European Private International Law and Third States*

Von Dr. Dr. Univ. Prof. *Andrea Bonomi*, Lausanne

Articulated in a number of sectorial regulations, the European private international law system has not always grown in a very systematic way. After years of swift development towards a more extensive coverage of different civil law areas and an increased integration of the national systems, the time has probably come to improve the coordination among the single instruments.

The regulation of third-country relationships is undoubtedly one of those issues that call for a more consistent approach. While the universal application of choice-of-law rules is a constant feature of all adopted regulations, unjustified disparities persist with respect to jurisdiction and lis pendens. *The national rules of the Member States have been entirely replaced by uniform European rules in certain areas, whereas they are still very relevant in others. Parallel proceedings pending in a third country are dealt with under one regulation, but ignored by the others. And while the recognition and enforcement of third-country judgments is consistently left to national law, this might seem at odds with the far-reaching European coverage of jurisdiction and choice-of-law issues.*

Hopefully, the Hague Judgments Project will result in a successful convention in the near future. But the external relations of the EU in the area of private international law should not depend entirely on the prospects for a Hague instrument. Whether this prospect materializes or not, the EU institutions should take advantage of the negotiation process in order to elaborate on a coherent set of unilateral European law rules for disputes involving parties of third countries.

I. Introduction

The relationship between the growing European system of private international law and third countries is not a new subject. For many years, this issue has been both at the centre of doctrinal debate and on the agenda of the European Commission and of the other EU institutions.

Already in its *Lugano* opinion of 2006, the ECJ held that the Brussels I Regulation[1] "contains a set of rules forming a unified system which apply not only to relations between different Member States [...] but also to relations between a Member State and a non-member country"[2]. As this language makes clear, EU external relations can also be covered by European rules of private international law.

To a large extent, this was already the case under the Brussels Convention and the 2001 Brussels I Regulation, since most jurisdictional rules contained in those instruments were already applicable in disputes involving the parties of third States. Rules on exclusive jurisdictions have always been applicable, irrespective of the parties' domicile[3]. But this was also true for all other jurisdictional rules included in those instruments, which – although subject to the defendant's domicile in a Member State – also applied to proceedings initiated by third-country plaintiffs and to disputes presenting other important contacts with third States. The *Group Josi, Owusu* and, more recently, *Taser* decisions clearly confirm this[4].

The tendency to extend coverage to "extra-European" litigation has been brought forward a step further by the Recast Regulation[5]. Although the Commission's proposal to include jurisdictional rules of universal application[6] was not accepted by the European Parliament[7], both the protective grounds based on the consumer's or employee's domicile, and the provision on choice-of-court agreements, have been made applicable regardless of the parties' domicile[8]. Moreover, the regulation has been completed with rules on *lis pendens* and related actions applicable in the relationship to third countries[9].

The trend towards a universal application of the European private international law rules is even more evident in other EU regulations. Thus, the classical distinction between defendants domiciled in a Member State and in a third country has been dropped since the Brussels II Regulation[10]. While this instrument still refers to the national jurisdictional rules for the purpose of establishing residual jurisdiction[11], all of the more recent instruments include a complete set of jurisdictional grounds that are also applicable to third-country defendants; these European rules entirely replace the national jurisdictional rules in force in the Member States and are therefore self-sufficient and universal in their scope[12].

Universal application is also – following the Rome Convention – the uncontested principle for European choice-of-law rules[13].

While it is clear that EU regulations are becoming increasingly "universal" in their scope, it is yet to be clarified whether this European system is bound in the long run to entirely replace the national PIL systems or whether it will still coexist with some residual national rules. We will examine this issue with respect to the main areas of international civil procedure, namely jurisdiction, parallel proceedings, and recognition and enforcement of foreign decisions.

---

* This paper is based on the presentation the author gave at the conference "Kodifikation des Internationalen Privatrechts: Deutsche Erfahrungen und europäische Perspektiven dreißig Jahre nach der großen EGBGB-Reform von 1986 – 35 Jahre IPRax" (Codification of Private International Law: German Experiences and European Perspectives 30 Years After the Major Amendment of the Introductory Act to the German Civil Code of 1986 – 35th Anniversary of IPRax) on September 24, 2016, at the University of Cologne. The conference was hosted by IPRax and the German Council for Private International Law.

1 Regulation No 44/2001.

2 ECJ, Opinion 1/03, [2006] ECR I-1145, No 144. On the consequences of the Court's opinion see Pocar (ed.), The External Competence of the European Union and Private International Law, 2007.

3 See Article 16 of the Brussels Convention and Article 22 of the Brussels I Regulation.

4 ECJ, case C-412/98, [2000] ECR I-5925; ECJ, case C-281/02, [2005] ECR I-1383; ECJ, case C-175/15 (not yet published).

5 Regulation No 1215/2012 (hereinafter "Brussels Ia Regulation").

6 See the Recast Proposal (COM (2010)748/3), notably Article 4(2), 25 and 26.

7 See the European Parliament Resolutions of September 2010, paras 15–18, and of 23/11/2010, para 35. In this sense already *Hess/Pfeiffer/Schlosser,* Report on the Application of the Brussels I Regulation in the Member States (hereinafter *Heidelberg Report*), Study JLS/C4/2005/3, No. 157. See also *Layton,* The Brussels I Regulation in the International Legal Order: Some Reflections on Reflectiveness, in: Lein (ed.), The Brussels I Review Procedure Uncovered, 2012, p. 75–81.

8 See Articles 18, 21 and 25 of the Brussels Ia Regulation.

9 Articles 33 and 34 of the Brussels Ia Regulation.

10 Regulation No 1347/2000, then replaced by the Brussels IIa Regulation No 2201/2003.

11 See Articles 7(1) and 14 of the Brussels IIa Regulation. This is not changed by the recent Recast Proposal (COM(2016) 411/2).

12 This is true for the Maintenance Regulation (No 4/2009), the Succession Regulation (No 650/2012), the Matrimonial Property Regulation (No 2016/1103) and the Registered Partnership Regulation (No 2016/1104).

13 Article 2 of the Rome Convention; Article 2 of the Rome I Regulation; Article 3 of the Rome II Regulation; Article 20 of the Succession Regulation; Article 20 of the Matrimonial Property Regulation; Article 20 of the Registered Partnership Regulation.

II. Jurisdiction

1. Civil and commercial matters

While many of the jurisdictional rules of the Brussels Ia Regulation are already universal in scope, others are only applicable when the defendant is domiciled in a Member State. National grounds are therefore still relevant for claims against third-country defendants[14]. The question of how jurisdiction should be regulated when the defendant is domiciled in a third country is still open[15].

a) Relationship with the Hague Judgments Project

As already mentioned, the attempt made by the Commission in the 2010 Recast Proposal to include in the Regulation jurisdictional rules applicable to defendants not domiciled in a Member State failed, because the European Parliament preferred to give priority to negotiations with third countries, in particular under the auspices of the Hague Conference.

