1983

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"Exorbitant Jurisdiction" and the Brussels Convention: Toward a Theory of Restraint

Joseph Halpern*

A contemporary theory of international jurisdiction must be based on a theory of legitimacy and a theory of restraint. It must establish criteria—embodying both predictable mechanisms of allocation and current state practice—to determine whether a particular national assertion of jurisdiction is acceptable.

One such system has been codified in the Brussels Convention of 1968, now in force in the European Community.¹ This Comment assesses the system established in that Convention, an example of a workable and flexible model of international jurisdiction, and the notion of "exorbitant jurisdiction" on which it is based. The normative system implicit in the Convention allows for the definition of relevant criteria for the allocation of jurisdiction. The restrictive approach of that system to the very notion of jurisdiction suggests, however, that the system could be expanded only by way of a series of discrete and limited international agreements.

I. Developing a Theory of Restraint

At the root of the notion of jurisdiction lies an inherent contradiction: jurisdiction has always meant power and the exercise of power, and at the same time a notion of restraints on power. It is both an assertion and a circumscription, both a practice and a syntax. On the one hand, jurisdiction is power, the "power to declare the law,"² to make and apply law. That connection has been understood since it was fully developed by Bodin and his contemporaries in the late sixteenth century,³ and it lies behind the development of the classical view of jurisdiction as an aspect of sovereignty and territoriality.⁴ At the same time, even within the power theory of territoriality, there exists the implicit logical necessity of

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limits on the exercise of that power. Jurisdiction thus also represents a
systematization and distribution of the right to speak the law.

A. The Objectives

A contemporary theory of international jurisdiction must take into ac-
count not only those restraints on assertions of jurisdictional competence
that can be derived from logical constructs, but also those resulting from
the actual limits established by states' refusals to give weight to the
claims of other states. The idea of self-limitation of the sovereign, born
either in comity, the mutual convenience and tacit consent of nations, or
in a theory of intersubjectivity, is no longer adequate to describe the real
limits of state jurisdictional competence. A theory of international jurisd-
iction must be more than a chart of currently accepted practices, more
than a measurement of power relationships, if it is to contribute in any
meaningful way to international order. For a system of international ju-
risdiction to work, it must be based on an empirically reasonable set of
rules to allocate states' prescriptive and applicative competence. It must
establish the foundation of a theory to limit in predictable fashion any
state's right to assert jurisdiction in a particular case, as well as criteria to
determine whether or not a particular national claim of jurisdiction is
legitimate from an international point of view. Finally, any such system
must delimit those categories of claims that will be deemed abusive or
"exorbitant," based upon standards more definitive than general notions
of fairness, justice, or reasonableness. What is needed, then, is both a
theory of legitimacy and a theory of restraint.

B. Shortcomings of the Classical Model

The failure of the classical nineteenth century model of international
jurisdiction relates to the incapacity of that model to produce a theory of
restraint. The maxims that Joseph Story published in his seminal work
on conflict of laws suggested that the rules of conflict of laws followed
logically and necessarily from the principle of territoriality. The max-
ims, abstract and theoretical in nature, consisted of the following:

1) "[E]very nation possesses an exclusive sovereignty and jurisdiction
within its own territory, [and, as a consequence,] the laws of every state
affect and bind directly all property, whether real or personal, within its

5. This refers to the power to make law and power to apply law. See generally, M. Mc-
Dougal & W. Reisman, International Law in Contemporary Perspective 1271-
Exorbitant Jurisdiction

territory; and all persons who are resident within it, whether natural born subjects or aliens, and also all contracts made and acts done within it;”

2) “[N]o state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein . . . [However,] every nation has a right to bind its own subjects by its own laws in every other place;”

3) “[W]hatever force and obligation the laws of one country have in another, depends solely upon the laws, and municipal regulations of the latter, that is to say, upon [the latter state’s] proper jurisprudence and polity and upon its own express or tacit consent.”7

The logical and abstract quality of these rules, which dominated international conflicts thought for the next century, precludes any analysis of either the substantive law or the relative weight of the interests they regulated. Considerations of whether a particular ground of jurisdiction was either fair or likely to be recognized outside the national system did not fit into the model. The model of jurisdictional theory that developed from Story’s maxims at first glance would appear better able to accommodate reality, for it added the notion of vested rights to the principles of territorial sovereignty and legislative jurisdiction. Yet even in this form, as exemplified by Beale’s writings on international conflicts,8 the amended model still depended on positive principles and not on factual reality. Once a sovereign exercised jurisdiction, according to the classical theory, the rights and obligations he created locally had to be accorded recognition and enforced internationally as a matter of principle. The eventual result of the theory was to undercut any sense of jurisdiction as restraint.

