International Shoe v. Brussels And Lugano: Principles and Pitfalls in the Law of Personal Jurisdiction

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INTRODUCTION

For an English lawyer to attempt to comment on the decision which this Symposium commemorates would, in the context of the distinguished company present, be presumptuous. In considering the development of the law relating to the jurisdiction of courts, various models may be put forward. One such model which exists in Europe is provided by two international conventions. The original six Member States of the European Community agreed to the first, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention), in 1968.[1] Since then, various amendments have been made to the original text, as new Member States have joined the Community.[2] The second convention,

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[1] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 30, 1968, 1978 O.J. (L 304) 36 [hereafter Brussels Convention]. The Convention entered into force as between the original Member States of the European Community in 1973. In 1971 these Member States entered into a protocol conferring jurisdiction on the European Court of Justice to interpret the Brussels Convention which entered into force in 1975. 1978 O.J. (L 304) 97. *See infra* notes 35-41 and accompanying text (discussing important role of European Court).

[2] Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice, Oct. 30, 1978, 1978 O.J. (L 304) 77. This Convention entered into force on January 1, 1987. It is implemented in the United Kingdom in Civil Jurisdiction and Judgments Act 1982, and the text appears as Schedule I to that Act. Convention on the Accession of the Hellenic Republic to the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice with the Adjustments Made to Them by the Convention on the Accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, Oct. 25, 1982, 1982 O.J. (L 388) 1; Convention on

the Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1988 (Lugano Convention), extended the model of the Brussels Convention, with some modifications, as between the Member States of the European Community (or Union) and states which belong to the European Free Trade Association (EFTA).[3] The result is an extensive network of harmonized rules of jurisdiction amongst a wide group of European countries. This represents an impressive achievement, not least because it demonstrates harmony between the common law systems — represented by the United Kingdom and the Republic of Ireland — and the legal systems of the civil law tradition — represented by the other States in the EC and EFTA groupings.

Since commentators in the United States have discussed these European developments in complimentary terms,[4] this contribution will seek to analyze and discuss the principles on which the Conventions are based, and to identify some of the pitfalls that the model, represented by the Conventions, gives rise to *in practice.* It must not be forgotten that each Convention is an intensely practical document. Thus, whatever doctrinal or jurisprudential purity which each Convention might seem to possess is greatly reduced in value if the nutritional significance of the diet which they offer to their principal consumers, lawyers and their clients, turns out to be rather meager. Since most of this paper is concerned with the practical operation of the Conven-

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the Accession of the Kingdom of Spain, and of Portugal to the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and to the Protocol on its Interpretation by the Court of Justice with the Adjustments Made to them by the Convention on the Accession of the Kingdom of Denmark, of Ireland and of the United Kingdom of Great Britain and Northern Ireland, May 26, 1989, 1989 O.J. (L 285) 1.

[3] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9 [hereafter Lugano Convention]. The Lugano Convention is implemented in the United Kingdom in the Civil Jurisdiction and Judgments Act 1991, and the text appears as Schedule 1 to that Act. The European Court of Justice does not, of course, have jurisdiction to interpret this Convention.

[4] *See, e.g.*, Patrick J. Borchers, *Comparing Personal Jurisdiction in the United States and the European Community: Lessons for American Reform*, 40 AM. J. COMP. L. 121, 122 (1992) (praising European Community as impressive example of supranationalism); Friedrich Juenger, *Judicial Jurisdiction in the United States and the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1203 (1984) (praising Europe's history of jurisdictional law); Friedrich Juenger, *American Jurisdiction: A Story of Comparative Neglect*, 65 U. COLO. L. REV. 1, 17 (1993) (discussing importance of Brussels Convention).

tions, it will focus principally on the Brussels Convention, because that Convention, with its earlier origins, has yielded most of the practical experience which to date has been gained.[5]

I. THE ORIGINS OF, AND REASONS FOR, THE BRUSSELS CONVENTION

The origins of the Brussels Convention are found in the Treaty of Rome, the founding treaty of the European Community.[6] Article 220 provides as follows:

> Member States shall, so far as necessary, enter into 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.

Literally, therefore, the aim of the provision appears to be a concern with the law relating to the recognition and enforcement of judgments, rather than with the original jurisdiction of courts in Member States. But as is well known, the Brussels Convention goes far beyond judgment recognition and enforcement and the "simplification of formalities" governing reciprocity in recognition and enforcement. The Convention establishes uniform rules of jurisdiction which must be applied to matters it does not exclude from its scope.[7] If a court having jurisdiction under the Convention renders a judgment, that judgment is entitled, subject to very limited exceptions, to recognition or enforcement or both in all other Member States who are parties to the Convention (Contracting States). The most efficacious way of achieving an appropriate mechanism for the recognition and enforcement of judgments was thus seen to lie in harmoniz-

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[5] For discussion of the Convention from an English perspective, see ADRIAN BRIGGS & PETER REES, NORTON ROSE ON CIVIL JURISDICTION AND JUDGMENTS (1993); LAWRENCE COLLINS, THE CIVIL JURISDICTION AND JUDGMENTS ACT 1982 (1983); LAWRENCE COLLINS ET AL., DICEY & MORRIS ON THE CONFLICT OF LAWS, chs. 11-14 (12th ed. 1993 & Supp. 1994); ALAN DASHWOOD ET AL., GUIDE TO THE CIVIL JURISDICTION AND JUDGMENTS CONVENTION (1987); TREVOR HARTLEY, CIVIL JURISDICTION AND JUDGMENTS (1984); PETER KAYE, CIVIL JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS (1987); PETER NORTH & JAMES FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW, chs. 14, 16 (12th ed. 1992); STEPHEN O'MALLEY & ALEXANDER LAYTON, EUROPEAN CIVIL PRACTICE (1989).

[6] Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11.

[7] *See infra* note 13 (discussing scope of Brussels Convention).

ing the rules of jurisdiction, not least because deficiency in the jurisdictional ground on which a foreign court took jurisdiction was typically the principal basis for attacking the recognition or enforcement of the judgment elsewhere.[8]

The principle behind the Brussels Convention model is attractive indeed because it kills two birds with one stone. Harmony is secured on two fronts. But why should an economic community of states, in a somewhat pressing economic climate, have been concerned with harmonization of a somewhat recondite area of the law? In a note sent to the Member States on October 22, 1959, inviting them to commence negotiations as envisaged in Article 220 of the founding treaty, the Commission of the European Economic Community alleged that

> a true internal market between the six States will be achieved only if adequate legal protection can be secured. The economic life of the Community may be subject to disturbances and difficulties unless it is possible, where necessary by judicial means, to ensure the recognition and enforcement of the various rights arising from the existence of a multiplicity of legal relationships. As jurisdiction in both civil and commercial matters is derived from the sovereignty of Member States, and since the effect of judicial acts is confined to each national territory, legal protection and, hence, legal certainty in the common market are essentially dependent on the adoption by Member States of a satisfactory solution to the problems of the recognition and enforcement of judgments.[9]

These are undoubtedly grandiloquent sentiments. But no evidence was offered to support them at the time they were made, and no hard evidence to support them has emerged since. The notion that the "free movement of judgments" is *fundamental* to the effective working of a common market must, perhaps, remain a suspect one.