However, some years later, this approach does not seem very promising. Certainly, the Hague Judgments Project is again well under way. However, based on the recommendation of an Experts' Group and of a Working Group, the Council of General Affairs and Policy of the Conference, followed by the Special Commission of June 2016, resolutely opted for the elaboration of a "simple" convention on recognition and enforcement[16]. In such an instrument, judicial jurisdiction will only be regulated as a basis for recognition (i.e. as "indirect jurisdiction")[17]. Admittedly, the work on uniform rules on "direct" jurisdiction is supposed to continue in a future, second step[18]. However, if a convention on recognition and enforcement is actually adopted, it seems quite unrealistic to believe that issues of jurisdiction might successfully be addressed in an additional instrument. If this prediction comes true, the question will have to be tackled again by the European institutions in a "unilateral" way[19].

b) Arguments for universal rules on jurisdiction

The political opportunity to harmonize or unify the jurisdictional rules in the relationship to third countries is open to discussion. However, there are several important grounds for doing so.

aa) Elimination of "exorbitant" jurisdictional grounds

A first, undisputable priority should be the elimination of the exorbitant/unreasonable jurisdictional grounds in the law of several Member States, which are still available for claims against defendants of third countries under Article 6(1) of the Brussels Ia Regulation.

This improvement is crucial to ensure consistency and avoid discrimination of defendants domiciled in third countries. This is not simply a technical issue: much to the contrary, the credibility of the entire Brussels scheme is at stake. A system that accords crucial importance to procedural fairness and to the defendant's protection can hardly be reconciled with a passive acceptance of exorbitant grounds[20].

The US jurisdictional approach, that Europeans like to criticize, is – at least in this respect – much more consistent: due process and its jurisdictional corollaries (such as minimum contacts and purposeful availment) are indistinctly applicable to the benefit of US and foreign defendants. The only limited differentiation is that – for federal law claims brought before a federal court – US-wide contacts (also called "aggregate contacts") replace "state contacts"[21]. But this distinction between home and overseas defendants does not involve matters of principle and can therefore not be put on the same footing as the availability of exorbitant grounds.

The denounced inconsistency is even more difficult to accept since the ECJ has clarified, in its *Lugano*-opinion, that the national grounds referred to in Article 4(1) (now 6(1)) are incorporated by reference into the Regulation[22]. That being so, it is no longer possible to turn a blind eye to national exorbitant grounds as if they were not a matter of European law.

As is well known, this problem is made even worse by the existing "asymmetry" in scope between the rules on jurisdiction and those on recognition of the Regulation. Member States' judgments given against a defendant domiciled in a non-Member State benefit from the mutual recognition system, even when they are based on unreasonable jurisdictional bases. This ensues from the prohibition under the Brussels instruments to review the jurisdiction of the rendering court, combined with the impossibility of applying public policy to the rules relating to jurisdiction[23]. Of course, this problem is not new and has often been denounced[24], but no step forward has been taken in this respect since the entry into force of the Brussels Convention.

bb) Ensuring equal access to justice

Because of the existing disparities among the national laws, access to justice is not guaranteed on an equal basis across the in-

14 Article 6(1) of the Brussels Ia Regulation.

15 See the study PE 493.024 commissioned to the Swiss Institute of Comparative Law by the JURI Committee of the European Parliament on "Possibility and Terms for Applying the Brussels I Regulation to Extra-EU Disputes", available at http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493024/IPOL-JURI_ET(2014)493024_EN.pdf. Excerpts of this study have been published by *Mari* and *Pretelli* in the 15 YPIL 2013/2014, p. 211 *et seq*.

16 See the 2016 Preliminary Draft Convention, available on the website of the Hague Conference at the address https://www.hcch.net/en/projects/legislative-projects/judgments, and our comments in *Bonomi,* Courage or Caution? A Critical Overview of the Hague Preliminary Draft on Judgments, YPIL 2015/2016, p. 1 *et seq*.

17 See Article 5 of the 2016 Preliminary Draft Convention.

18 The Council on General Affairs and Policy of the Conference (15–17 March 2016), Conclusions and Recommendations, No 13, www.hcch.net/projects/legislative-projects/judgements.

19 *Fallon/Kruger,* The Spatial Scope of the EU's Rules on Jurisdiction and Enforcement of Judgments: From Bilateral Modus to Unilateral Universality?, 14 YPIL 2012/2013.

20 See also *Fernández Arroyo,* Exorbitant and Exclusive Grounds of Jurisdiction in European Private international Law: Will they Ever Survive?, in: Mansel et al. (eds.), Festschrift für Erik Jayme, Bd. I, 2004, p. 174. Of course, we refer to a restricted notion of exorbitant fora, as they were defined in Article 18 of the Draft Hague Convention on Judgments of 30/10/1999 (on the website of the Hague Conference at the address https://www.hcch.net/en/projects/legislative-projects/judgments). See also the Explanatory Report by *Nygh* and *Pocar,* Prel. Doc. No 11 of August 2000, No 78 *et seq*.

21 See § 4(k)(2) of the Federal Rules of Civil Procedure. Some authors suggest that this approach should be extended to (certain) claims arising under state law: *Silberman,* Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective, 63 S.C.L Rev. 591 (2011–2012), p. 604 *et seq*.

22 ECJ, Opinion 1/03 (fn. 2), No 148, where the Court states that Article 4 (1) of the Brussels I Regulation (current Article 6(1)) "must be interpreted as meaning that it forms part of the system implemented by that regulation".

23 See Article 45(3) of the Brussels Ia Regulation.

24 *Von Mehren,* Recognition and enforcement of sister-state judgments: reflection on general theory and current practice in the European Economic Community and the United States, Columbia L.Rev. 1981, p. 1044–1060; *Juenger,* La Convention de Bruxelles du 27 septembre 1968 et la courtoisie internationale. Réflexions d'un Américain, RCDIP 1983, p. 37. See also *Fallon/Kruger* (fn. 19), p. 15.

dividual Member States[25]. This result is hardly compatible with the European freedoms and other EU basic principles, such as fair competition and the creation of an area of liberty, security and justice.

If businesses in Member State A can easily bring proceedings before the local courts against their third-country counterparties, taking advantage of extensive (and possibly exorbitant) jurisdictional grounds, they enjoy a competitive advantage over businesses in Member State B, if this same possibility is not open to them. *Mutatis mutandis,* unequal access to courts for individuals in the different Member States can sometimes result in a hurdle to the free movement of persons.

Article 6(2) of the Brussels Ia Regulation, while preventing discrimination based on nationality, does not guarantee *per se* a level playing field to plaintiffs domiciled in different Member States[26]. Only uniform jurisdictional grounds can help to achieve that.

cc) Consistency with other EU regulations

At the present stage of development, regulations of European private international law follow two different approaches. While the Brussels Ia and Brussels IIa Regulations still refer, albeit residually, to national jurisdictional rules, this reference has been replaced in all of the most recent instruments by uniform rules of subsidiary jurisdiction[27]. This discrepancy does not seem to be justified by objective reasons and should therefore be corrected.

c) The structure of a revised regulation

If we accept, based on the previous arguments, that the rules of the Brussels Ia Regulation should cover all cases of third-country disputes, several structural questions remain to be discussed.

aa) Unification or simple harmonization of the jurisdictional rules

A first question is how far uniformity should go. One first option consists of simply harmonizing the national rules, by prohibiting the use of a certain number of unreasonable jurisdictional grounds. To that end, the inclusion in the Brussels Ia Regulation of a "black list" of prohibited grounds would be sufficient; the provision of Article 18 of the 1999 Hague Draft Convention[28] could provide a useful model for a specific European list of prohibited grounds. For the rest, the structure of the Regulation could remain unaltered. In particular, the distinction between European and third-country defendants could be maintained.

