International Jurisdiction and Commercial Litigation

Uniform Rules for Contract Disputes

A Elisabeth et Dick

International Jurisdiction and Commercial Litigation

Uniform Rules for Contract Disputes

Internationale bevoegdheid: Eenvormige regels voor contractuele geschillen

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I have tried to state the law as on 1 November 2008.

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ABBREVIATIONS

A	
AC	Law Reports: Appeal Cases
ATF	Arrêts du Tribunal Fédéral
All ER	All England Law Reports
B	
BCLC	Butterworths Company Law Cases
BGB	Bundesgesetzbuch (German Civil Code)
BGH	Bundesgerichtshof
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen
Bull.	Bulletin
BverFG	Bundesverfassungsgericht
BverFGE	Entscheidungen des Bundesverfassungsgericht
C	
Cal.	California Reports
Cal.Rptr.	California Reporter
Cal. App.	Carlifornia Appelate Report
CC	Code Civil
Ch. D.	Law Reports: Chancery Division
CPC	Codice de Procedura Civile (Italian Code of Civil Procedure)
Cour de cass. ch. civ.	Cour de cassation chambre civil
Cour de cass. ch. com.	Cour de cassation chambre commercial
D	
DCC	Dutch Civil Code – or Burgerlijk Wetboek (BW)
ECJ	European Court of Justice
ECR	European Court Reports
EHRR	European Human Rights Reports
EWCA	Court of Appeal, Civil Division
EWHC	High Court, Administrative Court
F	
F.	Federal Reporter
F. Supp.	Federal Supplement
H	
HL	House of Lords
HR	Hoge Raad der Nederlanden (Dutch Supreme Court)
I	
Ill.	Illinois Reports
I.L.Pr.	International Litigation Procedure
IPRax	Praxis des internationalen Privat- und Verfahrensrechts
J	
JCP	La semaine juridique: édition générale/Juris-classeur Périodique

K	
KB	Law Reports: King's Bench Division
L	
L.Ed.2d	United States Supreme Court Reports, Lawyers' Edition
Ll. L. Rep./Lloyd's Rep.	Lloyd's Law Reports
LR	Law Reports
LOPJ	*Ley Orgánica del Poder Judicial* (Spanish Law on Judicial Organization)
M	
Mich.	Michigan Reports
N	
NCPC	Nouveau Code de Procédure Civile (French Code of Civil Procedure)
N.E.	North Eastern Reporter
NIPR	Nederlands Internationaal Privaatrecht
NJ	Nederlandse Jurisprudentie
NJW	Neue Juristische Wochenschrift
N.Y.S.	New York Supplement
N.W.	North Western Reporter
O	
OJ	Official Journal of the European Communities/Union
P	
P.	Pacific Supplement
PIL	Private International Law
Q	
QB	Queen's Bench
R	
RabelsZ	Zeitschrift für Ausländisches und Internationales Recht
Recueil des cours	*Recueil des cours de l'Académie de Droit International de la Haye*
RIW	Recht der Internationalen Wirtschaft
Rv.	Wetboek van Burgerlijke Rechtsvordering (Dutch Code of Civil Procedure)
S	
S.Ct.	Supreme Court Reporter
SDIA	Swiss Debts and Insolvency Act
So.2d	Southern Reporter
S.W.	South Western Reporter
U	
U.S.	United States/United States Reports
W	
WLR	Weekly Law Reports
WPNR	Weekblad voor privaatrecht, notariaat en registratie
Z	
ZPO	Zivilprozeßordnung (German Code of Civil Procedure)
ZZP	Zeitschrift für Zivilprozess

'*Come, let us go down and confuse their language, so that they will not understand one another's speech*' [1]

'*A certain degree of international unification of law is necessary to put an end to the chaotic situation in which international legal relations are found today. ... Lawyers must be awakened to the conscience of the new world and must be instilled with an international spirit which has lain dormant during a century of retreat of national law. In this lies a task of comparative law. The road will sometimes be hard*.'[2]

[1] Genesis 11:7

[2] R. David, 'The Methods of Unification', *American Journal of Comparative Law* (1968), 13-27, at 27.