The origins of, and reasons for, the Brussels Convention are not without importance, since they prompt the question of what principles should inform the rules relating to the jurisdiction of courts and the recognition and enforcement of judgments. The

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[8] *See, e.g.*, Buchanan v. Rucker, 9 East 192 (K.B. 1808) (ruling that jurisdiction does not exist by virtue of substituted service on defendant who has never set foot in territory of foreign court.)

[9] P. Jenard, Official Report on the Original Brussels Convention of 1968, 1979 O.J. (C 59) 1, 3.

Commission of the European Economic Community appeared to think, at least in the context of creating a true internal market between the Member States, that appropriate rules should aim to secure "legal protection" and "legal certainty." At the abstract level it would be difficult to disagree with this view. However, at the practical level, it is much more difficult to sustain, because it assumes that having uniform rules of jurisdiction will either operate on a "level playing field of litigation" as between Member States, or will create a "level playing field of litigation" where none existed before.

As the Community expands, the first assumption is increasingly unlikely to be correct. When the Brussels Convention entered into force in the United Kingdom, there was no doubt that English courts were popular venues for the resolution of disputes arising out of international transactions.[10] Moreover, with no disrespect, English courts were probably more popular than the courts of many other Contracting States, particularly when the matters involved complex questions and large sums of money.

As to the second assumption, the notion of *creating* a "level playing field of litigation" through the existence of uniform jurisdictional rules ignores the very considerable differences which exist between the procedural and substantive laws of Contracting States,[11] and the tactics of litigators, who in recent years have developed a flourishing business in "litigation about where to litigate." Further, as a distinguished member of the English Bar has stated:

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[42] 326 U.S. 310 (1945).

> Even if the Convention was a model of the [drafter's] art giving rise to no problems of interpretation, a fundamental problem — for would-be litigants — would nevertheless remain, namely the assumption that each court having jurisdiction under it is equally capable of dealing with the case in hand as any other Court which has jurisdiction. The assumption is as inevitable as it is erroneous. Although the English courts have rightly abandoned claims to some innate superiority in decision-making, the fact remains that some Courts, even within the Territory of the Conventions, are simply not suitable for the determination of substantial and complex litigations: either because the Courts in question are not used to it; or because the delays involved in trying cases are unacceptable, or for other reasons. In such cases the central question, at any rate for the plaintiff, may not be: which of these two or three courts should I be going to, but, can I get my case heard in England? If the answer to that question is no, then in some cases, the plaintiff may well feel constrained to abandon his action altogether or to pursue it outside the territory of the contracting States (if he can).[12]

Therefore, it may be thought that the abstract principles of "legal protection" and "legal certainty," which may clearly be regarded as appropriate bases for rules relating to the jurisdiction of courts, are counsels of perfection in the context of an exercise such as that contained in the Brussels Convention. These principles cannot, however, provide rules which necessarily eliminate practical phenomena encountered in litigation involving more than one country so as to create a "level playing field of litigation." This is particularly so in a legal unit consist-

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[12] Christopher S. Clarke Q.C., Address at the Annual Conference of the Bar, London, England (Oct. 1, 1994). To adopt the language of forum shopping, in this type of situation, the plaintiff wishes to shop in England only. If the "goods" cannot be purchased there, the plaintiff would prefer to go without any. Compare the well-known dictum of Lord Denning M.R. in The Atlantic Star [1973] 1 Q.B. 364, 381-82:

> No one who comes to these courts asking for justice should come in vain . . . . This right extends to any friendly foreigner. He can seek the aid of our courts if he desires to do so. You may call this "forum shopping" if you please, but if the forum is England, it is a good place to shop in, both for the quality of the goods and the speed of services.

Id. Such xenophobia might be thought of as incompatible with European harmony, but the present writer has a strong suspicion that many English practitioners would agree with it.

ing of diverse national legal systems with different procedural and substantive law, offering a range of different legal attractions to litigants.

II. THE CONVENTION IN OUTLINE

It may be helpful to the ensuing discussion to identify the main features and rules of the Brussels Convention.[13] The Convention establishes a basic rule that the defendant must be sued in the Contracting State in which he, she, or it is domiciled,[14] and can only be sued in the courts of another Contracting State to the extent that the Convention permits.[15] The application of certain rules of jurisdiction existing in the national law of Contracting States which are considered to reflect an exorbitant exercise of jurisdiction may not be invoked against defendants who are domiciled in a Contracting State.[16] Article 5 of the

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[13] For a detailed discussion of the Convention, see sources cited *supra* note 5. For a very valuable and succinct discussion, including a comparison with American practice, see Borchers, *supra* note 4. It must be stressed that the Convention only applies if the matter before the court is a "civil and commercial matter." Brussels Convention, *supra* note 1, art. 1; *see* Case 29/76, LTU Lufttransportunternehmen GmbH & Co. v. Eurocontrol, 1976 E.C.R. 2397 (discussing judgments given in actions between public authority and person governed by private law). Further, Article 1 declares that the Convention shall not extend, in particular, to revenue customs or administrative matters. Brussels Convention, *supra* note 1, art. 1. Moreover, the Brussels Convention shall not apply to the status or legal capacity of natural persons. *Id.* Furthermore, it does not apply to rights in property arising out of a matrimonial relationship, wills, and succession. *Id.* The Brussels Convention does not apply to bankruptcy proceedings, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions, and analogous proceedings. *Id.* Finally, it does not apply to social security or arbitration. *Id.* The precise scope of the last exclusion is particularly problematic. *See* Case 190/89, Marc Rich & Co. A.G. v. Societa Italiana Impianti P.A., 1991 E.C.R. I-3855.

[14] Brussels Convention, *supra* note 1, art. 2. Curiously, the Convention does not define "domicile" in relation to individuals. The definition is expressly left to national law. *Id.* art. 52. Because the common-law definition was entirely unsuitable to operate within the Convention, the United Kingdom had to create a new and more appropriate definition of domicile. *See* The Civil Jurisdiction and Judgments Act 1982, ch. 27, § 41 (defining domicile as used in Convention). As far as corporations are concerned, Article 53 provides that the "seat" of a company shall be treated as its domicile. Private international law rules should determine how the seat is to be located. Because the United Kingdom had no such private international law rules, special rules were created. *See id.* §§ 42, 43 (explaining rules for domicile and seat of corporation or association).

[15] Brussels Convention, *supra* note 1, art. 3.

[16] *Id. But see id.* art. 4 (permitting application of rules of jurisdiction against defendants not domiciled in Contracting State). When jurisdictional rules are based on the nationality of the plaintiff, Article 4 also extends the rules in a wholly inappropriate way to enable

Convention creates alternative bases of jurisdiction to that founded on domicile. Thus, for example, a defendant domiciled in a Contracting State may be sued in the courts of another Contracting State "in matters relating to a contract," if the latter Contracting State is "the place of performance of the obligation in question."[17] Similarly, "in matters relating to tort, delict or quasi-delict," the defendant may be sued in the Contracting State "where the harmful event occurred."[18] As will be seen, interpreting these two provisions has proven particularly problematic. Where a person domiciled in a Contracting State is one of a number of defendants, that person may also be sued in the courts for the place where any one of those defendants is domiciled.[19] Special rules are established for jurisdiction in matters relating to insurance,[20] and for jurisdiction over consumer contracts.[21] Other provisions address issues such as choice of court clauses and exclusive jurisdiction of courts.[22]

Articles 21 and 22 of the Convention contain deceptively simple provisions dealing with, respectively, *lis alibi pendens* and related actions.[23] It should be noted that in cases of *lis alibi*

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non-nationals domiciled in a state having such a rule to invoke this jurisdictional base against a defendant not domiciled in a Contracting State. *See* Code Civil [C. Civ.] art. 14 (Fr.).

