiciled in the forum state). It is also the approach followed in U.S. courts, with the ultimate question governed by the Due Process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution. See, e.g., Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITI. L. Rev. 661 (1999). Analysis of "in personam" 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 if the necessary statutory jurisdiction exists. The second step is the constitutional analysis by which it is determined whether the exercise of statutory jurisdiction is within the limits of the Due Process Clause. While some state long-arm statutes may have language similar to that of some of the special jurisdiction provisions of the Brussels Convention (providing reference to the cause of action), it is ultimately the due process analysis that is determinative. See id. at 669-71.

28. This is the approach followed in most of the "special" jurisdictional rules of the Brussels Convention found in Articles 5-16.
‘special jurisdictions,’ by virtue of which a defendant domiciled in a Contracting State may be sued in another Contracting State...."  

The principle laid down in the Convention is that jurisdiction is vested in the courts of the State of the defendant’s domicile and that the jurisdiction provided for in [the “special jurisdiction” articles are] exception[s] to that principle.

[T]he ‘special jurisdictions’ enumerated in Articles 5 and 6 of the Convention constitute derogations from the principle that jurisdiction is vested in the courts of the State where the defendant is domiciled and as such must be interpreted restrictively.

Thus, in Kalfelis v. Schröder, the European Court of Justice held that, in an action in both tort (Article 5(3)), and contract (Article 5(1)), “a court which has jurisdiction under Article 5(3) over an action in so far as it is based on tort or delict does not have jurisdiction over that action in so far as it is not so based.” The existence of tort jurisdiction in the German courts over a Luxembourg defendant did not bring with it the existence of contract jurisdiction over the same defendant resulting from the same set of facts.

The restrictive interpretation of special jurisdiction provisions of the Brussels Convention was also a part of the decision in the Shevill case, when the Court stated that the Article 5(3) tort rule of jurisdiction, as interpreted in Bier v. Mines de Potasse d’Alsace to provide a two-pronged choice to the plaintiff,

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30. Id. at 5583, ¶ 8.
31. Id. at 5585, ¶ 19.
32. Id.
33. Id.
36. Paragraph (3) of Article 5 of the Brussels Convention reads as follows: A person domiciled in a Contracting State may, in another Contracting State, be sued:

(3) in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred.

In the Bier case, supra note 35, the European Court of Justice interpreted the words “place where the harmful event occurred” to include both the place where the damage occurred and the place of the event giving rise to the damage, allowing the plaintiff the choice of locations for bringing suit. Thus, where the defendant discharged saline into the Rhine River in France, resulting in injury to the plaintiff’s horticultural interests in The Netherlands, the plaintiff could bring suit in either France or The Netherlands under Article 5(3).
is based on the existence of a particularly close connecting factor between the dispute and the courts other than those of the State of the defendant’s domicile which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice and the efficacious conduct of the proceedings.\(^\text{37}\)

Thus, the Court emphasized the court/claim nexus that is the foundation of the “special” jurisdiction rules of the Brussels Convention.

Three rules of interpretation under the Brussels Convention are thus clearly established:

(1) Article 2 jurisdiction is more “general” than the rules of special jurisdiction;
(2) the special jurisdiction rules (Articles 5-16) are to be narrowly interpreted; and
(3) the rules of special jurisdiction are based on a close connecting factor between the dispute and the courts.

For a U.S. observer, cases under the Brussels Convention provide strong support for a principal focus on jurisdictional rules based on the nexus between the court and the defendant. In *Marinari v. Lloyds Bank*,\(^\text{38}\) the European Court dealt with the tension between Article 2 of the Brussels Convention and the special jurisdiction rules (specifically Article 5(3)) when it stated,

> The choice thus available to the plaintiff cannot however be extended beyond the particular circumstances which justify it. Such extension would negate the general principle laid down in the first paragraph of Article 2 of the Convention that the courts of the Contracting State where the defendant is domiciled are to have jurisdiction.\(^\text{39}\)

Thus, the jurisprudence of the Brussels system demonstrates a clear preference for the court/defendant nexus, and provides less than complete certainty in the application of the “special” rules of jurisdiction that allow divergence from this general principle. This seems to acknowledge that, if we are determining when a court should have authority to dictate the conduct of a person, then we should be asking what it is that justifies the exercise of *that authority* over *that person*. From a U.S. perspective, the Brussels jurisprudence seems to confirm the value of a court/defendant nexus. What is less clear, is why it then allows jurisdiction to exist where no such nexus exists. The rules that base jurisdiction solely on a court/claim nexus not only diverge from the principal rule of the Brussels system, but also open the possibility of violations of due process in the United States.

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\(^{38}\) Case C-364/93, 1995 E.C.R. 2719.

\(^{39}\) *Id.* at I-2739, ¶ 13.
It may be that most states other than the United States base jurisdictional rules on a court/claim nexus. To do so seems, however, to avoid the question of when it is reasonable for a court to exercise authority over a specific person. A global convention should address this question directly, and the only way to do so is to deal with the only nexus existing in the question: the relationship between the court and the person over whom judicial authority is to be exercised.