Chapter 1

INTRODUCTION

This book deals with judicial jurisdiction of state courts in international disputes, in particular those arising out of transnational commercial contracts entered into between private entities, individuals, and corporations.[1] The present study examines whether any common grounds in jurisdiction rules exist and, as the case may be, whether a uniform global jurisdictional system for international contractual disputes is achievable. The question of jurisdiction of state courts to adjudicate transnational commercial disputes becomes relevant when a contract or dispute has an international dimension, for example because the parties are located in different countries, such as a sales contract with an Australian seller and a Dutch buyer, or because the contract calls for performance outside the states of the parties' seats. For a proper understanding of the relevance of jurisdiction in international court litigation, the following introductory remarks will put this study into the context of international commercial litigation.

1.1 International Jurisdiction in Commercial Litigation

Cultural, social, and commercial exchanges between private individuals or corporations from different corners of the globe are intensifying. As businesses continue to carry out activities across international borders, the number of international commercial relationships is growing. Inevitably, this also leads to international legal disputes in civil and commercial matters. The traditional method to settle international disputes is by litigating in national courts. One of the first questions raised in international court litigation is: which court has jurisdiction to adjudicate the dispute? Although this jurisdictional question appears logical and simple, the answer is far from simple. In times of the so-called 'globalization of the law',[2] the regulation of international jurisdiction of state courts has, remarkably, not kept up

[1] Jurisdiction to adjudicate should be distinguished from jurisdiction to prescribe (legislative power) and jurisdiction to enforce (executive power).

[2] See Hatzimihail and Nuyts, talking about 'legal globalization', N. Hatzimihail and A. Nuyts, 'Judicial Cooperation between the United States and Europe in Civil and Commercial Matters: An Overview of Issues', in *International Civil Litigation in Europe and Relations with Third States* (2005), 1-25, at 7. See on the issue in general, E. Loquin and C. Kessedjian, eds., *La mondialisation du droit* (2000); P. Berman, 'The Globalization of Jurisdiction', 151 *University of Pennsylvania Law Review* (2002), 311-545; A. Johnston and E. Powles, 'The Kings of the World and Their Dukes' Dilemma: Globalisation, Jurisdiction and the Rule of Law', in *Globalisation and Jurisdiction* (2004), 13-54, at 14-20; H. van Loon, 'Globalisation and The Hague Conference on Private International Law', 2 *International Law FORUM du droit international* (2000), 230-234; and see on the Americanisation of the law, H. Muir Watt, 'La fonction subversive du droit comparé', *Revue internationale de droit comparé* (2000), 503-527, referring to B. Audit, *L'americanisation du droit* (2001), and P. Wautelet, 'What Has International Private Law Achieved in Meeting the Challenges Posed by Globalisation?', in *Globalisation and Jurisdiction* (2004), 55-77, at 56.

with the legal consequences of the increasing number of international disputes. The regulation of 'traditional' adjudication by state courts over international disputes is still national law-based.[3] Apart from the few successful regional uniform regulations of international jurisdiction,[4] individual states determine the scope of their judicial powers according to their own rules of jurisdiction. States have different approaches in regulating international jurisdiction. Many of these differences are usually explained by the more general differences between the legal traditions of *common law* versus *civil law*. One of the principal differences is that courts of Anglo-American tradition have considerable discretion in determining their competence over an international dispute, whereas Continental European countries have limited or closed sets of jurisdiction rules leaving the courts with little discretion.

As a result, the identification of the competent court – or courts – in international litigation becomes quite a complex and difficult task for the parties involved. An international litigator searching for judicial relief through state courts will often find himself stuck in a web of national jurisdiction rules or in a 'jurisdictional jungle'.[5] For the parties involved, this may lead to jurisdictional uncertainty in international legal relationships and disputes.

1.1.1 The Relevance of International Jurisdiction

The complexity of determining the competent court in such a 'jurisdictional web' is all the more striking in view of the importance of the jurisdictional question. First and foremost, the competent court will, according to its own conflict of law rules, determine the law applicable to the case, or apply the *lex fori*.[6] The outcome of a dispute is therefore strongly dependent on which court has jurisdiction over the case. Differences in procedural law, varying from one forum to another, also influence the course and outcome of international court litigation.[7] Finally, once