[17] Brussels Convention, *supra* note 1, art. 5(1).

[18] *Id.* art. 5 (3). Article 5 also provides special rules for matters relating to maintenance creditors; civil claims for damages or restitution based on an act giving rise to criminal proceedings; and disputes arising out of the operations of a branch, agency or other establishment; trusts and salvage.

[19] *Id.* art. 6(1). Article 6(2) deals with third party proceedings. *Id.* art. 6(2). Article 6(3) addresses counterclaims and Article 6(4) deals with contractual actions which can be combined with an action against the same defendant which relates to a right in rem in immovable property. *Id.* art. 6(3)-(4).

[20] *Id.* arts. 7-12a.

[21] *Id.* arts. 13-15.

[22] Article 17, a provision of immense practical importance, provides elaborate rules dealing with the validity and effect of choice of court clauses. *Id.* art. 17. Interpretation of this provision has not been without difficulty. For a particularly valuable discussion, see BRIGGS & REES, *supra* note 5, at 55-65. Article 16 deals with exclusive jurisdiction and indicates that, in the cases enumerated in the provision, the nominated court has exclusive jurisdiction, irrespective of the domicile of the defendant. Brussels Convention, *supra* note 1, art. 16. Thus, for example, "in proceedings which have as their object rights in rem in immovable property or tenancies of immovable property," exclusive jurisdiction lies with the Contracting State in which the property is situated. *Id.* art. 16(1). Subject to Article 16, a defendant may submit to the jurisdiction of the courts of a Contracting State other than that where courts have jurisdiction under the Convention. *Id.* art. 18.

[23] According to Article 21:

pendens, any court other than the court first seised *must, of its own motion*, stay its proceedings. If the jurisdiction of the court first seised is then established, any other court must decline jurisdiction.[24] A subsequently seised court, therefore, has no discretion in the matter. Such a court only has discretion whether or not to stay its proceedings, as the case may be, if the actions are related, and thus, fall within Article 22.[25]

The Convention recognizes that despite the attempt to confer exclusive jurisdiction on the courts of one Contracting State by virtue of Article 16, actions may nonetheless fall within the exclusive jurisdiction of the courts of more than one Contracting State. In such cases, any court other than the court first seised *must* decline jurisdiction.[26] Subsequently seised courts have no discretion in the matter.

The Convention is a cooperative venture between Contracting States. This is recognized in Article 24, a significant provision whereby application "may be made to the courts of a Contracting State for such provisional, including protective, measures as

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> Where proceedings involving the same cause of action and between the same parties are brought in the courts of different Contracting States, any court other than the court first seised shall of its own motion stay its proceedings until such time as the jurisdiction of the court first seised is established. Where the jurisdiction of the court first seised is established, any court other than the court first seised shall decline jurisdiction in favor of that court.

Brussels Convention, *supra* note 1, art. 21.

According to Article 22:

> Where related actions are brought in the courts of different Contracting States any court other than the court first seised may, while the actions are pending at first instance, stay its proceedings.
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> A court other than the court first seised may also, on the application of one of the parties, decline jurisdiction if the law of the court permits the consolidation of related actions and the court first seised has jurisdiction over both actions.
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> For the purposes of this Article, actions are deemed to be related where they are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

Id. art. 22.

[24] *See infra* notes 67-69, 83-87 and accompanying text (discussing Articles 21 and 22 of Brussels Convention).

[25] *See infra* notes 67-69, 83-87 and accompanying text (discussing Article 22 of Brussels Convention).

[26] Brussels Convention, *supra* note 1, art. 23.

may be available under the law of that Contracting State, even if, under this Convention, the courts of another Contracting State have jurisdiction as to the substance of the matter."[27] Thus, for example, if an English court has jurisdiction over the substance of the matter, a party to those proceedings may apply to the courts of any other Contracting State for any provisional measures existing under that State's law in aid of the English proceedings.

Republic of Haiti v. Duvalier[28] illustrates the utility of Article 24. There, the Republic of Haiti had commenced proceedings in France in an attempt to recover more than $20 million allegedly embezzled by "Baby Doc" Duvalier, the former President of Haiti. In recent years, English courts have developed a very powerful injunction, whereby they can order that a defendant's assets be "frozen" worldwide, and in addition, can order the defendant to disclose the whereabouts of his assets.[29] In *Duvalier*, English solicitors for Duvalier held assets on his behalf in various countries. On application by the Republic, the English court granted a worldwide injunction freezing Duvalier's assets and, further, ordered the English solicitors to disclose the nature, location, and value of Duvalier's assets known to them.[30]

Title III of the Convention deals with recognition and enforcement of judgments.[31] It is sufficient to say that the grounds for attacking recognition are extremely limited.[32] Most importantly, subject to very narrow exceptions, the jurisdiction of the court which granted the judgment *cannot* be reviewed by the court in which recognition of the judgment is sought.[33] Although in Article 27(1) public policy is recognized as a ground for refusing to recognize a judgment, Article 28, paragraph 3 specifically prohibits the application of that slippery concept to the rules relating to jurisdiction applied in the court which gave

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[27] *Id.* art. 24.

[28] [1990] 1 Q.B. 1.

[29] For a detailed account of the English injunction, see COLLINS ET AL., *supra* note 5, at 189-197.

[30] The French action was subsequently dismissed. *See Clunet*, 118 JOURNAL DU DROIR INT'L 137 (1991).

[31] Brussels Convention, *supra* note 1, arts. 25-49.

[32] *Id.* art. 27.

[33] *Id.* art. 28.

judgment. The message is quite clear. A defendant who is sued in a Contracting State and who wishes to allege that he is not subject to the jurisdiction of that State's courts should press that point in proceedings within that State. It would be most unwise to sit back, allow judgment to be ordered against him, and then seek to resist recognition or enforcement of the judgment in another Contracting State.[34]

III. THE ROLE OF THE EUROPEAN COURT

Primarily, the task of interpreting the Brussels Convention will fall to national courts in Contracting States. However, the European Court of Justice is accorded an important role in the interpretative process, since a protocol to the Convention gives the court jurisdiction to give rulings on the interpretation of the Convention.[35] Essentially, such rulings *may* be requested by courts of Contracting States which exercise appellate jurisdiction.[36] However, the court of a Contracting State which exercises ultimate appellate jurisdiction *shall*, if it considers a decision on the question necessary to enable it to reach judgment,[37] request the Court of Justice to provide a ruling.

As of April 1, 1993, there had been some seventy rulings by the Court of Justice,[38] and the number seems (albeit from impression) to be rapidly increasing.[39] Doubtless, the increase is

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[34] *Cf.* Henry v. Geoprosco Int'l, 1976 Q.B. 726 (upholding, in English court, Canadian court's assertion of jurisdiction although defendant did not defend on merits in Canadian court).

[35] Brussels Convention, *supra* note 1, Protocol, art. 1. The European Court of Justice does not have jurisdiction to interpret the Lugano Convention. However, Protocol No. 2 to the Convention entitled "On the Uniform Interpretation of the Convention" provides some uniformity. This protocol provides that each Contracting State's courts shall, when applying and interpreting the Convention, give due consideration to the principles stated in any relevant decision by courts of other Contracting States concerning provisions of the Convention. *Id.* art. 1. Because decisions of the European Court of Justice are binding on all national courts of Contracting States to the Brussels Convention, the above provision is likely to ensure that those decisions influence EFTA States as well as EC States in interpreting the Lugano Convention.