The famous Lotus decision9 was one example of the permissiveness implicit in the classical model. In Lotus, the government of Turkey had prosecuted a French national in the aftermath of an incident involving the collision of French and Turkish vessels on the high seas. In the absence of any international prohibition of such jurisdiction, the Permanent Court validated Turkey’s action through the notion of concurrent jurisdiction. In the decision of the Court, the interrelated concepts of territorial sovereignty, legislative jurisdiction, and vested rights disintegrated into the exercise of effective power, without any validating system. Jurisdiction became a matter of seizure. The permissive notion of concurrent jurisdiction on which the decision depended in turn meant that no crite-

7. Id. at 19, 21-22, 24.
ria could be generated within the system to determine who was competent to make law in any given circumstance.

The principle of "presumptive freedom of State action" delineated in *Lotus* has been understood by some commentators as a departure from the classic model of jurisdiction. An equally accurate way of portraying the decision, however, is as an emblem of the inevitable breakdown of the classical model due to its inability to adapt to new factual situations or to determine the legitimacy of national assertions of jurisdiction. The model failed, in other words, as a theory of restraint. The classical model's logical consistency, it can be argued, was won at the expense of adaptability and operability in cases of actual conflicts. The theory produced results that were neither flexible nor responsive to the realities of state practice.

C. Improving the Model

In the last two decades, the major approach adopted by theorists of international jurisdiction seeking to improve upon the classical model has been an emphasis on the idea of connection rather than territoriality. Several writers, following the lead of F.A. Mann in his essay "The Doctrine of Jurisdiction in International Law," have pointed to the need for a new model of international jurisdiction that would allow consideration of the connection between a particular forum and the legal matter in question, or between the forum and the parties to the action.

The problem, Mann suggested, involved:

[the] search for the State or States whose contact with the facts is such as to make the allocation of legislative competence just and reasonable. It is, accordingly, not the character and scope inherent in national legislation or attributed to it by its authors, but it is the legally relevant contact between such legislation and the given set of international facts that decides upon the existence of jurisdiction.

While the contact Mann viewed as legitimizing assertions of jurisdiction was not considered to establish exclusive competence, it entailed only a limited possibility of legitimately concurrent jurisdiction:

Not every close contact will be legally acceptable. The question whether the contact is sufficiently close . . . is answered . . . by the objective standards of international law . . . . It must be possible to point to a reasonable relation, that is to say, to the absence of abuse of rights or of arbitrariness

10. See Mann, supra note 3, at 26 (citing interpretation of Sir Hersch Lauterpacht).
11. See, e.g., infra notes 15-17.
12. Mann, supra note 3.
13. Id. at 34-35.
Exorbitant Jurisdiction

... There will thus be definite barriers beyond which the exercise of jurisdiction is unlawful. There will be safeguards against any inclination to exaggerate flexibility.14

The idea of definite limits on the legitimacy of states' assertions of jurisdictional competence in turn established the basis for a theory of "reasonableness" in international jurisdiction (as suggested by Mann): a theory of restraint. Such a theory could be founded upon a notion of abusive, excessive, or exorbitant jurisdiction. Following Mann, other commentators asked how those barriers to certain assertions of jurisdiction could be made definite. Von Mehren and Trautman suggested a need both for new terminology and for a system of specific jurisdictions; that is, jurisdictions that are closely connected with the legal relation from which the action arises.15 Nadelmann took note of specific bases of civil jurisdiction generally considered abusive (and therefore often not recognized outside of the national forum that asserted them), and assessed various responses to the problem.16 Another writer suggested the need to go beyond case-by-case balancing to a typology of specific jurisdictions.17 These commentators all perceived the breakdown of the classical system and the need to incorporate both substantive questions and actual practice into any future system of jurisdictional allocation. They sought to determine whether it was possible to systematize the notions of connection and the relative interests of claimants into an internationally accepted normative scheme of jurisdictional competence.

D. The Brussels Convention and "Exorbitant Jurisdiction": An Introduction

The most tangible and elaborate response to these concerns emerged, not surprisingly, from the laboratory environment of the European Community. The notion of restraint found concrete expression in the idea of "exorbitant jurisdiction," most often associated with a particular agreement: the European Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (more commonly known as the Brussels Convention of 1968).18

14. Id. at 37-38.
18. Supra note 1. For another English version of the Convention and 1971 Protocol on
The Brussels Convention applies only to civil and commercial matters. It was negotiated by the member states of the European Community in an effort to simplify the recognition and enforcement of judgments between Contracting States.