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[3] In most legal orders, the question of international jurisdiction traditionally belongs to the discipline of private international law or conflict of laws. Contrary to what its name suggests, the discipline of private international law originates from national law: according to Juenger 'neither its rules nor the rules to which they refer, are of an international or supranational nature', F. Juenger, 'The Problem with Private International Law', in *Private Law in the International Arena: From National Conflict Rules towards Harmonization and Unification: Liber Amicorum Kurt Siehr* (2000), 289-309, at 290. However, the more unified the rules of private international law, the more 'international' or 'supranational' the discipline will become. See P. de Vareilles-Sommières, *La compétence internationale de l'état en matière de droit privé: Droit international public et droit international privé* (1997), at 224. See A. Lowenfeld, *International Litigation and the Quest for Reasonableness: Essays in Private International Law* (1996), at 2-3. The jurisdictional question is considered by Brand to be the 'jurisdictional subpart of private international law', see R. Brand, 'Balancing Sovereignty and Party Autonomy in Private International Law', 25 *University of Pittsburg School of Law Working Paper Series* (2005), at 4.

[4] See below, Sect. 1.3.1.

[5] By analogy to M. Reimann, *Conflicts of Law in Western Europe: A Guide through the Jungle* (1995).

[6] Except in cases where the parties have agreed upon the applicable law by way of a choice of law agreement.

[7] These procedural divergences include, among others, the existence of trial jury, procedural delays, the possibility of judicial review, judicial costs, and the existence of contingency fees. See below under Sect. 1.1.2 on forum shopping.

the court has rendered judgement, the underlying jurisdictional foundation of the court's judgement plays a significant role when its recognition and enforcement is sought in another country by one of the parties. If the court of origin based its jurisdiction on excessive grounds – in the sense that jurisdiction is founded on a (very) weak link between the dispute and the forum – the recognition and enforcement of the judgement by another state may be problematic.

Apart from these legal consequences illustrating the relevance of the jurisdictional question, there are other more practical aspects to the question of international jurisdiction. Litigating in a foreign court often involves language barriers, paying additional travel expenses and finding local legal counsel. The importance of jurisdiction in international litigation and its effect on the merits of a case make it worthwhile 'litigating on where to litigate'.[8] The competence of national courts is therefore often fiercely argued. Such 'judicial battles' involve a lot of energy, time and procedural costs, sometimes at the expense of the merits of the case, if resources are exhausted by the jurisdictional battle.

1.1.2 **Forum Selection and Forum Shopping**

International court litigation is characterized by the fact that, as a rule and apart from situations where parties validly agreed on a dispute settlement clause, it is the plaintiff who chooses one forum over another by simply instituting proceedings. Several courts can be available to the plaintiff to commence proceedings, either because more than one jurisdictional regime asserts jurisdiction over the same case,[9] or because a unified jurisdictional regime provides for alternative jurisdiction rules.[10] A well-advised claimant will logically institute proceedings at the most favourable forum, thus improving its chances of success.[11] The result is a race to the court, since the party who institutes proceedings first, gets to select its preferred forum.[12] Forum selection by the claimant for the most favourable forum is called forum shopping.[13] Traditionally the lack of unification – or 'decisional

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[8] See also W. O'Brian Jr., 'The Hague Convention on Jurisdiction and Judgments: The Way Forward', 66 *The Modern Law Review* (2003), 491-509, at 597; A. von Mehren, 'Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine, Policies and Practices of Common- and Civil-Law Systems: General Course on Private International Law (1996)', 295 *Recueil des cours* (2003), 9-431, at 195-196; L. Silberman, 'Developments in Jurisdiction and Forum Non Conveniens in International Litigation: Thoughts on Reform and a Proposal for a Uniform Standard', 28 *Texas International Law Journal* (1993), 501-529, at 502; and A. Bell, *Forum Shopping and Venue in Transnational Litigation* (2003), § 1.32 *et seq*., at 15.

[9] Also known as positive jurisdiction conflicts see below Sect. 1.2.1.

[10] This will be demonstrated in Chapter 2 which covers unification in Europe. See also A. Briggs, *Civil Jurisdiction and Judgments* (2005), § 2.10, at 34, on the need to be the first to commence proceedings.

[11] See R. Geimer, *Internationales Zivilprozeßrecht* (2005), § 1096, at 373, stating that it is a lawyer's duty to advise his client on the most favourable forum with the best chances of success.

[12] In the words of Geimer '*Entscheidend wäre die Parteirolle*', Geimer, *Internationales Zivilprozeßrecht*, § 1101, at 375.