[36] *Id.* Protocol, arts. 2, 3(2).

[37] *Id.* Protocol, arts. 2(1), 3(1) (emphasis added).

[38] COLLINS ET AL., *supra* note 5, at xv.

[39] Working on the annual supplements to the work cited in the preceding note gave the impression that the number of European Court of Justice decisions is increasing. The First Supplement was published in 1994 and the Second Supplement will appear in 1995.

connected with the expansion of European Community membership. Nonetheless, there must be cause for concern since references are involving unacceptable delays. In the first two English cases referred to the Court of Justice, the time between the order for the reference and the Court's decision was, respectively, just under two years[40] and two and a half years.[41] It is likely that these delays will increase as the volume of references increases. The cause for concern is that the issue for the Court to decide is whether a national court has power to try a case, a matter which should be resolved with the greatest expedition. The interest in pursuing uniformity in the interpretation and application of the Convention which justifies the interpretative role of the European Court inevitably leads to the prolonging of the jurisdictional inquiry. And, of course, that inquiry is not finished when that Court has done its work. The matter then must go back to the national court so that the European Court's ruling on interpretation can be applied to the facts of the case. It should also not be forgotten that references have to be paid for. The national court hearing the case determines costs, which means, in England, that the party which ultimately loses the case pays the "party costs" of the reference. This is a clear pitfall in the Brussels Convention model; uniformity can only be obtained at a price.

Virtually all of the difficulties (and thus the pitfalls) which are created by the Brussels Convention involve its interpretation. This problem will be examined below, but first it may help to put the problem in context by offering some general observations about the phenomenon of "litigation about where to litigate."

IV. "LITIGATION ABOUT WHERE TO LITIGATE"

There is little doubt that "litigation about where to litigate" has increased in the past twenty years, perhaps dramatically. The reasons for the increase might be laid at the door of jurisdic-

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[40] Case C-351/89, Overseas Union Ins. Ltd. v. New Hampshire Ins. Co., 1991 E.C.R. I-3317.

[41] Case C-190/89, Marc Rich & Co. A.G. v. Societa Italiana Impianti P.A., 1991 E.C.R. I-3855.

tional rules (perhaps even the present writer may be allowed to mention *International Shoe Co. v. Washington*[42] here), the imprecision or flexibility of which leaves plenty of scope for disagreement as to their proper application. In England, jurisdiction was based on the personal presence rule,[43] with the possibility of "long-arm" jurisdiction being asserted over absent defendants, in the discretion of the court, pursuant to Order 11, Rule 1 of the Rules of the Supreme Court.[44] More recently, a doctrine of forum non conveniens has emerged in England,[45] ensuring that opportunities to litigate about where to litigate abound. This is the case even if that doctrine, if we believe it, is designed to ensure that trial occurs in the "natural forum," that is, in the forum where the case may be tried more suitably for the interests of the parties and the ends of justice.[46] Yet litigation about where to litigate is a wasteful and negative activity. Such litigation is often pursued for tactical reasons, one of which may be a desire to avoid a trial on the merits of a claim in any country at all.[47] Conversely, it may be argued that uncertainty in jurisdictional law might encourage the settlement of cases, but it does little credit to a legal system that such a result ensues. It hardly accords with proper principle to adopt inappropriate rules which

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[42] 326 U.S. 310 (1945).

[43] For two troublesome cases, see Colt Indus., Inc. v. Sarlie, [1966] 1 W.L.R. 440; Maharanee of Baroda v. Wildenstein, [1972] 2 Q.B. 283. For an interesting case on personal service, see Barclays Bank of Swaziland Ltd. v. Hahn, [1989] 1 W.L.R. 506.

[44] For an important example in which the litigation went to the House of Lords, see Amin Rasheed Shipping Corp. v. Kuwait Ins. Co., [1984] A.C. 50.

[45] For the history of forum non conveniens, see COLLINS ET AL., *supra* note 5, at 398-400.

[46] *See* Spiliada Maritime Corp. v. Cansulex Ltd., 1987 App. Cas. 460 (determining "natural" forum based on satisfying parties' interests and ends of justice).

[47] A party is not likely to admit its desire to avoid a trial in any country. But some empirical evidence from the United States suggests that when courts dismiss cases on forum non conveniens grounds, a trial rarely comes to fruition in the alternative forum. David W. Robertson, *Forum Non Conveniens: A Rather Fantastic Fiction*, 103 L.Q. REV. 398 (1987); *see also* A. Geoffrey Slater, *Forum Non Conveniens: A View From the Shop Floor*, 104 L.Q. REV. 554, 561 (1988). For a case where the chances of trial in the natural forum, Lebanon, were minimal because the plaintiff in English proceedings had been sentenced to imprisonment in Lebanon, see Purcell v. Khayat, THE TIMES, Nov. 23, 1987. In the admittedly different context of forum-selection clauses it is difficult to believe that defendants genuinely desired trial in the chosen forum, the U.S.S.R. in The Fehmarn [1958] 1 W.L.R. 159. It is also difficult to believe that defendants would genuinely desire trial in post-revolution Angola. *See* Carvalho v. Hull Blyth, [1979] 1 W.L.R. 1228. In *Carvalho*, the plaintiff would have been unlikely to put his life in danger by going to Angola to commence proceedings.

have the effect of deterring the parties to litigation from asserting their legal rights or establishing their legal liabilities.

One way of testing the adequacy of the Brussels Convention model is to assess whether it discourages litigation about where to litigate. One could conclude that it does not. The opportunities for such litigation which the Convention offers are prompted, it is true, by somewhat different considerations than those which lie behind the doctrine of forum non conveniens. The latter offers opportunities because of its flexibility or imprecision. The Convention seeks to avoid this pitfall by establishing what appear to be simple, clear, and certain rules which allow little or no discretion. But in so doing it introduces a different problem. The rules require interpretation, and their interpretation and subsequent application is far from simple, clear, and certain. As of April 1993, apart from the cases referred to the European Court of Justice mentioned above,[48] there had been almost 3500 decisions on the Brussels Convention, including almost 900 decisions of the Belgian courts, over 800 decisions of German courts, and over 750 decisions of the Dutch courts.[49] No doubt these decisions provide a valuable jurisprudence for the interpretation of the Convention. Equally, however, their volume indicates that interpreting the Convention is not exactly plain sailing.

V. THE INTERPRETATIVE DIFFICULTIES

We can begin with an obvious interpretative difficulty which does not detract from the model itself, but which does create a particular difficulty for the Brussels Convention. The Convention "speaks in many tongues." Originally, there were four authentic texts: Dutch, French, German, and Italian.[50] At the next accession, English, Irish, and Danish were added as languages, "all seven texts being equally authentic,"[51] to which Greek,[52] Span-

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[48] *See* text accompanying *supra* notes 38-39.

[49] COLLINS ET AL., *supra* note 5, at xvi.

[50] Brussels Convention, *supra* note 1, art. 68.

[51] *Id.*, *amended by* 1978 O.J. (L 304) 77 (accession of Denmark, Ireland, and United Kingdom).