In addition to rules on recognition and enforcement, the Brussels Convention also contains rules directly governing the jurisdiction of national courts, and therefore involves prescriptive as well as applicative competence. The uniform rules of jurisdiction established in the Convention supersede, insofar as defendants domiciled in the European Community are concerned, all national rules of jurisdiction. In particular, the Convention prohibits the use of certain bases of jurisdiction, listed in Article 3, against defendants domiciled in a Contracting State. The term "exorbitant" is most frequently applied to these bases of jurisdiction.

The Brussels Convention does not contain an explicit theory of exorbitant jurisdiction. Instead it offers only a list of prohibited bases, clearly understood not to be exhaustive. Nevertheless, from the elements of that list, the framework of the Convention, and decisions interpreting the Convention, it becomes possible to extract the roots of such a theory and to appraise its usefulness. The balance of this Comment is concerned with that assessment.

II. Exorbitant Jurisdiction

Given the rapid movement of people and goods across national boundaries in the European Community, it is not surprising that the need for a workable system of jurisdictional allocation should be felt most acutely there, especially in terms of the recognition and enforcement of judgments. The growing interdependence apparent elsewhere in the world has been magnified within the Community. What has distinguished the Community from the forced interdependence elsewhere, however, has been the possibility of harmonization of national laws on matters of international consequence. In this instance, harmonization was not only possible but also required by prior agreement: the Treaty of Rome, which established the European Economic Community, prohibited in Article 7 all discrimination against nationals of member states, and Article 220

interpretation of the Convention, as well as the 1978 Act of Accession extending the Convention to all nine members of the Community, see the United Kingdom Civil Jurisdiction and Judgments Act of 1982, ch. 27 which gave effect to the Convention in that nation.


20. See infra note 33.

374
Exorbitant Jurisdiction

required member states to enter into negotiations aimed at the simplification of recognition and enforcement procedures.

Interestingly enough, part of the movement toward a theory of exorbitant jurisdiction came from outside the original boundaries of the Community. The Brussels Convention outlawed certain bases of jurisdiction partially in reaction to demands made by British and American delegations to the Hague Conference of 1966 that certain grounds of jurisdiction be declared exorbitant and that judgments based on those grounds not be recognized. The issue may thus be posed, in part, as a matter of comparative law: common law indignation directed at jurisdiction derived from bases such as the nationality of the parties, the habitual residence or domicile of the plaintiff, or the presence of property of the defendant in the territory of the forum. The sources of the jurisdictional claims under attack here were well-known national statutes, the most famous of which were Articles 14 and 15 of the French Civil Code, which base jurisdiction on the nationality of the plaintiff, and Article 23 of the German Code of Civil Procedure, which grounds unlimited general jurisdiction on the presence of a defendant’s assets.

The list of prohibited bases in Article 3 of the Brussels Convention takes account of common law views of what constitute exorbitant claims of jurisdiction and adds to those views a civil law perspective. Traditional common law concepts of jurisdiction that depend on the notion of presence or on solely procedural steps (such as personal service) are equally disfavored by the prohibition of Article 3. These divergent interests produce in Article 3 a list of prohibited bases of jurisdiction that is quite varied:

—personal service during the temporary presence of the defendant in the territory of the forum;
—defendant’s doing business in the territory of the forum (unless the action arises out of that business);
—presence or seizure of the defendant’s property (unless the action concerns that property or it serves as security) and attachment as the basis of *quasi-in-rem* jurisdiction;
—unilateral specification of the forum by the plaintiff; and

nationality, domicile, or habitual residence of the plaintiff.\textsuperscript{24}

One could assess the logic of the above list in isolation, focusing the analysis on the protection of the rights of the defendant. The prohibition of limited \textit{quasi-in-rem} attachment might be viewed as less sensible than the other prohibitions and as moving too far in protecting the interests of the defendant. However, Article 3 does not exist in isolation. Any theory of exorbitant jurisdiction that can be extracted from it can be understood only in terms of the general scheme of allocation and the general notion of jurisdiction incorporated in the Convention.