[13] See for other definitions 'Forum Shopping Reconsidered', 103 *Harvard Law Review* (1990), 1677-1696, at 1677 *et seq.* (editorial article). See also the House of Lords in *The Atlantic Star*, [1974] AC 436, at 442.

harmony'[14] – in conflict of law rules is considered to be the main incentive for forum shopping. A plaintiff will carefully weigh the differences in conflict of law rules determining the applicable law and will choose a forum applying the most favourable substantive law.[15] It has rightfully been argued that unification of conflict of law rules, or of substantive law for that matter, would not prevent forum shopping.[16] By selecting the forum, the claimant will also consider the availability of high damages awarded by the available forums, the level of procedural costs and cost liabilities, the existence of a jury trial and pre-trial discovery, potential delays for rendering judgements and the availability of contingency fees.[17] For example, U.S. courts are often considered to be attractive to foreign tort victims, as U.S. courts are said to award higher (punitive) damages and include generous trial juries.[18] Along with the language, cultural differences and other practical considerations mentioned above, alleged differences in the quality and independence of the judiciary among world courts also influence parties to choose for or avoid a particular forum.[19]

The legitimacy of forum shopping in itself has been debated, as well as whether forum shopping should be encouraged by allowing claimants to shop. This debate is not only concerned with parties' interests but also with the effects of forum shopping on the workload of some more popular forums, leading to overcrowded docks.[20] Nonetheless, the fact remains that forum shopping is a natural conse-

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[14] This refers to the words 'decisional harmony' found in the title of Juenger's article, F. Juenger, 'Jurisdiction, Choice of Law and the Elusive Goal of Decisional Harmony', in *Law and Reality: Essays on National and International Procedural Law in Honour of Cornelis Carel Albert Voskuil* (1992), 137-147.

[15] See P. Hay, 'Flexibility versus Predictability and Uniformity in Choice of Law. Reflections on Current European and United States Conflicts Law', 226 *Recueil des cours* (1991), 281-412, at 308-309, explaining and condemning the phenomenon of 'law shopping' by means of jurisdiction rules. See also A. Nuyts, 'Forum Shopping et Abus du Forum Shopping dans l'Espace Judiciaire Européen', 3 *Global Jurist Advances* (2003), at 6; available at: http://www.bepress.com/gj/advances/vol3/iss1/art2.

[16] See in general the article by F. Ferrari, '"Forum Shopping" Despite International Contract Law Conventions', 51 *The International and Comparative Law Quarterly* (2002), 689-708; and H. Schulze, 'Declining and Referring Jurisdiction in International Litigation: The Leuven/London Principles', 25 *South African Yearbook of International Law* (2000), 161-180, at 164.

[17] According to M. Whincop, *Policy and Pragmatism in the Conflict of Laws* (2001), at 188, a plaintiff looks for 'minimising litigation costs and award-maximising forum'.

[18] See the famous statement by Lord Denning, often cited in the forum shopping debate: 'As a moth is drawn to the light, so is a litigant drawn to the United States', in *Smith Kline & French Laboratories Ltd. and Others v. Bloch*, [1983] 1 WLR 730 (CA), at 733-734.

[19] According to Park, the fear of biased courts also strongly influences the plaintiff's choice for a particular forum, see W. Park, 'The Relative Reliability of Arbitration Agreements and Court Selection Clauses', in *International Dispute Regulation* (1997), at 6.

[20] Participating in this debate are, among many others, K. Siehr, '"Forum shopping" im internationalen Rechtsverkehr', 25 *Zeitschrift für Rechtsvergleichung* (1984), 124-144, at 133; K. Clermont and T. Eisenberg, 'Exorcising the Evil of Forum Shopping', 80 *Cornell Law Review* (1995), 1507-1535; F. Juenger, 'Forum Shopping Domestic and International', 63 *Tulane Law Review* (1989), 553-574; F. Juenger, 'What's Wrong with Forum Shopping?', 16 *Sydney Law Review* (1994), 5-13; B. Opeskin, 'The Price of Forum Shopping: A Reply to Professor Juenger', 16 *Sydney Law Review* (1994), 14-27; J. Kropholler, 'Das Unbehagen am Forum Shopping', in *Festschrift für Karl Firsching zum 70. Geburtstag* (1985), 165-173.