The advantage of this approach is that each Member State would be able, at least to a certain extent, to keep its own rules on jurisdiction with their national peculiarities, without being forced to follow unified rules: this would be more in line with the subsidiarity principle. At the same time, the observance of a minimum standard would be ensured. *Mutatis mutandis,* this solution would resemble that prevailing in the US, where each sister State is free to apply its own long-arm statute, subject however to constitutional due process requirements.

However, on the downside, this approach would not meet other possible goals of unification. The extension of the courts' jurisdictional reach would continue to vary from one Member State to the other, although less dramatically than now, so that access to justice would continue to depend on diverging national rules.

This might also have some implications for the recognition of third-country decisions as well as on *lis pendens* and related actions. On one hand, in several national recognition systems, "indirect" jurisdiction is measured by the yardstick of direct jurisdiction[29], so that different national jurisdictional rules may also result in broader or narrower recognition bases. On the other hand, such disparities also impact the rules on *lis pendens* and related actions of Articles 33 and 34 of the Brussels Ia Regulation, as they depend on a "recognition prognosis"[30].

For all of these reasons, we believe that the best option would be full unification. This would entail Member States' courts only being able to assert jurisdiction on the basis of common European rules, without relying on the grounds provided for by national law. This solution also appears to be preferred by the European institutions: as already mentioned, the Commission had already come up with a similar scheme in the Recast Proposal and the same approach has also been followed in all of the most recent EU regulations.

bb) Opportunity to maintain a distinction between internal and external situations

Full unification does not necessarily mean that the jurisdictional reach of the Member States' courts should be exactly the same for internal and external situations. In fact, in relationships with third States, the need for avoiding multiple concurrent fora is less urgent than in purely intra-European situations. Also, the protection of European citizens and businesses and, more generally, of European interests, may require easier access to Member States' courts when third countries are involved[31].

Subject to the elimination of exorbitant grounds, the need for differentiating internal and external situations is quite widely accepted. Accordingly, the Recast Proposal included some additional grounds for claims against third-country defendants (Articles 25 and 26). Moreover, all of the most recent regulations provide for subsidiary grounds, which become applicable essentially in external situations, i.e. when no courts in a Member State can assert jurisdiction on the ordinary grounds[32].

cc) How to distinguish "internal" from "external" situations

If the need for some differentiation is generally accepted, the next question is how to draw the line between internal and external situations[33].

Traditionally, the instruments in the civil and commercial area have distinguished between defendants domiciled in a Member State and those domiciled in a third country. This divide is not the most appropriate to distinguish between internal and external disputes: it goes without saying that, even though

25 Recast Proposal (COM(2010) 748/3), p. 3 and 8; *Heidelberg Report* (fn. 7), No 158 *et seq.; Fallon/Kruger* (fn. 19), p. 18.
26 See also *Heidelberg Report* (fn. 7), No 159 *et seq.*
27 See Articles 6 and 7 of the Maintenance Regulation (No 4/2009), Articles 10 and 11 of the Succession Regulation (No 650/2012), Articles 10 and 11 of the Matrimonial Property Regulation (No 2016/1103) and Articles 10 and 11 of the Registered Partnership Regulation (No 2016/1104).
28 See *supra,* fn. 20.
29 See *infra,* fn. 62.
30 See *infra,* fn. 50.
31 As mentioned already, the US system also provides for some differences between home and foreign defendants.
32 See *supra,* fn. 27.
33 On this point, see *Pataut,* International Jurisdiction and Third States: A View from the EC in Family Matters, in: Malatesta/Bariatti/Pocar (eds.), The External Dimension of EC Private International Law in Family and Succession Matters, 2008, p. 125 *et seq.*

the defendant is domiciled inside the EU, the dispute may well involve third-country interests.

A different (and better) approach has been followed in the Brussels IIa Regulation and in most of the other EU regulations of the "second generation". In all these instruments, the distinction based on the defendant's domicile has been dropped and replaced by a different mechanism pursuant to which some "residual" or "subsidiary" grounds become applicable when no court in a Member State can assert jurisdiction on a first set of "primary" jurisdictional grounds[34].

If this approach is extended to the Brussels Ia Regulation, the first "primary" jurisdictional ground would obviously still be the defendant's domicile in a Member State. Accordingly, the subsidiary grounds would only be applicable to third-country defendants. However, the current grounds of special jurisdiction of Articles 7 and 8 would probably also belong to the first layer of jurisdictional rules: contrary to the current rules, they would become available not only against "European" defendants, but also against third-country defendants.

This means, for instance, that in contractual matters, the subsidiary grounds could only be relied upon if *both* the defendant's domicile *and* the place of performance under Article 7(1) were situated in a third country. This approach had been adopted by the Commission in the Recast Proposal, pursuant to which the subsidiary grounds of Article 25 and 26 would be applicable only if no court in a Member State had jurisdiction under the previous rules.

At the end of the day, the traditional approach, based on the defendant's domicile, and the new mechanism, based on subsidiary jurisdiction, produce rather similar results. A difference between the two methods only arises when the defendant is domiciled in a third country but a special jurisdictional ground is satisfied in a Member State.

One could also wonder whether some distinctions should be made based on the plaintiff's domicile. In the current system, third-country plaintiffs are treated as plaintiffs domiciled in a Member State, subject only to the special rules protecting weak parties. While this makes sense with respect to defendants domiciled in the EU, a differentiation might appear justified when a third-country plaintiff sues a third-country defendant[35].

d) Specific content of the jurisdictional grounds

Besides the structural issues, the choice of the jurisdictional grounds to be applied in the relationship with third States also raises difficult questions.

aa) Extension of the existing jurisdictional grounds

As already mentioned, it is fairly safe to assume that all jurisdictional grounds provided under the current Brussels Ia Regulation should be made available also against third party defendants. Although these grounds have been developed for internal disputes, they also appear to be normally acceptable in external cases[36]. This was also the approach of the Commission in the Recast Proposal. It remains to be discussed what "subsidiary" grounds should be made available when no courts in a Member State can rely on the existing grounds.

bb) Subsidiary grounds modelled on the recognition basis under a future Hague Judgments Convention

It goes without saying that – if a Hague Convention on recognition and enforcement is finally adopted – at least all jurisdictional grounds that will be contemplated in that instrument as recognition bases should also be made available as rules of direct jurisdiction under a revised Brussels Ia Regulation. This will allow the Hague Convention's potential to be fully exploited, because judgments given under those jurisdictional premises will be capable of recognition in all future Contracting States.

However, this does not bring us very far. A brief survey of the current preliminary draft reveals that most of the bases for recognition provided therein correspond to jurisdictional rules that are by now already included in the Brussels Ia Regulation, subject only to some slight differences[37]. Accordingly, the recognition ground based on the habitual residence[38] closely resembles general jurisdiction based on the defendant's domicile[39]. The same is also true for other recognition bases, such as those based on express or tacit consent, on the location of a defendant's branch or establishment, on the place of the harmful act or omission, and on the place of protection of IP rights[40].

One of the very few instances where the Hague Draft goes somewhat further than the Regulation is with reference to judgments in contractual matters. For these disputes, the present text of Article 5(1)(g) does not refer to the place of performance of the "characteristic" obligation (as implicitly does Article 7(1)(b) of the Regulation), but to the place of performance of the disputed obligation, albeit subject to the additional condition that the defendant's activities reveal a "purposeful and substantial connection" to the forum State. This seems to allow a judgment ordering the debtor to pay the contractual price to be recognised and enforced in the other future Contracting States of the Hague Convention, if it was given at the place of payment. In order to fully exploit this possibility, a forum at the place of payment (and more generally at the place of performance of the disputed obligation) should be made available in a revised Brussels Ia Regulation for claims under a contract for sale or for the provision of services. This jurisdictional ground should not replace the place of performance of the characteristic obligation, but should rather be added as a subsidiary rule, applicable only in external situations.