Article 2 of the Convention grounds the allocation of jurisdiction in the domicile of the defendant. The most significant innovation of the Convention is that it abolishes domestic rules of jurisdiction based on nationality, long a part of civil law theory, and replaces them with the criterion of domicile.\textsuperscript{25}

Within this general framework, the Convention also allows for cases of concurrent jurisdiction in certain "special situations." Concurrent jurisdiction is given to the place of performance in contract claims, to the place where the harmful event occurred in tort claims, and to the place where the branch or agency is situated as well as to the place of the corporate headquarters in claims involving corporate branches or agencies.\textsuperscript{26}

Beyond this, the Convention moves away from the criterion of domicile to allow exclusive jurisdiction in matters such as those relating to immovable (real) property, the constitution and dissolution of companies, or public registers and patents. In these matters, exclusive jurisdiction vests in the State in which the property is located or where the register is kept.\textsuperscript{27} Exclusive jurisdiction may also be created by prorogation, that is, by forum selection clauses in contractual matters.\textsuperscript{28} Finally, the Convention system is completed by its acceptance of the appearance of the defendant in court (except where appearance is entered solely to

\textsuperscript{24} See de Winter, \textit{supra} note 17, Nadelmann, \textit{supra} note 16; see also Giardina, \textit{The European Court and the Brussels Convention on Jurisdiction and Judgments}, 27 \textit{Int’l & Comp. L. Q.} 263 (1978).

\textsuperscript{25} The relevant text of Article 2 is: "Subject to the provisions of this Convention, persons domiciled in the territory of a contracting state shall, irrespective of their nationality, be sued in the courts of that state."

\textsuperscript{26} Article 5 defines these, as well as alimony cases and suits for damages or restitution based on a tort, as "[j]urisdiction in special situations."

\textsuperscript{27} Article 16 ("Exclusive jurisdiction regardless of domicile").

\textsuperscript{28} Article 17 ("Jurisdiction of a court by agreement"). However, such agreements must be consistent with other provisions of the Convention, and are without effect "if the courts whose jurisdiction they preempt have exclusive jurisdiction under Article 16."
Exorbitant Jurisdiction

contest jurisdiction) as a sufficient independent basis of jurisdiction.29

From a comparative law viewpoint, the essence of the Convention's allocational scheme lies in its treatment of jurisdiction as a matter of positive law. Jurisdiction is assumed to be not an exercise of state power but rather a theory of restraint. The basis of jurisdiction is domicile, and persons domiciled in a Contracting State "may be sued in the Courts of another Contracting State only under the rules set forth" in subsequent chapters of the Convention.30 Similarly, Article 20 provides:

In case a defendant domiciled in the territory of one Contracting State is sued before the court of another Contracting State and does not enter an appearance, the court shall ex officio declare that it lacks jurisdiction if its jurisdiction is not established by this Convention.31

This approach in itself is not surprising in the context of civil legal systems.32 Its effect, however, is to constitute the relevant background for a theory of exorbitant jurisdiction. As opposed to the "presumptive freedom of State action" evident in the Lotus decision, here it appears that all assertions of competence governed by the Convention are presumed to be illegitimate unless allowed by the scheme of the Convention. The interplay between Article 3 and the general structure of the Convention is thus clarified: there is no need to attach an explicit theory or definition of exorbitance to the list in Article 3,33 since the prohibited bases are no more than specific and non-exhaustive examples derived from the general restriction. As all bases for jurisdiction not codified in the Convention are in theory illegitimate, an exhaustive list of prohibited bases is impossible.

The interest of the theory pursued here, as a heuristic model of international allocations of competence, depends precisely on questions of state freedom and restraints on political power. While on one level the inquiry here concerns the limited area of private dispute resolution, the governing principles resonate in public international law as well. This point already has been made above in an oblique manner, in terms of Mann's linkage of jurisdictional issues to substantive questions of inter-

29. Article 18 ("Appearance of defendant"). Once again, this is inapplicable if another court has exclusive jurisdiction under Article 16.
30. Article 3 ("Courts of other contracting states") (emphasis added).
31. Article 20 ("Non-appearance of defendant").
32. See generally, SCHLESINGER, supra note 23, at 329-493 (surveying procedures in civil law systems).
33. Article 3 lists specific provisions in the codes of six contracting states, including Articles 14 and 15 of the French Penal Code and Section 23 of the German Code of Civil Procedure, as those which may not be invoked against persons domiciled in the territory of another contracting state. The list, however, is not meant to be exhaustive, as the language of the Article makes clear.
national law. It is reinforced here by the fact that the Convention does not govern only matters of applicative competence, but, through its direct rules on jurisdiction, also governs prescriptive competence. Story's third maxim declared that the force of the law of one country as applied in another depended on the laws of the latter, and indeed the restrictive approach of the Convention would seem to make particular sense if limited to matters of private applicative competence: the recognition and enforcement of judgments. Yet what is also at issue in a valid model of exorbitant jurisdiction is the more general delimitation of those instances in which a state may have control over a defendant in some way but in which that de facto control is deemed inappropriate. Among the values to be considered, then, are not only the relative interests of plaintiffs and defendants, but also the relative interests of states.