quence of differences among available fora.[21] A more interesting question is asked by Juenger, namely, 'if the forum shoppers are free from blame what about the shops?'[22] While forum shopping is only possible when more than one court is available to the plaintiff, it is more interesting to identify the bases upon which courts accept jurisdiction and whether these bases are excessive, or in another term 'exorbitant'. Eliminating exorbitant jurisdiction rules and restricting the plaintiff's choice of fora by unifying jurisdiction rules will reduce forum shopping.[23]

Despite a plaintiff's natural procedural advantage due to his privilege to select the forum, defendants are however not always defenceless. 'Reversed forum shopping' occurs when a proactive defendant seeks an anti-suit injunction or declaratory judgement in another court.[24] Alternatively, 'anti-shopping' devices are available in common law jurisdictions. In those jurisdictions a defendant can request the court to stay proceedings on the basis of the *forum (non) conveniens* doctrine, which in practice results in evaluating the claimant's choice of forum.[25]

1.2 International Litigation and the Principle of Party Autonomy

A growing need for efficient international dispute resolution on the one hand and the complexity of international litigation by state courts on the other, led the international trade community to turn to alternative dispute settlement methods, such as arbitration, to settle their international disputes.[26] The principle of party autonomy implies that parties are not only free to agree on which law will govern their contract, but also on how their disputes will be settled and by whom.[27] Today, party autonomy plays a fundamental role in international dispute resolution. In fact, the question of unification of jurisdiction rules only becomes relevant if the parties have not – or have not *validly* – agreed how and where their disputes will be resolved.

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[21] See the famous statement made in *The Atlantic Star*, [1974] AC 436, at 471: '"Forum-shopping" is a dirty word; but it is only a pejorative way of saying that, if you offer a plaintiff a choice of jurisdictions, he will naturally choose the one in which he thinks his case can be most favourably presented: this should be a matter neither for surprise nor for indignation.'

[22] F. Juenger, 'Forum Non Conveniens – Who Needs It?', in *Wege zur Globalisierung des Rechts: Festschrift für Rolf A. Schütze zum 65. Geburtstag* (1999), 317-336, at 319. According to Juenger 'Instead of casting aspersions on forum shoppers, we should applaud them for putting this important question into stark relief', see Juenger, 'What's Wrong?', at 13.

[23] See Bell, *Forum Shopping and Venue*, § 1.19 *et seq.*, at 9.

[24] Ibid., § 4.04, at 135 *et seq.*; Geimer distinguishes '*Steuerungsmoglichkeiten en Abwehrstrategien des Beklagten*', see Geimer, *Internationales Zivilprozeßrecht*, § 1108-1124, at 376-381.

[25] See Chapter 4 on 'England'. See also J. Fawcett, *Declining Jurisdiction in Private International Law* (1995), at 22.

[26] See in this sense S. Greenberg, 'Resolving International Business Disputes', in *Guide to Export-Import Basics: Vital Knowledge for Trading Internationally* (2008), 59-76 and Park, 'The Relative Reliability', at 4.

[27] *Black's Law Dictionary*, 8th edn. (2004) and see Lowenfeld, *The Quest for Reasonableness*, at 199 *et seq.*

1.2.1 Choice of Forum and Forum Fixing

Parties to international court litigation are free to designate a particular court or forum, by way of a jurisdiction clause – or choice of forum clause – to hear their case either exclusively or non-exclusively.[28] By *fixing* the competent forum in advance, parties avoid having to litigate in an unknown or distant forum. Such *forum fixing* avoids uncertainty and the 'jurisdictional battle' described above.[29] However, the validity of the jurisdiction clause still depends on the requirements arising out of the national law of the chosen court. In addition, especially courts from the common law tradition are allowed to refuse jurisdiction if they consider the chosen forum inappropriate for the dispute lying before them.[30] Finally, although scarce, some national jurisdictional regimes will not give effect at all to an express choice of a particular forum.

Judgements rendered by agreed courts are more likely to be recognised and enforced in other countries, because they result from the parties' consent. At present, successful international instruments regulating the validity and effect of a choice of forum are lacking in transatlantic business relations.[31] The Hague Convention on Choice of Court Agreements of 30 June 2005, which was drafted by The Hague Conference for Private International Law is still in the process of ratification and has not yet entered into force. [32] However, this important Convention should, if successful, contribute to more certainty around choice of forum clauses and resulting judgements.[33]

1.2.2 The Alternative: The Success of International Arbitration

The current lack of clarity on the jurisdictional question creates uncertainty. This is one reason for the success of the alternative dispute resolution mechanism: international commercial arbitration.[34] International commercial arbitration has taken the lead in international litigation as the principal way to settle international disputes.[35] Available only where the parties have entered into an arbitration agree-

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[28] See for an exhaustive overview A. Briggs, *Agreements on Jurisdiction and Choice of Law* (2008) and see also Park, 'The Relative Reliability', at 7, referring to jurisdiction clauses as 'prorogation agreements'.