This solution, which mirrors the existing jurisdictional rules of some Member States, serves European interests well, since European providers of goods and services would be able to avail themselves of a forum at the place of payment (often at their own domicile) even though the goods or services are to be delivered/provided overseas. Nobody could suggest that such a jurisdictional ground is unreasonable or exorbitant, since it was already provided for (in "internal" situations) by the Brussels Convention and is still available under the Brussels Ia Regulation for contractual disputes falling under Article 7(1)(a).

cc) Opportunity to provide for further grounds

Further subsidiary grounds might be provided by European legislation, even though they do not match the bases for recog-

34 See *supra,* fn. 27.

35 In such "f-cubed" cases, US courts often dismiss the case on *forum non conveniens* grounds. This possibility might also be envisaged in Europe.

36 The European Group of Private International Law (EGPIL), in its "Proposed Amendment of Chapter II of Regulation 44/2001 in Order to Apply to External Situations" (Bergen, 2008, available at the address http://www.gedip-egpil.eu), envisaged a simple extension of all existing jurisdictional rules to external situations, with the only addition of a *forum necessitatis.*

37 See *Bonomi* (fn. 16), p. 18 *et seq.*

38 Article 5(1)(a).

39 In particular, the definition of "habitual residence" for legal persons under Article 3(2) of the Draft is almost identical to the definition of "domicile" under Article 63 of the Brussels Ia Regulation.

40 Article 5(1)(d), (e), (f), (j) and (k) of the Draft.

nition under a future Hague instrument. Although the recognition and enforcement of judgments rendered on such grounds will not be guaranteed by the future instrument, a broader reach of European courts' jurisdiction can be considered appropriate on several grounds.

A first obvious reason is that, even in the absence of recognition in the concerned third State(s), a decision given in a Member State will be effective in the forum State, and capable of being recognised and enforced in all other Member States of the EU (as well as in the Lugano States). Therefore, the prevailing party will be able to enforce the judgment on assets situated in the forum or in other EU or EFTA States. It will also be able to use that judgment as a "shield" against recognition and enforcement of an unfavourable third country decision. Also, at an earlier stage of litigation, the availability of a forum in an EU State will create the conditions, at least in some cases, for a *lis pendens* or *forum non conveniens* motion to be raised before a third-country court.

A second reason is that a judgment rendered by a Member State's court might be recognised and enforced in a third country, even though it rests on other jurisdictional premises than those endorsed by a future Hague Judgment Convention. On one hand, countries that won't ratify the future instrument will continue to apply their national rules on recognition, which may provide for different, sometimes even broader bases for recognition. On the other hand, national recognition rules will continue to be relevant even in the Contracting States of a future Hague Convention: it is almost certain that this instrument will only set a minimum standard for recognition and enforcement, thereby allowing Contracting States to maintain more generous rules based on their national law[41].

US law provides a good example. Under the recognition rules that are presently applicable in most sister States, a foreign judgment can be recognised and enforced if it satisfies US jurisdictional standards, i.e. whenever the defendant has established minimum purposeful connections with the forum State. This means, for instance, that a judgment in a contractual matter can be recognised (even though it was not rendered at the place of performance of the contractual obligation), when the defendant, for instance, had "reached out" to the other party and/or accepted to engage in lengthy pre-contractual negotiations within the forum State[42]. Such recognition bases, which will not be included as such in the future Hague Convention, will nevertheless continue to be applicable, irrespective of whether the US will ratify the Convention or not.

This does not mean, obviously, that broad and unpredictable criteria such as "minimum contacts" or "purposeful availment" should be included in the Brussels Ia Regulation, but only that additional jurisdictional grounds other than those that are presently available against European defendants might well be considered as subsidiary grounds in third-country relationships.

dd) The subsidiary grounds of the Recast Proposal

Articles 25 and 26 of the Recast Proposal, are an example of possible subsidiary grounds. Article 26 included a *forum necessitatis* rule, which is now also available on a subsidiary basis in most other recent EU regulations. This is certainly a very important provision that ensures access to justice when no other court is available outside the Member States of the EU, thereby complying with basic principles of due process[43]. However, since its application is limited to exceptional situations, *forum necessitatis* should not be the only subsidiary rule for "external" situations.

Article 25 embodied a rule of *"quasi in-rem"* jurisdiction, such as those that exist under several national systems. Its most significant advantage resides in the fact that it grants jurisdiction to the courts at the place where the debtor's assets are situated, so that a judgment can be directly enforced in the forum State. For money judgments, this takes off the table the possible problems related to recognition and enforcement in a third country. To avoid its exorbitant and unwarranted application, the Commission suggested that this ground be available only if (1) the value of the property is not disproportionate to the value of the claim and (2) the dispute has a sufficient connection with the forum. With such qualifications the rule is certainly compatible with due process requirements and might therefore be considered as one of the possible rules of subsidiary jurisdiction. However, other options might also be considered.

ee) Further subsidiary grounds in contractual matters

In the contractual area, we have already mentioned that subsidiary jurisdiction could be based, for all types of contracts, on the place of performance of the disputed obligation (i.e. the obligation "in question"). However, this ground should also coexist, again for all contracts, with that at the place of performance of the characteristic obligation: the courts at that place would be able to rule on all obligations arising out of the contract, irrespective of their place of performance. Compared with the current provisions of Article 7(1) of the Brussels Ia Regulation, the dual reference, for all contracts, to the place of performance of both the disputed and the characteristic obligation would significantly increase the jurisdictional options available to EU businesses and professionals.

Furthermore, it might be interesting to explore the possibility of extending some of the solutions currently applied to consumer contracts to (at least certain) business-to-business disputes. At first sight, the claimant's domicile rule of Article 18 of the Brussels Ia Regulation might be deemed inappropriate if applied to B2B disputes. One should consider, however, that the potentially exorbitant reach of that rule is largely tempered by the "directed-activity" requirement of Article 17(1)(c): a forum at the consumer's domicile is available only if the trader "targeted" that country. To a large extent, this targeting requirement addresses the same concern that, in the US jurisdictional scheme, is expressed by the "purposeful availment" paradigm. This means that a judgment rendered by the courts of a "targeted" EU country might very well be capable of being recognised and enforced in the US (and perhaps in other third countries that might share the US approach).

ff) Further subsidiary grounds for tortious claims

With respect to tortious claims, the extension to external relationships of the *locus delicti* rule of Article 7(2), as interpreted by the ECJ on the line of the so-called "ubiquity rule", would *per se* guarantee a very broad reach to Member States courts – much broader, in fact, than the jurisdiction of their US counterparts.

Products liability disputes offer a good example. If a product manufactured overseas by a third-country corporation causes an

41 See Article 16 of the 2016 Preliminary Draft.

42 *Burger King Corp.* v. *Rudzewicz,* 105 S.Ct. 2174 (1985). See also *van Lith,* International Jurisdiction and Commercial Litigation, Uniform Rules for Contractual Disputes, 2009, p. 278 *et seq*.