III. Interpretation of the Brussels Convention

To the degree that a theory of exorbitant jurisdiction can be extracted from the scheme of the Brussels Convention, what emerges may be understood as a response to criticism directed at the classical nineteenth-century model of jurisdiction and criticism directed at—or refusals to enforce—specific excessive national claims. The first elements of a working version of exorbitant jurisdiction surface in the Convention as directives: the need to work from the principle of connection and the need to protect the interests of the defendant.

A. Initial Analysis

In her treatise on the Convention, Professor Weser offers two definitions for what constitutes exorbitant jurisdiction. One is not particularly illuminating: "Extraordinary rules, in derogation of the common law, whose sole aim is to attribute jurisdiction to national courts which would normally lack jurisdiction." This definition begs the question. Her more useful second definition centers on the principle of connection:

34. See, e.g., Elefanten Schuh v. Jacqmain, 1981 E. COMM. CT. J. REP. 1671, 1688, in which the court held that Contracting States may not create formal requirements on prorogation "other than those contained in the Convention."

35. See, e.g., Id. at 1684-85; Denilauler v. Couchet Freres, 1980 E. COMM. CT. J. REP. 1553, 1569-70, 1979-1981 COMM. MKT. REP. (CCH) ¶ 8679, for statements on the rights of defendants and the basic goals of the Convention.


37. Id. at 98. "Des regles exceptionnelles, derogatoires au droit commun, et dont le seul but est d'attribuer competence aux tribunaux lorsque normalement ceux-ci seraient incompetents. . . ."
"[R]ules not based on any objective link with the litigation." The concept of jurisdiction in the Convention reflects the theoretical concerns of Mann and the writers who followed him. Jurisdiction is understood not as an aspect of autonomous sovereignty but as a question of systematic connection. This view of jurisdiction affords an initial understanding of bases of exorbitant jurisdiction, as noted in Weser's second definition: inadequate connections between the state and the parties, or between the forum and the subject matter of the particular claim.

Nonetheless, even Weser's second definition does not suffice. The problem rests with the word "objective". Domicile may be a more satisfactory connection than is temporary presence, but it is still difficult to understand how one is an "objective" relation while the other is not. Every one of the grounds prohibited in the Convention, including temporary presence, constitutes an "objective" link of some kind, however attenuated, to the claim. The term "objective" only obscures the issue of the appropriateness of various types of factual control.

What the Brussels Convention appears to espouse is an implicit theory of "genuine" or "significant" connection. The "significance" of a connection, in turn, seems to be linked to substantive questions of consent, participation, and adequate protection of the defendant. Initial analysis here might characterize the prohibitions of Article 3 as eliminating bases of jurisdiction that require only minimal connections to the defendant (such as temporary residence or seizure of the defendant's property), or that do not mandate any connection with the defendant at all (plaintiff's nationality, domicile, or specification of the forum). Article 3, then, can be read as a statement that these grounds for jurisdiction are insufficient because they give inadequate weight to the interests of the defendant, whose connection to the forum is merely procedural, temporary, incidental, or nonexistent.

B. Extending the Analysis

The first line of analysis can be extended to encompass the Convention's use of domicile of the defendant as the primary criterion for jurisdictional allocation. Nadelmann's essay had presented exorbitant bases of jurisdiction as unfair to defendants; the discussion above presented Article 3 as an implicit response to that criticism.

More broadly, one might construe the replacement of nationality by domicile as a strengthening of individual rights. It is possible to see in...
the criterion of domicile an inherent theory of consent or submission to jurisdiction. There remains a notion of choice in habitual residence, which appears to imply acquiescence to local law and local jurisdiction. Behind the idea of domicile lies "an amalgam of the reasonable interest of a state in a person habitually within its territory and the assumption that persons in the territory may be assumed to have adopted by implication the norms and values expressed in the local law." 40 Because the Convention roots jurisdiction in the domicile of the defendant, it appears to ensure some modicum of certainty that the defendant will be subject to laws he has in some sense adopted.

Commentators already have pointed out the flaws in such an analysis as a general matter. 41 In this instance, any notion of consent related to the Convention would have to be a very attenuated and theoretical one. It rarely could be more than implied consent, and its practical effects would serve only the interests of corporations and individuals affluent enough to transfer domicile at will. If this were all the Convention represented, an assessment of it would have to be a negative one. From this limited perspective, the Convention merely would have substituted one mechanical scheme, based on domicile, for another.