[52] *Id.*, *amended by* 1982 O.J. (L 388) 1 (accession of Greece).

ish, and Portuguese[53] texts have since been added. Unfortunately, these language texts do not say the same thing when translated into English, nor, probably, do they all say the same thing when translated from any one language into any other. The problem may be illustrated by reference to the English case of *New Therapeutics Ltd. v. Katz*.[54] The case was concerned with the construction of Article 16(2) of the Convention, which provides in pertinent part:

> The following courts shall have exclusive jurisdiction, regardless of domicile:
> 1. . . .
> 2. In proceedings which have as their object the validity of the constitution, the nullity or the dissolution of companies or other legal persons or associations of natural or legal persons, or the decisions of their organs, the courts of the Contracting State in which the company, legal person or association has its seat.[55]

The issue which arose in *New Therapeutics Ltd. v. Katz* was whether the phrase "decisions of their organs" is governed only by the initial phrase "in proceedings which have as their object," or instead by the longer phrase "in proceedings which have as their object the validity of." Applying principles of English grammar, Knox J. held that the latter result ensued.[56] Apparently, however, the French and German texts suggest the former solution, as does the Dutch text and, probably the Italian text, though the Spanish text can be read in the same sense as the English text!

Next, in style, the Brussels Convention is like a Continental code, and the original Convention, as agreed between the original six Member States, was the product of legal thought of a civilian nature designed for consumption by a civil law audience. Accession of a common law system was therefore bound to exacerbate the two principal difficulties to which the original Convention gave rise. First, the Convention uses legal terminology and concepts of substantive law which either have no defined

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[53] *Id.*, *amended by* 1989 O.J. (L 285) 1 (accession of Spain and Portugal).

[54] [1991] Ch. 226.

[55] Brussels Convention, *supra* note 1, art. 16(2).

[56] Knox J.'s view was followed in Grupo Torras S.A. v. Sheikh Fahad Mohammed Al Sabah (not yet reported). For a discussion of this case, see Kate Lloyd, *Developments in European Jurisdiction*, 144 NEW L.J. 1482, 1556 (1994).

legal meaning in the law of some Contracting States,[57] or which have a different meaning in some or all of the Contracting States.[58] Secondly, the drafting of the Convention at some points necessarily involves reference to the procedural law of Contracting States. Procedural law tends to be the most nationalistic part of a country's legal system.[59] Additionally, procedural rules are normally designed, at least in origin, to deal with domestic cases rather than cases with a foreign element.[60] Therefore, when a foreign element is involved, a particular procedural rule may be inappropriate.[61] Moreover, the European Court of Justice is naturally reluctant to create uniform procedural rules which intrude on the procedural law of Contracting States.[62]

A further difficulty which arises in the interpretation of the Convention lies not so much in the meaning of words as in applying the Convention to the phenomena actually encountered in transnational litigation. A first reading of the Convention might reveal a document of admirable clarity and simplicity.[63] Practical experience of actually working with its provisions might, on the contrary, suggest that the Convention is too simplistic a model to deal with the complex realities of transnational litigation.[64] This is particularly likely to be the view of those

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[57] In England, the expression "civil and commercial matters" was not a term of art. *See* Case 814/79, Netherlands v. Ruffer, 1980 E.C.R. 3807; Case 29/76, LTU Lufttransportunternehmen GmbH & Co. v. Eurocontrol, 1976 E.C.R 1541.

[58] *See Ruffer*, 1980 E.C.R. at 3807; *LTU*, 1976 E.C.R at 1541; *see also* Case C-26/91, Soc. Jakob Handte et cie. GmbH v. T.C.M.S., 1993 I.L. Pr. 5 (stating opinion of Advocate General Jacobs that in most Community countries action by subpurchaser against manufacturer for economic loss lies in tort, but lies in contract in law of France, Belgium, and Luxembourg).

[59] *See* O'MALLEY & LAYTON, *supra* note 5, at Part III (surveying nations' views on procedural law).

[60] The "personal presence" rule of in personam common-law jurisdiction may be a perfectly respectable rule in domestic cases. However, the rule may be indefensible in cases with a foreign element. *See, e.g.*, Maharanee of Baroda v. Wildenstein, [1972] 2 Q.B. 283.

[61] *See* Dresser U.K. Ltd. v. Falcongate Freight Management Ltd., [1992] 1 Q.B. 502 (holding that English court seised for purposes of Article 21 of Convention when writ is served, despite previous notion that court is "seised" when writ issued). For further difficulties, see Neste Chems. S.A. v. D.K. Line S.A., [1994] 3 All E.R. 180.

[62] *See* Case 129/83, Zelger v. Salinitri (No. 2), 1984 E.C.R. 2397 (determining when court first "seised" is matter for national law).

[63] *But see* text accompanying *supra* notes 55-56 (discussing *New Therapeutics Ltd. v. Katz* and its focus on construction of Article 16(2) of Convention).

[64] *See* Richard Fentiman, *Judgments, Purposes and the Brussels Convention*, 53 C.L.J 239 (1994).

who conduct such litigation in the English courts, where it largely involves sophisticated commercial matters with large sums at stake.[65]

Examples of some potential difficulties that can arise from interpreting the Convention can be seen in *Grupo Torras S.A. v. Sheikh Fahad Mohammed Al Sabah*.[66] In this case an English High Court judge faced a case involving twenty-two defendants, some of whom were located in England, some in other Contracting States (Spain and the Netherlands), and others in non-Contracting States (the Bahamas, Jersey, the Isle of Man, and Gibraltar). The claim involved in excess of $450 million. Amongst the issues the court had to resolve was, firstly, whether Spanish or English courts were "first seised" for the purposes of Article 21 (and Article 22) of the Convention. The European Court of Justice had held that a court is first seised for these purposes when, in accordance with its national law, the conditions for proceedings to become "definitively pending" in that court are fulfilled.[67] In England, it had been held that the court was seised, according to this formula, when the writ was served on the defendant.[68] But what was the position under Spanish law? The highest court of Spain had given no answer to this question because it had never been asked to provide it. But an English judge nonetheless decided this issue with the (no doubt expensive) assistance of some two weeks of expert evidence on Spanish law. Secondly, if an English court was *first* seised if the writ in the English proceedings was served before the Spanish court was seised, what was the effect on a case involving twenty-two defendants who were served at different times, with some having been

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[65] The proliferation of English litigation concerning Articles 21 and 22 of the Convention bears out the contention that most cases involve sophisticated commercial matters. *See, e.g., Dresser*, [1992] 1 Q.B. at 502; Overseas Union Ins. Ltd. v. New Hampshire Ins. Co., [1994] 1 Q.B. 434, Case 351/89, 1991 E.C.R. 3317; A.G.E. v. Chiyoda Fire and Marine Co. (U.K.) Ltd., [1992] 1 Lloyd's Rep. 325; Gamlestaden Plc. v. C.D.S., [1994] 1 Lloyd's Rep. 433; Continental Bank N.A. v. Aeakos Compania Naviera S.A., [1994] 1 Lloyd's Rep. 505; The Filiatra Legacy, [1994] 1 Lloyd's Rep. 513; Case 129/92, Owens Bank Ltd. v. Bracco (No 2), [1994] 1 All E.R. 336; Neste Chems. S.A. v. D.K. Line S.A, [1994] 3 All E.R. 180; Case 406/92 The Tatry, THE TIMES, Dec. 28, 1994; Grupo Torras S.A. v Sheikh Fahad Mohammed Al Sabah (not yet reported).