43 See also the Article 24bis of the EGPIL "Proposed Amendment" (*supra,* fn. 36).

accident in Europe, the courts of the place of the harmful event would undisputedly have jurisdiction under an "extended" Brussels system[44]. From a European perspective, this would not be particularly revolutionary, because several Member States already have similar rules in their national systems. However, this is quite different from the present state of the law in the US, where the courts at the place of the damage can only assert jurisdiction over an out-of-state manufacturer if he created purposeful contacts with the forum State. The simple act of putting products in the "stream of commerce" is (at least generally) not sufficient, even though the manufacturer could predict that they would end up in the forum State[45].

The extensive implications of the "ubiquity rule" are tempered by other case-law rules developed by the ECJ with the clear purpose of preventing an excessive proliferation of available fora inside the European justice area and ensuring a priority to the courts' at the defendant's domicile. However, such concerns do not have the same weight when the defendant is domiciled in a third State, while it becomes more important to guarantee that the victims of a tort occurring in Europe have effective access to justice.

It seems, in particular, that the so-called "mosaic approach", the effect of which is to limit the jurisdiction of the courts at the place of the event to local damages only[46], is not so pertinent with respect to third-country disputes. In such cases, the possibility for the tort victim to bring proceedings for the entirety of the damage suffered in the State of the defendant's domicile – often emphasized by the ECJ as a justification for the "mosaic approach" – is less effective. Accordingly, the jurisdiction of the court situated at the place of damage should extend to the entirety of the damage.

One can also wonder whether the quite restrictive definition of "damage" adopted by the ECJ[47] should perhaps also be reconsidered in order to better protect European victims of a harmful event occurred abroad. Presently, the European victim of an accident occurring abroad cannot bring a liability claim against the tortfeasor at the place where she suffered indirect and consequential damages. In third-country disputes, this might perhaps be corrected, at least in certain situations.

In this respect, particular attention should be paid to human rights violations. Admittedly, some of the hurdles that potential plaintiffs currently meet in this area could be overcome through the mere extension to third-country defendants of some jurisdictional rules already provided by the current Regulation. Thus, the availability on a European scale of the jurisdictional rule of Article 8(1) of the Brussels Ia Regulation would allow victims of overseas violations to jointly sue before a Member State court a European corporation and its foreign subsidiaries, thereby filling a gap that results from the absence of an equivalent rule in the national systems of several Member States. Also, when the act or the event is located in Europe, the *erga omnes* application of the *locus delicti* rule would make it easier to initiate proceedings against third-country defendants. Furthermore, a *forum necessitatis* rule would be particularly helpful when proceedings are impossible, or cannot reasonably be brought or conducted in the third State (or States) that are more directly concerned. However, all these improvements might sometimes be insufficient. While the admission of a "universal" jurisdiction for these kind of disputes would be extremely controversial, a broader interpretation of the notion of damage could help victims at least in certain situations.

2. Family and succession area

Outside the scope of civil and commercial matters, for matters covered by the most recent EU regulations such as the Regulations on Maintenance, Succession, Matrimonial Property and Registered Partnership, the national jurisdictional rules that were in force in single Member States have already been entirely replaced by unified rules.

The question of unification (or harmonization) of the jurisdictional grounds applicable in the relationship with third countries is still open with respect to the Brussels IIa Regulation. For both matrimonial causes and parental responsibility, Articles 7 and 14 of that Regulation still refer to the national jurisdictional rules in each Member State. As clarified by the ECJ[48], and similar to the approach of more recent regulations, these provisions are only applicable when no court in a Member State can assert jurisdiction based on the primary jurisdictional grounds (listed in Articles 3 to 5 for matrimonial causes and in Articles 8 to 12 for parental responsibility). For the reasons mentioned above, this reference to national rules should preferably be replaced by uniform jurisdictional grounds. However, the recent Recast Proposal does not yet go in that direction[49].

III. Lis pendens and related actions

Following the Recast, the Brussels Ia Regulation contains provisions designed to cope with parallel proceedings pending before the courts of third countries (Articles 33 and 34). While being a huge step forward towards a uniform approach, these rules are still subject, to a certain extent, to the national law of the individual Member States. As a matter of fact, since the rules on recognition of third-country judgments are not unified, the "recognition prognosis" *(Anerkennungsprognose),* which is required as a condition for a procedural stay[50], hinges on the national recognition rules in force in the forum State. It follows that the application of the new European provisions may diverge from one Member State to the other. As we will see, a simplification can only be expected should EU law rules on the recognition and enforcement of third-country judgments be introduced.

Contrary to the Brussels Ia Regulation, the other European PIL regulations do not include rules on *lis pendens* and related actions for "external" situations. Also it remains to be clarified whether the Member States' courts can still rely, in those areas, on national *lis pendens* rules, if such rules exist[51]. Undoubtedly,

44 The ubiquity rule is undoubtedly applicable in product liability cases as in all other tort disputes: ECJ, case C-189/08, *Zuid-Chemie,* [2009] ECR I-6917; ECJ, case C-45/13, *Kainz* (published in the electronic Report).

45 We refer to the well-known case law of the US Supreme Court: *World-Wide Volkswagen Corp.* v. *Woodson,* 444 U.S. 286 (1980); *Asahi Metal Industry Co.* v. *Superior Court,* 480 U.S. 102 (1987); *J. McIntyre Machinery, Ltd*. v. *Nicastro,* 131 S. Ct. 2780 (2011).

46 ECJ, case C-69/93, *Shevill,* [1995] ECR I-415, para. 33.

47 ECJ, case 220/88, *Dumez,* [1990] ECR I-49; ECJ, case C-364/93, *Marinari,* [1995] ECR I-2719.

48 ECJ, case C-68/07, *Sundelind Lopez,* [2007] ECR I-10403.

49 COM(2016) 411/2.

50 Under Articles 33 and 34, the court seized in a Member State may stay the proceedings only if it is expected that the court in the third country will give a judgment capable of recognition in the forum.

51 This might conflict with the *Owusu* ruling, where the ECJ held that Article 2 of the Brussels Convention is "mandatory in nature", with the consequence that a court designated by the Brussels rules cannot decline jurisdiction on national law grounds: ECJ, case C-281/02, *Owusu,* [2005] ECR I-1383, No 37.While in that case the ECJ intended to rule out the English *forum non conveniens* doctrine, it is open to discussion whether the same arguments could be relied upon against national *lis pendens* rules.

the inclusion of common European rules would represent important progress.

IV. Recognition and enforcement of third-country judgments

None of the existing EU regulations include recognition and enforcement rules applicable to third-country judgments. Up until now, this issue is exclusively regulated by national recognition rules in force in each EU Member State, subject to existing bilateral and multilateral conventions. The question to be answered in the coming years is whether the development of uniform European rules in this area is desirable. Assuming that the answer is yes, we will then speculate on how such European rules on recognition should be conceived.

1. *On the desirability of unifying the rules on recognition and enforcement of third-country judgments*

The desirability of European recognition rules for the judgments of third countries has not been discussed very often up until now. The European Group of PIL thoroughly analysed the question of uniform rules for third-country judgments in its Copenhagen and Brussels meetings and came up with a detailed draft proposal[52]. However, as the commentary makes clear, the Group intentionally avoided all discussion around the political desirability of such unification and only focussed on its technical modalities. Only few commentators have discussed the policy issue[53].

a) Priority of a treaty-based solution?