C. Reassessing the Convention

For two reasons, however, this cannot be the final appraisal of the Convention. First, as already noted, the notion of exorbitant jurisdiction cannot be isolated from other elements of the Convention that balance the interests of the defendant against both interests of the plaintiff and interests of the state. Second, a reading of the cases interpreting the Convention confirms the possibility of flexible and workable decisionmaking within the terms of the Convention: consideration of substantive questions within a procedural framework.

The ability of a particular defendant to restrict claims of jurisdiction over him is limited in the Convention by its creation of concurrent and exclusive jurisdictions. The structure of the Convention allows the principle of domicile to be overridden by either the consent or participation of the defendant (by prorogation or appearance in court). In addition, the Convention sets aside domicile when the interests of the state are believed to outweigh the interests of particular parties.

In Article 16, 42 the Convention vests exclusive jurisdiction in matters

40. M. McDougal & W. Reisman, supra note 5, at 1408.
41. See id. at 1413 (citing other sources analyzing domicile as a ground for asserting applicative competence).
42. See supra note 27.
relating to immovable property, for example, in the courts of the state where the property is located. The creation of such exclusive jurisdiction in Article 16 defines certain civil and commercial matters that will be governed by territoriality rather than domicile. In these areas, the interest of the state in keeping its own records, controlling the disposition of its land, and so forth, is both reasonable in theory and too entrenched as a practical matter to allow territoriality to be displaced. Principles of fairness to litigants are set against the refusal of nation states to cede any further ground to transnational procedural protections.

In the same way, the effective protection of the Convention is limited by doctrines of act of state and public order. The scope of "civil and commercial matters" under the Convention has been interpreted by the European Court of Justice so as not to include acts of a public authority in the exercise of its public powers. Thus, in Netherlands v. Ruffer, the official removal of a wreck from a public waterway was held to be an issue outside the limits of civil and commercial matters. Claims arising in regard to such public acts thus remain outside the bounds of the Convention — or at least are not to be addressed by the courts applying the Convention. In this area, national law is not superseded, and agencies other than courts empowered with jurisdictional competence are recognized by necessity. When the courts evade decision, other agencies will enforce the Convention as a matter of accommodation. The basis of the decision in Netherlands v. Ruffer was not an independent definition of civil and commercial matters on the part of the Court, but rather the fact that national (Dutch) law conferred the status of public act on such removals. Although the Convention supersedes specific international law and national law, it also accommodates implicit state reservations of authority. The scope of the Convention's power is established both by its own self-limitation and by the realities of effective state power.

In similar fashion, the establishment of special concurrent jurisdictions in Article 5 limits the principle of domicile and creates flexibility within the scheme of the Convention. To some degree, that very flexibility is problematic: an uncontrolled proliferation of special jurisdictions would defeat the uniformity and equality of application that is one of the main goals of the Convention. Nonetheless, in subject areas as broad as torts and contracts the Convention provides jurisdiction to both the state of

43. The civil law doctrine of public order, or "ordre public," is analogous to "public policy" under Anglo-American conflict of laws rules. See generally, Husser, Public Policy and Order Public, 25 VA. L. REV. 37 (1939).
45. Id. at 3820-21.
domicile of the defendant and the place where the harmful event occurred (or the place of performance). Judicial interpretations of these terms can promote further flexibility. For example, in the case of the pollution of the waters of the Rhine by a French firm, the court interpreted the expression "place where the harmful event occurs" in Article 5(3) of the Convention as intended to cover both the place where the damage occurred (the Netherlands) and the place of the event giving rise to the damage (France).46

The effect of such concurrent jurisdiction is to create counterbalancing weights in favor of the interests of the plaintiff, who has the option of suing in either forum. Having created a system of restrictions aimed at limiting the exposure of the defendant, the Convention then introduces significant exceptions to that system. A corporation is to be sued at its place of headquarters, according to the principle that governs the Convention, yet according to Article 5, disputes arising out of the operations of a branch or agency allow suit in the state where the branch or agency is situated. In the case of exclusive jurisdiction, the Convention, embodying a system of restrictive allocations of national competence, discovered its own limits in the willingness of states to adhere to those restrictions. Here, in the case of concurrent jurisdiction, where the Convention may be understood as embodying a system intended to assure adequate protection of the defendant, the principle of adjustment is similar.