VII. COMBINING JURISDICTIONAL CONCEPTS

The efforts of the Hague negotiations to find common ground on bases of jurisdiction can be demonstrated by reference to the provisions in the Hague texts dealing with jurisdiction in matters relating to tort and contract. The evolution of these provisions demonstrates a conscious effort on the part of the negotiators to bring together systems emphasizing a court-claim nexus and those emphasizing a court-defendant nexus. This can be demonstrated by considering aspects of Article 5 of the Brussels Regulation, how those rules have entered the Hague texts, and how they have then evolved in the negotiation process. Article 5 of the Brussels Regulation provides for jurisdiction in contract and tort cases as follows:

A person domiciled in a Member State may, in another Member State, be sued:

1. (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question
   (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
       — in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered,
       — in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided,
   (c) if subparagraph (b) does not apply then subparagraph (a) applies;

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

40. See, e.g., the distinction in Dumes between Advocate General Darmon’s opinion that indirect damage is included under the two-prong test of Bier, supra note 35, but is suffered where the direct damage occurs, and the Court’s opinion that the location of indirect damage (assumed to be at the domicile of the plaintiff) is not encompassed in the Bier second prong. Case C-220/88, 1990 E.C.R. 1-49 (opinion of Advocate General Damon at 1-63, et seq. and Judgment at 1-78 et seq.).
This approach was incorporated in the 1999 Preliminary Draft Hague Convention in Articles 6 and 10, respectively, which contained the following language:

**Article 6 Contracts**
A plaintiff may bring an action in contract in the courts of a State in which—
   a) in matters relating to the supply of goods, the goods were supplied in whole or in part;
   b) in matters relating to the provision of services, the services were provided in whole or in part;
   c) in matters relating both to the supply of goods and the provision of services, performance of the principal obligation took place in whole or in part.

**Article 10 Torts or Delicts**
1. A plaintiff may bring an action in tort or delict in the courts of the State—
   a) in which the act or omission that caused injury occurred, or
   b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.

The U.S. approach to jurisdiction in basic contract and tort cases has elements that are in some ways similar to the Brussels approach. This can be seen in the text of state long-arm statutes, which often include language referring to the place of injury or place of contract performance. Unlike the civil law approach to jurisdiction, however, the U.S. approach follows a two-step process. Jurisdiction must first exist according to the state long-arm statute. Once it is determined that state long-arm jurisdiction exists, then the

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41. *See, e.g., New York Civ. Prac. L. & R. § 302* (McKinney's 1990), which provides in part:

   **Personal Jurisdiction by Acts of Non-domiciliaries**

   (a) Acts which are the basis of jurisdiction. As to a cause of action arising from any of the acts enumerated in this section, a court may exercise personal jurisdiction over any nondomiciliary, or his executor or administrator, who in person or through an agent:

   (1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or
   (2) commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or
   (3) commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he
      (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or,
      (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or
   (4) owns, uses or possesses any real property situated within the state.

42. Even in federal court, Federal Rule of Civil Procedure 4(k)(1)(A) authorizes a district court to borrow the jurisdictional powers of state courts in the state where the court is located.
court must determine whether that exercise of jurisdiction is within the limits of the Due Process clause. At this point, the focus moves from the connection between the court and the claim to the connection between the court and the defendant. Thus, the U.S. approach focuses ultimately on justification for the exercise of judicial authority over the defendant—and a state long-arm statute cannot create jurisdiction where to do so would go beyond the limits of the Due Process clause. This focus on due process has brought a jurisprudence analyzing the activity of the defendant within the forum state, and the extent to which that activity makes it reasonable to exercise judicial authority in regard to the specific persons involved. Thus, the court-claim focus of civil law judicial competence is replaced in the U.S. with a court-defendant focus on personal jurisdiction over the defendant.

In the informal meetings leading up to the first weeks of the Diplomatic Conference in June 2001, efforts were made to combine these two approaches to contract and tort jurisdiction. The first paragraph of each of Articles 6 and 10 was retained, providing the court-claim connection, and a second paragraph was added to each, providing a court-defendant nexus. After the Edinburgh meeting in April 2001, the new paragraph 2 of each of these articles read as follows:

**Article 6 Contracts**

2. A plaintiff may bring an action in contract in the courts of the State in which the defendant has engaged in frequent or significant activity, or has [intentionally] directed such activity into that State, for the purpose of promoting [the conclusion of contracts] [or negotiating] or performing a contract, provided that the claim is based on a contract directly related to that activity.

**Article 10 Torts or Delicts**

2. A plaintiff may bring an action in tort or delict in the courts of the State in which the defendant has engaged in frequent or significant activity, or has [intentionally] directed such activity into that State, provided that the claim arises out of that activity.

Thus, the approach in the informal meetings was to include elements of both the civil law court-claim nexus and the U.S. “activity-based” court-defendant nexus. This approach was retained in the June 2001 Diplomatic Conference

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43. *See Brand, supra note 23,* at 671 et seq.
44. *See id.* at 672-687.
45. *Informational note, supra note 9.*
46. *Id.*
draft of Article 10, which made minor changes to the Edinburgh language, and includes the following text:

**Article 10  Torts [or Delicts]**

1. A plaintiff may bring an action in tort [or delict] in the courts of the State—
   a) in which the act or omission that caused injury occurred, or
   b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.