A first possible approach could be that the achievement of uniformity on this issue should be left to an international treaty to be negotiated under the auspices of the Hague Conference[54]. As already mentioned, the Hague Judgments Project is heading towards a convention on recognition and enforcement of foreign decisions. If adopted and ratified by the EU, this instrument will enter into force in all Member States as a part of the European PIL system. The advantage of such an approach is that the treaty rules will become applicable between the EU Member States and the other Contracting States on the basis of reciprocity: they will therefore not only allow the uniform recognition of third-country decisions in the EU Member States but also, at the same time, promote the recognition of EU Member States' judgments in third countries.

However, even though the adoption of a Hague instrument will be a huge step forward, it will not solve all problems. First, and obviously, this is because a treaty will only cover judgments given in the Contracting States: subject to other treaties, judgments from non-contracting States will continue to depend on the national recognition rules of each Member State. Second, the material scope of a future Hague Judgment Convention will be limited only to some judgments in the civil and commercial area: all judgments ruling on issues of family, succession, and bankruptcy law will fall outside its scope, as well as those ruling on some specifically excluded matters; accordingly, the 2016 Preliminary Draft rules out admiralty and defamation disputes[55]. Here again, recognition and enforcement will be left to national law. Finally, even for judgments covered by the future convention, national recognition rules will still play a role when they allow for recognition in a particular case: as stated in Article 16 of the 2016 Preliminary Draft, the future convention will not prevent the recognition and enforcement of judgments under national law.

In all these cases, the national recognition rules of the individual Member States will continue to be relevant. However, such rules reflect different philosophies and traditions, and may lead to quite diverging results. Such differences are much more significant than those existing among US sister States. In the US, in the absence of federal rules, recognition and enforcement of foreign judgments is also still a matter of State law; however, the local rules are quite similar to each other because they are either based on one of two Uniform Recognition Acts[56], or they reflect shared common law principles based on comity[57].

b) Arguments for a unilateral approach

The coexistence in Europe of divergent approaches to recognition and enforcement of third-country judgments might be regarded as a situation one can live with. After all, the procedural systems of the individual Member States are also very different one from the other – if not in their basic philosophy, at least in the technical details and in their efficacy. However, important arguments also militate for the elaboration of common European rules.

aa) Better protection of EU law objectives

A first line of arguments can be drawn from the considerations that underpin the principle of mutual recognition of Member States' decisions and its corollaries, notably the uniform European rules on jurisdiction and on applicable law. The driving idea behind the spectacular rise of European PIL was the unyielding belief of the European Commission and of the other EU institutions that coexistence of diverging national rules in these areas was inconsistent with both the European freedoms and other EU basic principles, such as fair competition and the creation of an area of liberty, security and justice. Arguably, the same reasoning also applies to the recognition and enforcement of third-country judgments[58].

If money judgments stemming from third countries are easily enforced in Member State A, but rejected in Member State B, businesses having their seat and assets in B will enjoy an undue advantage over competitors located in A. This might result in a hurdle to the free movement of companies and capital, and even lead eventually to the creation of "safe havens", which are at odds with free and fair competition. *Mutatis mutandis,* if third-country judgments in family law matters (such as divorce, maintenance, property relations between spouses and partners, or parental responsibility) are recognised in Member State A and not in Member State B, this may create "limping" relationships that are hardly compatible with the establishment of a common area

52 "Extension of the 'Brussels I' Regulation and judgments given in a State which is not a Member of the European Union", available at http://www.gedip-egpil.eu/documents/gedip-documents-20poe.htm (hereinafter: EGPIL Draft Proposal).

53 *Carbone,* What about the Recognition of Third States' Foreign Judgments?, in: Pocar/Viarengo/Villata (eds.), Recasting Brussels I, 2012, p. 299–309; *Fallon/Kruger* (fn. 19), p. 22 *et seq*.

54 This would mirror the solution preferred by the European Parliament with respect to jurisdiction (see *supra,* fn. 7).

55 See Article 2(1)(g) and (k) of the 2016 Preliminary Draft.

56 The 1962 Uniform Foreign Money-Judgments Recognition Act and the 2005 Uniform Foreign-Country Money Judgments Recognition Act.

57 The common law principles on recognition have their historical roots in the seminal decision *Hilton* v. *Guyot,* 159 U.S. 113 (1895).

58 See also *Fallon/Kruger* (fn. 19), p. 23 ("[...] dysfunctioning of the European area that can result from disparities between national legislations").

of justice, and may eventually discourage the free movement of persons inside the EU[59].

Of course, this kind of arguments will probably not convince everybody. As is well known, they have already been criticized and resisted when they were advanced as a motive for the first instruments in the area of judicial cooperation. This notwithstanding, they finally led to the adoption of an impressive number of EU regulations. That being so, there is no reason why they should be taken less seriously now with respect to third-country judgments.

bb) Consistency with the principles underlying existing regulations

A second group of arguments for the unification of the recognition rules throughout Europe is based on consistency with the values underlying the choice-of-law rules included in most European regulations. It can hardly be contested that the European conflict rules reflect a philosophy of both openness and uniformity. First, all existing regulations include bilateral and universal conflict rules, i.e. rules that allow for the application of foreign law, including the law of a third country. By doing so, they do not discriminate against the law of third countries, and normally do not grant any priority to the law of the forum nor of other EU Member States. Second, the European instruments widely recognize party autonomy, allowing the choice of the applicable law even when it leads to the law of a third country. Finally, while all regulations preserve the public policy of the forum, they also require the court to use it in a very cautious manner. All this reflects the concern of guaranteeing a uniform regulation of cross-border relationships and avoiding "limping" relationships. This approach is hardly consistent with a complete indifference to the fate of third-country judgments, whose recognition is also an essential ingredient of the international harmony of solutions.

cc) Smoothening the operation of existing regulations

Some more technical arguments in favour of unified rules for the recognition and enforcement of third-country judgments can finally also be derived from the need to improve and smoothen the operation of existing regulations. As a matter of fact, the recognition of third-country judgments significantly impacts the functioning of certain European law rules.

On one hand, all existing rules on the recognition and enforcement of Member States' judgments contemplate the inconsistency with and a third-country judgment as a ground for refusal – this however obviously only if such judgment is capable of recognition in the Member State addressed[60]. This condition currently hinges on national recognition rules, which not only makes the EU recognition provisions less predictable and more difficult to apply, but also results in disparities as to the circulation of a Member State's judgment in the European area. Uniform recognition rules would remove this source of imbalance.

On the other hand, national recognition rules have also become relevant for the functioning of European rules on *lis pendens* and related actions. As already mentioned, Articles 33 and 34 of the Recast Regulation allow a Member State's court to stay proceedings when parallel suits have previously been initiated abroad, but only if it is expected that the foreign court will render a judgment capable of being recognised or enforced in the forum country[61]. Currently, a court must verify this condition on the basis of the national rules on recognition and enforcement. It follows, once again, that the operation of the uniform rules of Article 33 and 34 is less predictable and might lead to different results in the individual Member States. Moreover, if the court in Member State A refuses to stay proceedings on the ground that the future third-country decision will not be recognised in the forum, its judgment might then be denied recognition in Member State B if the third country's decision is recognised there.

dd) Avoiding the complexity of national recognition rules

Finally, the unification of the rules for recognition of third-country judgments would also simplify the application of the national recognition rules at least in certain Member States. In most national recognition systems, the jurisdiction of the foreign court (also known as "indirect jurisdiction") is a standard requirement for recognition. In several countries, this condition hinges on the analogical application of the national rules on ("direct") jurisdiction in force in the State addressed ("bilateralization", "mirror effect")[62]. Since the inclusion in many EU regulations of uniform jurisdictional rules, which sometimes coexist with, and sometimes replace, national jurisdictional rules, it remains to be clarified if and how this affects indirect jurisdiction. Is this condition still based on national jurisdictional rules (which might have become inapplicable because of the European unification), or should courts refer to the unified European rules, or to both sets of rules[63]? The answer to this complex question would become much easier if national recognition rules were replaced by common European rules.