[66] [1992] Ch. 72.

[67] Case 129/83, Zelger v. Salinitri (No. 2), 1984 E.C.R 2397.

[68] *Dresser*, [1992] 1 Q.B. at 502.

served after some of the defendants had commenced proceedings in Spain? Is the date of "definitive pendency" when the first of the defendants is served, or the date when the last of the defendants is served, or somewhere in between? Thus, for instance, is the court first seised vis-à-vis each defendant on the date of service on that particular defendant? The judge held that the court was seised in relation to all of the twenty-two defendants on the date when the writ was served on the first of them. So much for the simplicity of the rule in Article 21!

A very basic difficulty which the Convention fails to resolve with the necessary degree of clarity pertains to its operation where the courts of non-Contracting States are involved. In *Re Harrods (Buenos Aires) Ltd.*[69] the English Court of Appeal held that the English court could stay an action brought against a defendant domiciled in England, on the grounds that the courts of a non-Contracting State were the appropriate fora. It is accepted that the English doctrine of forum non conveniens does not survive the Brussels Convention where the alternative forum is in a Contracting State. The Court of Appeal, however, held that it was not inconsistent with the Convention to apply the doctrine of forum non conveniens when the alternative forum is in a non-Contracting State, since the Convention is only intended to regulate jurisdiction as between Contracting States. This decision is, to say the least, controversial, and indeed has been viewed as wrongly decided, because the Convention is concerned with more than merely regulating jurisdiction as between Contracting States, and injecting any discretion to stay proceedings will detract from uniformity of jurisdictional rules in the European Community.[70] Not surprisingly a reference was made to the European Court of Justice.[71] But the reference was subsequently withdrawn and the answer to a most fundamental question must await another occasion.[72]

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[69] [1992] Ch. 72. *But see* S. & W. Berisford Plc. v. New Hampshire Ins. Co., [1990] 2 Q.B. 631; Arkwright Mut. Ins. Co. v. Bryanston Ins. Co. Ltd, [1990] 2 Q.B. 649.

[70] NORTH & FAWCETT, *supra* note 5, at 333-34. *But see* COLLINS ET AL., *supra* note 5, at 401-402 (approving use of forum non conveniens against non-Contracting State); *see also* BRIGGS & REES, *supra* note 5, at 131-41.

[71] *See* Case 314/92, Laedinmor S.A. v. Intercomfinanz S.A., 1992 I.L. Pr. 512 (indicating questions referred to European Court of Justice, which omit agreed question concerning effect of Article 16(2)).

[72] *See* The Nile Rhapsody, [1994] 1 Lloyd's Rep. 382 (refusing reference to European

Occasionally, much more obvious questions of scope can be the subject of a reference. In *Owens Bank v. Bracco (No. 2)*[73] proceedings were pending in Italy and England to enforce a judgment of the High Court of St. Vincent. It was argued that the English proceedings should be stayed pursuant to Article 21, on the ground that the Italian court was first seised. The European Court rejected this argument. A literal reading of the Convention would seem to make it pellucidly clear (beyond peradventure as well) that the jurisdictional rules of the Convention do not apply to enforcement proceedings, while the enforcement provisions in Title III are expressly limited to the enforcement of judgments of *Contracting States*.[74] The argument against this conclusion was based on a teleological incantation of the need to avoid the possibility of inconsistent judgments between the courts of Contracting States. This undoubtedly takes teleology too far in the face of an unambiguous declaration to the contrary evident in the Convention itself.[75]

One last interpretative difficulty may be usefully referred to. It may appear to be of a more parochial nature, but it is likely that some of these concerns will be felt in other Contracting States. English courts (and lawyers) have, perhaps, more experience with international litigation than some of their continental counterparts amongst the Contracting States. Inevitably, this leads to a familiarity with certain well-understood common rules and practices, and a desire to either subsume such practices within the Convention, or to preserve those practices despite the Convention.

As to the latter point, this too can be illustrated by *Re Harrods (Buenos Aires) Ltd.*[76] It demonstrates the potential difficulty for English courts to accept that proceedings should take place in England solely because the defendant was domiciled there, when the only other relevant jurisdiction was a non-Contracting State,

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Court of Justice).

[73] Case 129/92, Owens Bank Ltd. v. Bracco, [1994] 1 All E.R. 336.

[74] Brussels Convention, *supra* note 1, art. 25.

[75] *See* Fentiman, *supra* note 64, at 239.

[76] [1992] Ch. 72.

when England was an inappropriate forum for the trial of the action, and when trial could much more sensibly take place in Argentina.

As to the former point, one might refer to *Kurz v. Stella Musical GmbH.*[77] Article 17 of the Convention provides that where "the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or courts of a Contracting State are to have jurisdiction to settle any disputes . . . that court or those courts shall have exclusive jurisdiction."[78] How does a clause which conferred non-exclusive jurisdiction on a court of a Contracting State fit in with these words? Adopting a teleological approach, Hoffman J. held that Article 17 applied to a non-exclusive jurisdiction clause, but did not convert such a clause into an exclusive jurisdiction clause, because "exclusive" did not mean "unique."[79] The practical merit of the decision is clear, since it gives effect to the intentions of the parties, which had always been at the forefront of judicial thinking on forum-selection clauses at common law.[80] But the violence done to the language of Article 17 is such that one commentary has counselled "that until the Court of Justice deals with non-exclusive jurisdiction clauses, they are best avoided."[81]

That old habits die hard may also lie behind *Continental Bank N.A. v. Aeakos Cia Naviera S.A.*[82] Here a loan agreement between an American bank with a branch in Athens and a number of one-ship companies registered in Panama or Liberia and managed by a Greek company, contained a clause which, under the circumstances, conferred exclusive jurisdiction on the English courts. The borrowers defaulted and the bank claimed to be owed a sum of more than $32 million. The borrowers (and their guarantors), by way of a preemptive strike, brought pro-

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[77] [1992] Ch. 196.

[78] Brussels Convention, *supra* note 1, art. 17.

[79] *See* Gamlestaden Plc. v. C.D.S., [1994] 1 Lloyd's Rep. 433 (following Hoffman J.'s interpretation); COLLINS ET AL., *supra* note 5, at 431 (approving Hoffman J.'s interpretation of Article 17 of Brussels Convention). *But see* BRIGGS & REES, *supra* note 5, at 62 (treating Hoffman J.'s interpretation as unreliable); NORTH & FAWCETT, *supra* note 5, at 317 (disapproving Hoffman J.'s interpretation of Article 17).

[80] *See, e.g.*, Continental Bank N.A. v. Aeakos Compania Naviera S.A., [1994] 1 Lloyd's Rep. 505, 511.

[81] BRIGGS & REES, *supra* note 5, at 62.

[82] [1994] 1 Lloyd's Rep. 505.

ceedings against the bank in Athens claiming damages of $63 million as well as a declaration releasing them from the loan. The claim under Greek law, to the effect that the bank had exercised its rights under the agreement in a manner contrary to business morality, was a claim in tort. In response the bank brought proceedings in England for an injunction to restrain the borrowers and guarantors from continuing to proceed in Greece. It was clear that initiating proceedings in Greece was a breach of the exclusive jurisdiction clause, and thus of Article 17 of the Convention. The borrowers and guarantors argued, however, that since the Greek courts were seised of the case before the English courts, the English courts should decline jurisdiction under Article 21 or 22 of the Convention. The English Court of Appeal held that Article 17 prevails over Articles 21 and 22. Therefore, a court with exclusive jurisdiction under Article 17 is not bound to give up jurisdiction in favor of the court first seised. Indeed, the latter is bound to give up its jurisdiction in favor of the former.