IV. Beyond an Analysis of Procedure

Previous sections discussed the importation of mechanisms of flexibility and counterbalancing tendencies into the Convention's procedural framework. More broadly, the very tendency to provide systematic protection of defendants also represents a reaction to the establishment of a system of rules. A reading of the more than thirty European Court cases that have interpreted the Convention since 197647 reveals that the primary objectives of the Convention are understood to be greater simplification and uniformity in recognition and enforcement practices. In the desire to facilitate the free circulation of judgments and Community business practice, and to avoid superfluous procedure and duplication of efforts, the Convention is intended to develop uniform rules. In other

words, its major goal is the assurance of legal certainty within the Com-

munity — and it is for this reason, as much as any, that it must develop a

theory of exorbitant jurisdiction.

Legal certainty is purchased at the price of simplification, and simplifi-
cation in this context signifies liberalization. What the Convention does
is to sweep away local barriers. It makes it easier to obtain transnational
recognition and enforcement of a judgment against a particular defen-
dant. As a result, exorbitant jurisdiction is redefined: it becomes not only
a matter of competing claims among states, but also a matter of relating
the power of the state to individual interests, since in this arena the inter-
ests of the national community are adjudicated only through private
claims. The legitimacy of a particular claim becomes a matter of regulation
of those diverse interests. Although the Convention aims in principle at legal certainty, its value is that in practice it creates not absolute
certainty but predictability. The degree to which its regulation is negated
by national power is not an ad hoc question of seizure or assertion but a
predictable matter of the Convention's scope, established by the Conven-
tion itself. Viewed broadly, the Convention's linkage of exorbitant jurisdic-
tion and the protection of the defendant is recognizable as part of the
dialectic of rulemaking and the particularization of justice.\footnote{48}

In addition to importing flexibility, the European Court's interpreta-
tions of the Convention introduce substantive breaches of its procedural
rigidity. The Court has interpreted the Convention so as to allow consid-
eration of substantive legal issues as part of the allocation of competence.
The goal of harmonization, the European Court has made it clear, is to be achieved only through "the proper administration of justice."\footnote{49} The liberalized enforcement procedures of the Convention are validated only
by strict protection of the defendant's rights in the initial proceedings
against him: the European Court has insisted on adequate and timely
notice, an opportunity to be heard, and adversary proceedings in the ren-
dering court.\footnote{50} Measures of substantive control are also involved in the
special jurisdictions created by Article 5, at least theoretically in the ex-
clusive jurisdiction provisions of Article 16, and also in the authorization
of provisional and protective measures in Article 24.\footnote{51} In all of these

\footnote{48. In this context, "rulemaking" refers to the organization of system and "particulariza-
tion" refers to the case-by-case demands for individualized decisionmaking. The tension be-
tween the two is the tension between efficiency and fairness.}

COMM. MKT. REP. (CCH) ¶ 8454 (involving interpretation of Article 16).


\footnote{51. Article 24 ("Temporary measures by court lacking jurisdiction over the merits").}
cases, the Court has understood that it must determine which courts are in the best position to assess the facts and circumstances of the case.

From this point of view, the Court has read the concurrent jurisdiction provisions of Article 5 not only as strengthening the plaintiff's position but also as based on the possibility of turning to the forum best able to judge the matter — the court with the closest connection. It has justified the exclusive jurisdiction provisions of Article 16 in the same terms: "[t]he courts which are given exclusive jurisdiction are those which are the best placed to deal with the disputes in question . . . . the assignment of exclusive jurisdiction satisfies the need for the proper administration of justice."52 Finally, the Court has held that decisions involving ex parte provisional or protective orders fall outside the ambit of the Convention and allow the enforcing court to reconsider the substantive issues, because

"[T]he courts of the place or, in any event, of the Contracting State, where the assets subject to the measures sought are located, are those best able to assess the circumstances . . . . [T]he granting of this type of measure requires particular care on the part of the court and detailed knowledge of the actual circumstances in which the measure is to take effect."53

If one reads the Convention with the emphasis suggested by these decisions, closeness of connection displaces domicile as the primary principle of the Convention. One can then create a linear allocational scheme for the Convention, operating between the poles of connection and exorbitancy. From this perspective, exclusive jurisdiction comes first, based on the closeness of connection of the forum to the dispute, followed by concurrent jurisdiction based on connection or domicile, then by domicile where no other indicia of connection prevail, and finally by exorbitant jurisdiction, where significant connection fails and which the Convention defines as illegitimate.