[29] See Geimer, *Internationales Zivilprozeßrecht*, § 1125, at 382, and see for other *pros* and *cons* of *forum fixing*, P. Kuypers, *Forumkeuze in het Nederlandse internationaal privaatrecht* (2008), at 35-42.

[30] According to the *forum non conveniens* doctrine, see Chapters 3, 4, 5 and 8.

[31] See Sect. 1.3.2, below.

[32] See http://www.hcch.net/index_en.php?act=conventions.text&cid=98. On 19 January 2009, the outgoing State Department Legal Advisor, John Bellinger, signed the Hague Convention on Choice of Court Agreements on behalf of the U.S.A. Mexico is the first party to the Convention through accession on 26 September 2007. Regarding the EU, on 5 September 2008 a Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements of 2005 was presented, see COM(2008) 538 final.

[33] As also discussed by K. Kramer, 'De forumkeuze als betrouwbaar alternatief voor het arbitraal beding in de internationale handelspraktijk? Het nieuwe Haags Forumkeuzeverdrag', *Nederlands Tijdschrift voor Handelsrecht (*2006), 165-172.

[34] P. Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice: A Comparative Study* (1999), at 2.

[35] See P. Schlosser, 'The 1968 Brussels Convention and Arbitration', 7 *Arbitration International* (1991), 227-242, at 228; P. Schlosser, 'The Competence of Arbitrators and of Courts', 8 *Arbitration*

ment, this alternative way to settle disputes gives one or more arbitrators – 'private judges' – the power to resolve the dispute by rendering a binding decision.[36] Since arbitration is – but for a few exceptions – voluntary and is founded on the parties' consent, the parties waive their traditional right of access to judicial adjudication by national courts and entrust the settlement of their disputes to arbitrators to the exclusion of court proceedings.[37]

Apart from the other alleged advantages of arbitration in comparison with court litigation, such as speed, confidentiality, efficiency and expertise,[38] the increasing use of international arbitration is unmistakably due to the success of the *New York Convention* of 1958.[39] This Convention facilitates the recognition of foreign arbitral awards and most importantly for present purposes, stipulates validity requirements for international arbitration agreements.[40] The above-mentioned Hague Convention on the Choice of Court Agreements could equally increase the use of *choice of forum* clauses and complement the New York Convention.

Another significant advantage of international arbitration over court proceedings is that by its very nature the latter is 'coloured' by cultural or political aspects of a national legal order, whereas in international arbitration parties agree on the procedural rules, including the language of the proceedings and the composition of the arbitral tribunal.[41] Parties generally do not want to risk court proceedings in an unknown or distant court, or even in a suspected biased court.[42] Moreover, one of the parties will have an advantage over the other or even a 'home court advantage'.[43] Only dispute settlement mechanisms, which are based on the con-

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International (1992), 189-204, at 190. Another alternative dispute resolution mechanism worth mentioning in the present context is 'expert determination'. See for a more detailed overview of alternative dispute resolution (ADR) mechanisms in international disputes, F. De Ly, 'Applicable Law and Dispute Resolution Clauses: A Premilinary Report', in *Les grandes clauses des contrats internationaux, Brussels Conference, March 11-12, 2005* (2005), 167-234.

[36] The arbitration agreement or arbitration clause – a private agreement based on consent of the parties to arbitrate – constitutes the very basis for the arbitration process and its arbitral award.

[37] International arbitration, however, still needs the support of the courts, especially for the enforcement of arbitral awards. See Sanders, *Quo Vadis?*, at 19; see also Schlosser, 'The 1968 Brussels Convention and Arbitration', at 228.

[38] Critics challenge the so-called advantages, especially in light of a recent trend of juridicalisation of international arbitration proceedings. See in general F. Lowenfeld, 'Book Review: Quo Vadis Arbitration? Sixty Years of Arbitration Practice', 95 *American Journal of International Law* (2001), 728-731, and L. Silberman, 'International Arbitration: Comments from a Critic', *American Review of International Arbitration* (2002), 9-18.