Again, the primacy accorded to jurisdiction clauses at common law continues under the Convention by interpreting the Convention in a way which reflects the common law. According to Steyn L.J., in "construing the Brussels Convention it is important to put aside preconceptions based on traditional English rules."[83] But Steyn L.J. achieves the same result that would be reached at common law by holding that the court is bound by Article 17 (there being no discretion in that provision) to give effect to an exclusive jurisdiction agreement which conforms with Article 17. Accordingly, if Article 17 applies it takes precedence over both Article 21 and Article 22. For Steyn L.J., the "structure and logic of the Convention convincingly point to this conclusion."[84] For another commentator, the result in *Continental Bank* is "bold, attractive and hopelessly wrong."[85] In the face of such conflicting views, practitioners tread at their peril, and a reference to Luxembourg seems ultimately inevitable.[86]

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[83] *Id.* at 511.

[84] *Id.* at 512.

[85] Adrian Briggs, *Anti-European Teeth for Choice of Court Clauses*, L.M.C.L.Q. 158, 159 (1994). For other comments critical of this case, see Andrew S. Bell, *Anti-Suit Injunctions and the Brussels Convention*, 110 L.Q. REV. 204 (1994); Phillipa Rogerson, *English Interference in Greek Affairs*, 53 C.L.J. 204 (1994).

[86] The Court of Appeal in *Continental Bank* rejected a request for a reference on the

VI. "PRINCIPLES" OF INTERPRETATION?

Although the primary task of interpreting the Conventions will fall on national courts, the power to make references to the European Court of Justice is clearly designed to charge the latter court with the duty to give interpretative rulings designed to ensure uniformity in the application of the Convention, and which will be binding on national courts.[87] More particularly, an English court is thus required to follow the interpretative methodology of the European Court, which is somewhat more free-thinking than the normal English habits.[88] What, therefore, are the principles of interpretation involved?

On more than one occasion the Court of Justice has stated that the Convention must be interpreted by reference to its principles and objectives, in light of the preamble and of Article 220 of the EC Treaty. The Court considered the purposes behind simplifying the formalities regarding the recognition and enforcement of judgments, and of strengthening the legal protection for persons within the European Community (or Union).[89] The message which emerges is that the Convention must be interpreted so as to ensure uniformity in its application throughout the Union. And, further, regard to the objectives and principles of the Convention requires a teleological rather than a literal approach to the construction of the Convention.

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relationship between Articles 17 and 21. *See* Briggs, *supra* note 85 (criticizing decision as "scarcely credible"). Steyn J. has stated the following:

> It is true that, except for first instance decisions, there is no authority directly in point. The more obvious the answer to a question is the less authority there sometimes is on it. We entertain no doubt about the answers to the proposed question.

Continental Bank, [1994] 1 Lloyd's Rep. at 512.

[87] For the United Kingdom's power to refer cases to the European Court of Justice, see Civil Jurisdiction and Judgments Act 1982, § 391(2); see also text accompanying *supra* notes 26-37 (discussing utility of Article 24, and recognition and enforcement of judgments under Title III of Brussels Convention).

[88] An English court must follow the interpretive methodology of the European Court even after Pepper v. Hart, [1993] A.C. 593. English courts, however, have displayed a more liberal attitude to interpretation of international conventions. *See also* Fothergill v. Monarch Airlines Ltd., [1981] A.C. 251.

[89] *See supra* text accompanying note 8 (discussing most efficacious way of achieving uniform rules of jurisdiction); COLLINS ET AL., *supra* note 5, at 286 (discussing purposes behind simplifying these formalities).

How is this uniformity to be achieved? The answer most commonly given by the European Court is that where concepts referred to in the Convention have differing meanings in different Contracting States, the duty of the Court is to provide an "independent" or "autonomous" definition, rather than a definition derived from national law (that is, the law of the country whose courts are seised of the matter).[90] Thus, in the context of Article 5(1) of the Convention (virtually every word of which has been interpreted in Luxembourg at least once),[91] the expressions "matters of contract" and "obligation in question" have been attributed an autonomous meaning.[92] On the other hand, the meaning of the expression "the place of performance" has been left to national laws.[93]

There are real practical difficulties with the "autonomous interpretation" approach, despite the seemingly obvious advantages which it has over the national law approach. The initial difficulty is determining when such an approach will be justified, a difficulty which confronts the lawyer advising a client or a court. Where procedural concepts are at issue, the bias towards autonomous interpretation is less evident.[94] In one sense, it may further be a premise of the autonomous interpretative approach that some general principles emerge from "the corpus of national legal systems."[95] In other words, for this approach to be effective, there must be at least a modicum of consensus in national law on what comprises the core meaning of a concept.

An example of this is demonstrated in *Tessili v. Dunlop*.[96] In this case the European Court held that to determine the "place of performance" of the relevant obligation it was necessary to identify the applicable law by reference to the forum's rules of

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[90] For a representative sample of cases in which the European Court of Justice has provided an independent definition, see BRIGGS & REES, *supra* note 5, at 16; COLLINS ET AL., *supra* note 5, at 287.

[91] BRIGGS & REES, *supra* note 5, at 78-94; COLLINS ET AL., *supra* note 5, at 354-59.

[92] Case 9/87, Arcado S.P.R.L. v. Haviland S.A., 1988 E.C.R. 1539; Case C-26/91, Societas Jakob Handte et cie. GmbH v. T.M.C.S., 1993 I.L. Pr. 5; Case 266/85, Shenavai v. Kreischer, 1987 E.C.R. 239; Case 14/76, De Bloos v. Bouyer S.A., 1976 E.C.R. 1497.

[93] Case 12/76, Tessili v. Dunlop, 1976 E.C.R. 1473.

[94] Case 129/83, Zelger v. Salinitri (No. 2), 1984 E.C.R. 2397.

[95] Case 29/76, LTU Lufttransportunternehmen GmbH & Co. v. Eurocontrol, 1976 E.C.R. 1541.

[96] *Tessili*, 1976 E.C.R. at 1473.

private international law, and to define in accordance with that law the place of performance of the obligation in question. In the opinion of the Court:

> Having regard to the differences obtaining between national laws of contract and to the absence at this stage of legal development of any unification in the substantive law applicable, it does not appear possible to give any more substantial guide to the interpretation of the reference made by article 5(1) to the "place of performance" of contractual obligations. This is all the more true since the determination of the place of performance of obligations depends on the contractual context to which those obligations belong.[97]

The irony of this approach is that the more uniformity there is, the more there will be, whereas the less there is the less there will be.

A second difficulty with the autonomous approach is that the interpretation provided may suit the particular case in which it is established, but turn out to be unsuitable for subsequent cases. Thus, for example, interpretation of the expression, in Article 5(1), "obligation in question" as meaning the obligation which constituted the basis of the proceedings, has produced a suitable principle for resolving certain cases.[98] However, when faced with the prospect of applying this test to a case involving an employment contract, the European Court found the result unacceptable, largely because it could not ensure that an employee could sue his employer in the country where he habitually worked. Accordingly, the Court defined "obligation in question" as the "characteristic obligation" which was, in a contract of employment, the obligation of the employee to carry out work.[99] This, of course, left the law in a state of some uncertainty since the status of each test remained unsure. It therefore required a third reference to discover that the "characteristic obligation" principle was applicable only to employment contracts.[100]

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[97] *Id.* at 1485.