Introducing the notion of the forum "best able" to assess the circumstances of the case legitimizes, within the bounds of the Convention, some form of interest analysis. This assures consideration of the relative interests of the rendering or enforcing forum and the national state. Decisions of the European Court, moreover, have demonstrated that questions of comparative substantive law also can be considered directly within the framework of the jurisdictional questions regulated by the Convention. The 1982 case of Ivenel v. Schwab,54 in which a French plaintiff brought a claim of breach of an employment contract against a

52. Sanders, supra note 49, at 2390-91.
53. Denilauler, supra note 35, at 1570.
German defendant in a French court, affords one example. The question raised under Article 5's notion of "place of performance" was what the place of performance was in a contract of representation involving multiple obligations, and in which the place of payment was not the same as the place where plaintiff had his office. In its decision, the Court first stressed that the special rules of Article 5 are "justified inter alia by the fact that there must be a close connecting factor between the dispute and the court with jurisdiction to resolve it . . . . [I]t is desirable as far as possible for disputes to be brought before the courts of the State whose law governs the contract . . . ."\(^{55}\) The Court then referred to provisions of a convention on the law applicable to contractual obligations, open for signature in the Community since June 1980, which put forward the law of the place where the employee habitually worked as that law which governs the contract. The Court concluded:

It follows from the foregoing account that in the matters of contracts Article 5(1) of the Convention is particularly concerned to attribute jurisdiction to the court of the country which has a close connection with the case; that in the case of a contract of employment the connection lies particularly in the law applicable to the contract; and that according to the trend in the conflict rules in regard to this matter that law is determined by the obligation characterizing the contract in question and is normally the obligation to carry out work.

It emerges from an examination of the provisions of the Convention that in establishing special or even exclusive jurisdiction . . . those provisions recognize that the rules on jurisdiction, too, are inspired by concern to afford proper protection to the party to the contract who is the weaker from the social point of view.\(^{56}\) (emphasis added.)

*Ivenel v. Shwab* combined interest analysis based on the idea of connection with substantive analysis of the relevant labor law. Even though the Convention is premised on minimal interference with national laws, in *Ivenel* the European Court of Justice found itself authorized to interpret the Convention as moving toward empirical comparison and particularization of interests, beyond neutral procedural principles to the articulation of substantive values.

V. Conclusion

What are the proper standards for evaluating the *Brussels Convention*? The premise here has been that the Convention must be measured in terms of its ability to function within a framework of potentially con-

55. *Id.* at 1899-1900.
56. *Id.* at 1900-01.
flicting goals: efficiency and fairness, uniformity of procedures and appropriateness of individual decisions. On this basis it has been suggested that the Convention, as a model, satisfies all of the traditional criteria for an acceptable theory of conflicts: "logical consistency, practical workability, adaptability to new factual situations, and satisfactory operability in terms of real problems." More specifically, it is possible to say that the Convention addresses the particular policies that von Mehren and Trautman identified as relevant to recognition and enforcement practices: avoiding duplication of effort, protecting the successful litigant, fostering international order and stability, and finding, in certain classes of cases, jurisdiction in the more appropriate forum. The result is the possibility of a system that could allow for "application by a court most likely to apply policy in the general community interest..."

Whether the theory of exorbitancy embedded in the Convention could serve as a general model for the international allocation of competence, as a general theory of reasonableness and restraint of abusive jurisdiction, depends on two questions. Could it function outside a restrictive general approach to the notion of jurisdiction, and could it be accepted outside the centralized enforcing authority of the European Community, where the greatest possibility for harmonization of national laws existed? On a technical level, the Convention certainly could be expanded as the basis for international agreement on civil and commercial matters. At the same time, the operability of the Convention depends on the need for cooperation: indeed, limits on the scope of the Convention both acknowledge and accommodate that need for cooperation between the members of the Community.

One can question, moreover, whether the Convention, even as a matter of theory, could be expanded into anything more than a series of limited and disjointed agreements. The restrictive approach to the notion of jurisdiction which functions as the basis for the entire Convention contains in itself the limits on how far the Convention can be expanded. There is a point beyond which the Convention's negation of assertions of jurisdiction not authorized by its terms cannot be expanded. At that point the Convention's practical self-limitations and its accommodation to state reservations of authority and to the reality of judicial evasion, pass from

Exorbitant Jurisdiction

mechanisms for ensuring flexibility to restrictions which begin to under-
mine the Convention's very basis.

Nonetheless, the achievement of the Convention is its establishment of
accepted allocational criteria. Its potential lies in the fact that its judicial
implementation, at least in the cases to date, has extended beyond the
creation of a mechanical system toward flexible procedures that allow
both accommodation to the realities of relative interests and substantive
choice.