2. A plaintiff may bring an action in tort in the courts of the State in which the defendant has engaged in frequent or significant activity, or has directed such activity into that State, provided that the claim arises out of that activity and the overall connection of the defendant to that State makes it reasonable that the defendant be subject to suit in that State.

An effort was made at the June 2001 Diplomatic Conference session to combine the two approaches in the first paragraph of Article 6, with an initial focus on the defendant’s activity, and a second paragraph defining activity in a way that reinserts the claim-focused element of the civil law approach. This is represented in the Interim Text as an alternative to the Edinburgh approach, and includes variants representing both a limited and a general approach to the concept of activity. The following is the Article 6 language found in the Interim Text:

**Article 6 Contracts**

1. Subject to the provisions of Articles 7 and 8, a plaintiff may bring an action in contract in the courts of the State—
   a) in which the defendant has conducted frequent [and] significant activity; or
   b) into which the defendant has directed frequent [and] significant activity;

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

**Variant 1:**

2. For the purposes of the preceding paragraph, ‘activity’ means one or more of the following—
   a) [regular and substantial] promotion of the commercial or professional ventures of the defendant for the conclusion of contracts of this kind;
   b) the defendant’s regular or extended presence for the purpose of negotiating contracts of this kind, provided that the contract in question was performed at least in part in that State. [Performance in this sub-paragraph refers [only] to non-monetary performance, except in case of loans or of contracts for the purchase and sale of currency];

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c) the performance of a contract by supplying goods or services, as a whole or to a significant part.

*Variant 2:*

2. For the purpose of the preceding paragraph, 'activity' includes, *inter alia*, the promotion, negotiation, and performance of a contract.\(^4\)

The combination of variants (indicating choices yet to be made) and bracketed words (indicating a lack of consensus on specific language) in the Interim Text demonstrates significant uncertainty in terms of a final product at the end of the June 2001 Diplomatic Conference. It does indicate, however, a concerted effort to find words that will incorporate both the court-claim, "competence" approach of civil law traditions and the court-defendant, "personal jurisdiction over the defendant" approach of U.S. jurisprudence.

Language that encompasses both the court/claim and court/defendant nexus demonstrates the willingness of delegations to work together in an attempt to achieve global rules that could be applied in national courts with the hope of similar results. Unfortunately, the failure to provide rules that will consistently result in both adequate court-claim nexus for Brussels systems states and adequate court-defendant nexus for U.S. due process purposes resulted in rules still incapable of generating global consensus.

**VIII. Key Issues in the Negotiations if a Comprehensive Convention Is to Be Achieved**

The difficulties in reaching acceptable language for tort and contract jurisdiction rules were not the only problems preventing an adequate Interim Text. Differences on the prohibited list remained without clear hope of resolution. An early compromise on the application of rules of *lis pendens* and *forum non conveniens* in Articles 21 and 22 remained open to further discussion. The Article 33 early compromise language on damages enforcement resulted in continued discussion. Article 7 of the Interim Text demonstrated the morass of issues and positions on jurisdictional rules applicable to consumer contracts. Article 12 remained under debate on questions of exclusive jurisdiction, especially in the growing area of intellectual property rights. No clear solution had been reached regarding how any resulting convention would intersect with existing conventions and regional instruments such as the Brussels Regulation. And the advent and growth of electronic commerce during the negotiations meant that the

\(^4\) Interim Text, *supra* note 11, art. 6.
delegates were being asked to lock in global rules of jurisdiction in areas in which national legal systems had not yet reached adequate solutions.

IX. CONCLUSIONS: U.S.—EU RELATIONS IN LIGHT OF THE HAGUE NEGOTIATIONS

The parallel evolution of Community competence for external matters of judicial cooperation and the consideration of a global convention on jurisdiction and recognition of judgments at The Hague have created important dynamics in international relations regarding the development of private international law. A review of this process serves to highlight the ever-growing role of the relationship between the United States and the European Community. The fact that instruments dealing with judicial cooperation within the Community will now issue from Brussels means that the role of the Hague Conference on Private International Law must change from that of a “Euro-centric” organization to that of a global institution. If this change does not occur, the relevance of the Hague Conference can only diminish. A corollary to this is that there must be adjustments in procedures at the Hague Conference in order to accommodate EU participation and make that participation fit with the role of other delegations. This will require changes in voting procedures, necessitating a consensus approach to most issues.

The changes that have affected negotiations in The Hague also have important implications for the bilateral relationship between the United States and the European Union. This relationship has become crucial to the negotiation of a convention on jurisdiction and the recognition and enforcement of judgments. It will likely become more important in other fora (such as UNCITRAL and UNIDROIT) that deal with matters of private international law. For the judgments convention, success likely will depend on whether the U.S. and Europe can reach a mutually satisfactory approach to a text. Ultimately, however, the only possibility for a judgments convention that can be effective on a global scale lies in a mixed convention that is much less comprehensive than the Brussels Regulation now in effect in the European Union.