[98] *See, e.g.*, Case 14/76, De Bloos S.P.R.L. v. Bouyer S.A., 1976 E.C.R. 1496.

[99] Case 133/81, Ivenel v. Schwab, 1982 E.C.R. 1891.

[100] Case 266/85, Shenavai v. Kreischer, 1987 E.C.R. 239. The 1989 Convention, providing for the accession of Spain and Portugal, contained an amendment which specifically addresses the question of employment contracts. *See also* Lugano Convention, *supra* note 3, art. 5(1).

This particular difficulty results in part from the logistics of references to the European Court. The national court poses a question which is normally narrowly drawn. The European Court provides an interpretative answer it thinks suitable for that narrow question. The answer is, however, framed in general terms. To the extent that the general terms are dictated by the particular question posed, the answer may not be suitable for other cases. Yet the European Court does not seem to offer the more general guidance which lawyers would surely appreciate.[101] One might also point out the obvious implications in terms of cost of such an interpretative methodology.

Although the European Court has said that the autonomous approach to interpretation does not rule out a national approach in appropriate cases and vice versa, most of its decisions appear to commit it to the autonomous approach. It has, however, been suggested that there may be a tendency towards *unnecessary* "Europeanization" in the case law of the Court, leading to uncertainty and confusion, and the need for further references to the Court of Justice where a previous ruling does not address the present case.[102] This unnecessary "Europeanization," so the argument goes, may conflict with the post-Maastricht ethos of subsidiarity: national law should be preferred to Community law, unless there is some policy at stake that can be carried out only if the matter in question is "Europeanized." Whatever the merits of this argument (and there must be doubts about whether the original intent behind the principle of subsidiarity makes it applicable in Brussels Convention cases), it seems highly likely that in the pursuit of uniformity the European Court has travelled too far down the road of autonomous interpretation to turn back. All that one can expect is the occasional contraflow towards a national-law-based position.[103]

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[101] Sometimes the answer provided by the European Court to one referred question renders answers to other referred questions unnecessary, thereby leaving those questions unresolved. For a recent example in which important questions concerning Article 17 were left unanswered for this reason, see Case C-288/92, Custom Made Commercial Ltd. v. Stawa Metallbau GmbH, 1994 E.C.R. I-2913.

[102] *See* Treavor C. Hartley, *Unnecessary Europeanisation Under the Brussels Jurisdiction and Judgments Convention: The Case of the Dissatisfied Sub-Purchaser*, 18 E.L. REV. 506 (1993) (identifying *Jakob Handte*, 1993 I.L. Pr. 5, as example of unnecessary Europeanization).

[103] National courts can, of course, adapt their own national law to suit the purposes of the Convention and in this way bring that national law into line with the law of other Con-

It would seem fairly clear that the autonomous approach to interpretation creates difficulties for lawyers and national courts. Identifying a likely outcome if a reference is made, or trying to suggest an autonomous meaning for a national court to adopt will involve a good deal of comparative research, with no guarantee that the suggested outcome will materialize. Again, of course, all of this has to be paid for.

Although the search for uniformity has been a prime motivator in the European Court's work on the Convention, other principles have often guided its interpretation. Thus, decisions have stated that the provisions of the Convention which allow a defendant to be sued, without consent, in a jurisdiction other than that in which she is domiciled ought to be construed narrowly.[104] The intent of the Convention is to establish domicile as the primary jurisdictional rule.[105] This interpretative trend, which is of relatively recent origin, may throw doubt on the early approach in *Handelskwekerij G. J. Bier v. Mines de Potasse*[106] to Article 5(3) of the Convention. There the court construed the attribution of jurisdiction to the "courts for the place where the harmful event occurred" as providing the plaintiff a choice of suing the defendant either where the defendant acted, or where the plaintiff suffered harm in cases where those places were different.[107] Further, the Court has indicated that it is necessary to do the utmost to prevent concurrent proceedings in different Contracting States, in order to eliminate the risk of inconsistent judgments within the Community.[108] Again, though, one finds decisions which conflict with this principle.[109] The short point seems to be that like any principles of

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tracting States. *See, e.g.*, Dresser U.K. Ltd. v. Falcongate Freight Management Ltd., [1992] 1 Q.B. 502.

[104] *E.g.*, Case 220/88, Dumez France S.A v. Hessische Landesbank, 1990 E.C.R. 1; Case 189/87, Kalfelis v. Schroder, 1988 E.C.R. 5565.

[105] Case 115/88, Reichert v. Dresden Bank, 1990 E.C.R. I-27.

[106] Case 21/76, Handelskwekerij v. Mines de Potasse d'Alsace S.A., 1976 E.C.R. 1735; *see* BRIGGS & REES, *supra* note 5, at 17.

[107] For an example of the application of this test in the context of defamation, see Shevill v. Presse Alliance S.A., [1992] 2 W.L.R. 1, and the judgment on a reference to the European Court, Case C-68/93, THE TIMES, Apr. 6, 1995.

[108] *E.g.*, Case 351/89, Overseas Union Ins. Ltd. v. New Hampshire Ins. Co., 1991 E.C.R. I-3317.

[109] *E.g.*, Case 129/92, Owens Bank Ltd. v. Bracco (No. 2), [1994] 1 All E.R. 336.

interpretation, these various principles may sometimes lead in the wrong direction. When this happens the Court must apply the brake. For the lawyer advising the client, however, the difficulty is guessing when the brake will be applied.

CONCLUSION

The Brussels Convention is not what one might call mainstream Community Law. Unlike much of the EC Treaty, which is of a largely public law character, the context of the Convention falls squarely within the fields of private international law and procedural law. It does not follow that a Court with expertise in the mainstream will be equally well equipped for dealing with the by-product contained in the Convention. Nor does it follow that techniques for dealing with mainstream cases are always appropriate for dealing with the rather different by-product that is the Brussels Convention. Experience with the Convention to date appears to suggest that it cannot eliminate the phenomenon of litigation over where to litigate. The eternal optimist may hold to the belief that ultimately all will be resolved by the European Court. For others that will be well into the next generation and thus too far off for comfort.[110] The more realistic may feel that when the Brussels Convention attains *its* fiftieth anniversary, it will exist in a rather different form to that which it presently possesses.

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[110] The Rome Convention on the Law Applicable to Contractual Obligations 1980 implemented in the United Kingdom in the Contracts (Applicable Law) Act 1990 may also be relevant in a jurisdictional context in cases not falling within the Brussels Convention. As a result, the rules of the Rome Convention will determine whether the English law explicitly or implicitly governs a contract for the purposes of Rules of the Supreme Court, Order 11, Rule 1(1)(d)(iii) (1962) (U.K.). This result is unsatisfactory. The protocol to that Convention providing for references to the European Court is not yet in force. When it does enter into force, it will not compel the ultimate national appellate court to make a reference. But the possibility of references clearly exists. For a decision on the application of the Rome Convention in this context, see Bank of Baroda v. Vysya Bank Ltd., [1994] 2 Lloyd's Rep. 87.