[39] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on 10 June 1958. See also Sanders, *Quo Vadis?*, at 9.

[40] Art. 2 of the New York Convention requires such an agreement to be in writing and obliges the courts of Contracting States to give effect to such an agreement. See also http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

[41] Schlosser claims that '[l]acking any transnational judiciary, arbitration is an absolute necessity in international trade', see Schlosser, 'The Competence of Arbitrators and of Courts', at 189.

[42] 'Arbitration justifies itself in a cross-border business context principally as a tool to minimize the real or imagined dangers of litigation abroad: a mechanism to reduce the risk of ending up before a biased foreign judge who will apply unfamiliar procedures in a strange language', Park, 'The Relative Reliability', at 4 *et seq.*

[43] See Lowenfeld, *The Quest for Reasonableness*, at 198.

sent of parties, have the ability to 'delocalize' or 'denationalize' transnational disputes.[44]

International arbitration is however not best suited for every international dispute, especially those arising out of small and medium sized contracts, but the complexity of international jurisdiction for court litigation leaves parties with arbitration as the sole option to settle their dispute.[45] Parties should be given a real choice between state courts and arbitration; a choice that will not exist as long as a jurisdictional framework for international court litigation is lacking.

1.3 Unification of International Jurisdiction Rules

Unification efforts in the field of private international law[46] have mainly been focused on conflict of law rules, rather than on international jurisdiction rules.[47] In the field of international commercial matters in general, and contractual disputes in particular, little unification of international jurisdiction has been achieved at a world-wide level.[48] International conventions are considered the principal source of the unification of private international law.[49] As a rule, they are negotiated and drafted by state delegates and based on a political consensus among the participating states. The principal objection to this method of unification is the lack of flexibility to adapt to changes in a dynamic legal world.[50]

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[44] See in general, L. De Lima Pinheiro, 'The "Denationalization" of Transnational Relationships: Regulation of Transnational Relationships by Public International Law, European Community Law and Transnational Law', in *Aufbruch nach Europa: 75 Jahre Max-Planck-Institut für Privatrecht* (2001), 429-446, at 429.

[45] See in general, R. David, 'The Methods of Unification', 16 *American Journal of Comparative Law* (1968), 13-27, at 24.

[46] In the international arena, unification also takes place in other fields of law, such as in procedural law and substantive law. The United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980 (CISG) is often used to illustrate a successful instrument of uniform substantive law, as it has been ratified by many states and elaborated within the *United Nations Commission for International Trade Law (UNCITRAL)* whose 'business is the modernization and harmonization of rules on international business', see http://www.uncitral.org/uncitral/en/index.html. Some consider different forms of unification to 'go hand in hand', see P. Glenn, 'Unification of Law, Harmonization of Law and Private International Law', in *Liber memorialis François Laurent, 1810-1887* (1989), 783-793, at 783; others see them as each other's opposite, see R. David, 'Unification du droit et arbitrage', in *Verhagen Lectures: Erasmus University Faculty of Law, 20 September 1976* (1977), at 6.

[47] A. Miaja de la Muela, 'Les principes directeurs des règles de compétence territoriale des tribunaux internes en matière de litiges comportant un élément international', 135 *Recueil des cours* (1973), 1-96, at 41-42.

[48] Most bilateral agreements in this field aim at recognition and enforcement of each other's judgements, but are less concerned with international jurisdiction. In this context it is worth mentioning that an attempt to elaborate a U.K./U.S. bilateral agreement failed after long negotiations. See in general the articles of H. Smit, 'The Proposed United States-United Kingdom Convention on Recognition and Enforcement of Judgements: A Prototype for the Future', 17 *Virginia Journal of International Law* (1977), 443-468; and P. Hay and R. Walker, 'The Proposed U.S.-U.K. Recognition-of-Judgements Convention: Another Perspective', 18 *Virginia Journal of International Law* (1978), 753-768.

[49] See also Bell, *Forum Shopping and Venue*, § 3.03 *et seq.*, at 50.