2. How to proceed?

If the decision of introducing European rules on the recognition and enforcement of third-country judgments were taken, the next question is how should these rules look. Obviously, this question cannot be completely severed from the previous one, since the opportunity to regulate a certain area is always affected by the policy choices that might be included in the regulation in question.

a) Relationship with other (existing or future) rules on recognition

A first question concerns the relationship of new European rules with the existing recognition systems, i.e. the European rules on the mutual recognition and enforcement of Member States' decisions, the rules included in a future Hague Judgments Convention, and the national rules in the Member States.

The existing European rules on mutual recognition and enforcement are only applicable to decisions given in a Member State. They are based on reciprocity and mutual trust among the Member States. While such rules can certainly provide a framework for European rules on third-country judgments, it is clear that there is no need for a complete alignment[64].

59 *Fallon/Kruger* (fn. 19), p. 23 (fn. 81).

60 See Article 45(1)(d) of the Brussels Ia Regulation. Similar rules are provided for in all of the other regulations that deal with the recognition and enforcement of Member States' decisions.

61 See *supra,* fn. 50.

62 See, for instance, Article 328(1)(1) of the German ZPO *("Spiegelbildprinzip"),* Article 64(a) of the Italian PIL Act, and Article 14 of the Belgian PIL Code.

63 *Bonomi,* Règles européennes de competence et règles nationales de reconnaissance: une cohabitation difficile, in: Entre Bruselas e La Haya. Liber Amicorum Alegría Borrás, 2013, p. 241–254.

64 See the commentary by *Fallon* to the EGPIL Draft Proposal (*supra,* fn. 52): "Globalement, le regime appliqué aux décisions de pays tiers ne devrait pas différer fondamentalement de celui appliqué actuellement aux décision des Etats membres"; however, "[...] l'analogie des regimes ne signifie pas l'identité des regimes". See also *Fallon/Kruger* (fn. 19), p. 33.

The same is also true with respect to the rules on recognition and enforcement that might be included in a future Hague Convention. If the European unilateral rules were exactly equivalent to those of such a conventional instrument, there would be no incentive for a third country to negotiate and ratify that convention. This does not mean that – at least on specific points – the European rules cannot be similar to, or even more favourable to recognition than those of a global treaty: as mentioned above, the Hague Convention will almost certainly allow for the application of more favourable (national or supranational) rules[65]. However, this cannot be true for every single European rule.

Finally, the national recognition rules of the Member States will be replaced by a European regulation. Their concurrent application based on the principle of *favor recognitionis* is difficult to envisage, because it would jeopardise the improvements that are expected from the adoption of uniform rules. Of course, these rules can also be a source of inspiration – as they already were when the existing EU-law rules on recognition and enforcement were first adopted. However, because of their diversity, the drafters of a European regulation will have to arrive at clear choices from the different available options or come up with original solutions.

b) Content of the uniform recognition rules

aa) General principles on recognition and enforcement

It seems quite obvious that some basic features of the existing European rules on mutual recognition and enforcement should also be extended to the recognition and enforcement of third-country judgments. The fact that some of these points have also been included in the 2016 Hague Preliminary Draft is a reflection of this.

This is notably true for several general principles on recognition and enforcement, such as *"Wirkungserstreckung"*[66] or the prohibition of revision of the foreign judgment on the merits[67].

However, it is debatable whether third-country judgments should also benefit from the principle of "automatic" recognition ("without any special procedure being required"). Certainly, there is no need for abolishing *exequatur* proceedings, as has already taken place in the Recast Regulation and in a number of other EU instruments[68].

bb) Grounds for denial

The essential grounds for denial under the existing EU regulations should obviously also be applicable with respect to third-country judgments. These include a manifest incompatibility with public policy, insufficient notice of process, and inconsistency with a judgment given between the same parties, either in the requested State or in a third country[69]. The 2016 Hague Preliminary Draft is very similar to the EU regulations also in this respect[70].

However, some deviation from the existing EU rules are probably needed.

First, the notion of "insufficient notice" would probably need to be adapted. As is well known, since the Brussels I Regulation, existing EU rules on recognition have no longer focussed on the "regularity" of service, but rather on the question of whether the defendant was placed in a position to arrange its defence. This is justified by the need to prevent abuses, but also by the fact that the judgments covered by these instruments originate from Member States bound by the EU Service Regulation[71]. Since third countries are not bound by that instrument, it is important to ensure that service of process is made in a regular way, or at least in line with the basic European principles concerning service of process[72].

Second, a specific ground of denial based on *lis pendens* should probably be added. In a number of internal and international systems, recognition of a foreign judgment can be refused when proceedings between the same parties and on the same object are already pending in the State addressed, provided that they had been initiated before the foreign proceedings[73]. This ground for refusal would be extremely valuable with respect to third countries, in particular because many of those countries do not have mandatory *lis pendens* rules akin to those of the EU regulations[74].

Thirdly, considering the very strict interpretation of the public policy exception by the ECJ[75], it would be wise to provide for an additional ground of refusal based on the inobservance of overriding mandatory provisions within the meaning of Article 9 of the Rome I Regulation. This should cover both overriding provisions that are part of the law of the forum and those belonging to European law[76].

Finally, the inclusion of specific provisions could be considered for situations of "systemic" lack of due process and miscarriage of justice in the foreign country[77]. In the national recognition systems these situations fall normally under the public policy exception. However, since courts are generally very reluctant to invoke public policy, it might be wise to include in a future EU regulation a sort of "safeguard clause" allowing the European Commission to "suspend" its application in relation to those countries that do not guarantee an impartial judicial system and the observance of the rule of law.

cc) Recognition bases ("indirect" jurisdiction)

Contrary to the regulations on mutual recognition of Member States' judgments, a future instrument on the decisions of third countries should include some "jurisdictional filters", i.e. some requirements as to the "indirect" jurisdiction of the foreign court[78]. Given that jurisdictional rules are not harmonized outside the EU, the risk exists that a third-country judgment might be given on unreasonable or exorbitant jurisdictional grounds.

How should the rules of indirect jurisdiction be conceived? In theory, one could envisage three different approaches (which

65 See Article 16 of the 2016 Preliminary Draft.
66 ECJ, case 145/86, [1988] ECR 645, No 11. See also Article 14, first sentence, of the 2016 Hague Preliminary Draft.
67 Article 52 of the Brussels Ia Regulation (and the identical provisions included in all of the other existing regulations). See also Article 4(2) of the 2016 Hague Preliminary Draft.
68 See Article 56-8 and 56-9 of the EGPIL Draft Proposal.
69 Article 45(1)(b) to (d) of the Brussels Ia Regulation (and the similar provisions included in all of the other existing regulations).
70 See Article 7(1)(a), (c), (e) and (f) of the 2016 Preliminary Draft.
71 Regulation No 1393/2007.
72 See Article 9(c) of the 2005 Hague Choice of Court Convention and Article 7(1)(a) of the 2016 Hague Preliminary Draft.
73 See for instance Article 27(2)(c) of the Swiss PIL Act, Article 64(1)(f) of the Italian PIL Act, and Article 22(c) of the 2007 Hague Child Support Convention. See also Article 7(2) of the 2016 Hague Preliminary Draft.
74 See Article 56-4(2) of the EGPIL Draft Proposal.
75 ECJ, case C-7/98, *Krombach,* [2000] ECR I-1935, No 21 and 37; ECJ, case C-394/07, *Gambazzi,* [2009], I-2563, No 27; ECJ, case C-559/14, *Meroni* (not yet published), No 42.
76 See Article 56-5(1) of the EGPIL Draft Proposal.
77 This situation is specifically contemplated as a mandatory ground of denial by both the 1962 and 2005 US Uniform Recognition Acts: see § 4(A)(1) of the 1962 Act; § 4(b)(1) of the 2005 Act.
78 See also Article 56-3 of the EGPIL Draft Proposal.

of course could also be combined depending on the subject matter).

Under a first approach, the recognition bases would simply mirror the rules of direct jurisdiction. This approach is currently adopted in several EU Member States[79]. Its advantage is that – blurring the distinction between direct and indirect jurisdiction – it makes it unnecessary to include specific recognition bases. The downside is that far-reaching jurisdictional rules – such as those we have proposed above – automatically result in a broad recognition system, an outcome that is not necessarily desirable. In particular, the risk exists that an excessive openness puts in jeopardy the chances of success of a future Hague instrument[80].

Instead of spelling out specific rules on indirect jurisdiction, the EU regulation could simply require the existence of a "substantial connection" between the dispute and the foreign court, leaving to the judiciary the task of applying such an open test in each particular case[81]. This second approach, followed by the French courts since the *Simitch* case[82], also resembles the US jurisdictional analysis, based on "minimum contacts" and "purposeful availment". While avoiding recognition of judgments given on unreasonable or exorbitant jurisdictional grounds, this system is even more liberal than the "mirror image" test. For the reason we have already mentioned, this probably goes too far. Moreover, this system risks being quite unpredictable and may result in divergent applications across the individual Member States.

All things considered, the best solution would probably be to spell out some specific recognition bases. These should probably be narrower than the direct jurisdictional grounds made available in third country situations and closer to the kind of grounds that are presently provided for claims against European defendants.

V. Concluding Remarks

Articulated in a number of sectorial regulations, the European private international law system has not always grown in a very systematic way. After years of swift development towards a more extensive coverage of different civil law areas and an increased integration of the national systems, the time has probably come to improve the coordination among the single instruments.

The regulation of third-country relationships is undoubtedly one of those issues that call for a more consistent approach.

While the universal application of choice-of-law rules is a constant feature of all adopted regulations, unjustified disparities persist with respect to jurisdiction and *lis pendens.* The national rules of the Member States have been entirely replaced by uniform European rules in certain areas, whereas they are still very relevant in others. Parallel proceedings pending in a third country are dealt with under one regulation, but ignored by the others. And while the recognition and enforcement of third-country judgments is consistently left to national law, this might seem at odds with the far-reaching European coverage of jurisdiction and choice-of-law issues.

Hopefully, the Hague Judgments Project will result in a successful convention in the near future. But the external relations of the EU in the area of private international law should not depend entirely on the prospects for a Hague instrument. Whether this prospect materializes or not, the EU institutions should take advantage of the negotiation process in order to elaborate on a coherent set of unilateral European law rules for disputes involving parties of third countries.

79 See *supra,* fn. 62.

80 The recognition bases included in Article 5 of the 2016 Hague Preliminary Draft are quite restrictive: see *Bonomi* (fn. 16), p. 30 *et seq*.

81 This approach was adopted by the EGPIL in Article 56-3(3) of its Draft Proposal. However, this provision also includes a "black list" of prohibited grounds in line with Article 18 of the 1999 Hague Draft Convention (*supra,* fn. 20).

82 Cass. civ. 6.2.1985, *Simitch,* RCDIP 1985, p. 369; *Bureau/Muir Watt,* Droit international privé I, 2007, No 264 *et seq*.

Diskussionsbericht zu den Referaten von *Jayme* und *Bonomi*

In der von Prof. Dr. *Karsten Thorn,* Hamburg, geleiteten Diskussion knüpfte Prof. Dr. Dr. h.c. mult. *Jürgen Basedow,* Hamburg, an die von *Jayme* berichtete Gutachtenanfrage zum spanischen Ehescheidungsrecht und die Bedeutung von Art. 13 Abs. 3 EGBGB an. Nach Auffassung *Basedows* muss sich die Vorschrift an der europäischen Freizügigkeit messen lassen. Möglicherweise gebe das Primärrecht insoweit vor, die Ehe eines Unionsbürgers, die in einem anderen Mitgliedstaat als wirksam gelte, ohne weitere Voraussetzungen auch vom deutschen Recht als wirksam anzuerkennen. *Basedow* zog hier eine Parallele zur Entscheidung *Grunkin-Paul* des EuGH,[1] nach der Art. 18 EG (heute Art. 21 AEUV) das Standesamt eines Mitgliedstaats zwinge, den Nachnamen eines ausländischen Staatsbürgers anzuerkennen, der in einem anderen Mitgliedstaat bestimmt und eingetragen wurde. *Jayme* wies auf eine Konsequenz dieser Sichtweise hin: Auch rein religiös geschlossene Ehen müssten vor den deutschen Gerichten uneingeschränkt Anerkennung finden.

Basedow thematisierte ferner die von *Bonomi* aufgeworfene universelle Zuständigkeit bei Menschenrechtsverletzungen. Hier stelle sich das Problem, dass die Gerichte bereits auf der Zuständigkeitsebene die unter Umständen auch politisch heikle Frage umfassend prüfen müssten, ob tatsächlich eine Menschenrechtsverletzung vorliegt. Hierzu schlug Prof. Dr. *Gerald Mäsch,* Münster, vor, die Lehre von den doppelrelevanten Tatsachen heranzuziehen: Für die Begründung der Zuständigkeit reiche es demnach aus, wenn die Menschenrechtsverletzung schlüssig vorgetragen sei. *Basedow* erwiderte, dass in den etablierten Fallgruppen der Lehre von den doppelrelevanten Tatsachen stets eine (zumindest potentielle) örtliche Verbindung zum Forum bestehe, während es bei der universellen Zuständigkeit an einem solchen lokalen Bezug gerade fehle.

Prof. Dr. Dr. h.c. *Thomas Pfeiffer,* Heidelberg, nahm Bezug auf den „Heidelberg-Report" von 2007[2] und die dort festgestellten Auswirkungen divergierender nationaler Zuständigkeitsvorschriften. Ausländische Kläger könnten sich ohne weiteres auf § 23 ZPO berufen, wenn der Beklagte mit Wohnsitz in

1 EuGH, Urteil v. 14.10.2008 – Rs. C-353/06 – *Grunkin-Paul* = NJW 2009, 135.

2 *Hess/Pfeiffer/Schlosser,* The Brussels I Regulation 44/2001: Application and Enforcement in the EU, 2008; auch online verfügbar.