[50] See K. Zweigert and H. Kötz, *Introduction to Comparative Law* (1998), translated by Tony Weir from the German, *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, at

1.3.1 **Regional Unification**

a) *Europe*

Regional unification of jurisdiction rules has proved most successful in Europe. The 1968 Brussels Convention on Jurisdiction and Enforcement of Judgements[51] turned out to be a successful regional unification instrument of jurisdiction rules in the field of civil and commercial matters.[52] Its successor, Council Regulation 44/2001, is currently in force in all the EU Member States.[53] Its provisions have been extended to Switzerland, Norway and Iceland by virtue of a 'parallel' Lugano Convention.[54] As a result, judicial powers in the EU and the remaining EFTA states are allocated by uniform jurisdiction rules, and judgements are automatically recognized and enforced according to the same 'Brussels Model'. As Stephen Cromie roughly summarises, 'The courts of the world are now divided into two categories: those whose jurisdiction is decided wholly by their own rules of Private International Law, and those of countries which are parties of the Brussels and/or Lugano Conventions.'[55]

The particularity of this Brussels Model is that it is a 'double convention':[56] not only does the instrument eliminate barriers to the free movement of judgements by regulating recognition and enforcement of judgements within the EU and EFTA borders, it also contains direct uniform jurisdiction rules allocating judicial powers among the participating states. The jurisdictional question is therefore directly linked to the question of recognition and enforcement of foreign judgements.[57]

25: 'Multilateral treaties are very difficult to achieve and rather clumsy in operation.' See also S. Baumgartner, *The Proposed Hague Convention on Jurisdiction and Foreign Judgements: Trans-Atlantic Law Making for Transnational Litigation* (2003), at 68, arguing that transatlantic law-making has become a laborious task, especially considering the attitude of some countries towards international treaties.

[51] The Brussels Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters of 27 September 1968 was first published in French in OJ 1972 L 299/32 and in English in OJ 1978 L 304/36 [hereafter 'Brussels Convention']. See Chapter 2, Sect. 2.1.

[52] The Convention entered into force in 1971 between the original six Member States.

[53] Council Regulation on Jurisdiction and the Enforcement of Judgements of Civil and Commercial Matters (EC) No. 44/2001 of 22 December 2000, OJ 2001 L 12. Denmark's exceptional position will be explained in the following chapter.

[54] The Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters enacted for the States of the European Free Trade Association (EFTA) was signed on 16 September 1988, published in OJ 1988 L 319/9. A new Lugano Convention has recently been approved to replace the 1988 Lugano Convention in order to align it with the modifications of the Brussels Regulation. The official text of the revised Lugano Convention is published in OJ of 21 December 2007 L 339 at 3, which also includes the Council Decision of 15 October 2007 on its signing, on behalf of the Community (2007/712/EC), L 339, at 1. See also the Proposal for a Council Decision of 29 February 2008 concerning the conclusion of the new Lugano Convention, COM (2008) 116 final 2008/0048.

[55] S. Cromie and W. Park, *International Commercial Litigation* (1990), at 3.

[56] See Baumgartner, *The Proposed Hague Convention*, fn. 269, at 55, stating that very few *double* bilateral conventions have been elaborated prior to the Brussels Convention of 1968.

[57] See among others R. Michaels, 'Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions', 123 *Duke Law School Legal Studies* (2006), at 11-12.

The Brussels Model consists of a 'closed' set of uniform jurisdiction rules which replaces national jurisdiction rules.

b) *Latin America*

Apart from this 'pan-European' unification, other regional unification efforts are to be found in Latin America.[58] The Latin American States are pioneers of the regional unification of private international law. Latin American unification is twofold: the first private international law treaties, known under the Montevideo Treaties and revised in 1939-1940, were adopted in 1889[59] and in 1928 a comprehensive code for private international law, the Bustamante Code, was approved in Havana at the Sixth Conference of American States.[60] Both instruments already included provisions dealing with international jurisdiction, even though the main body of the Treaties and Code consists of conflict of law rules.[61]

After the OAS was established, its Inter-American Juridical Committee[62] resumed efforts to unify private international law and attempted to merge the Bustamante Code and the Montevideo Treaties in light of the U.S. Restatements of Conflict of Laws, but without much success.[63] Currently unification of private in-

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[58] Association of Southeast Asian Nations (ASEAN) whose purpose is to promote regional peace and stability in Southeast Asia through abiding respect for justice and the rule of law, is limited to legal cooperation. See also Van Loon, 'Globalisation and The Hague Conference', at 233; R. Graveson, 'Private International Law: A Century of Unification', in *Liber memorialis François Laurent, 1810-1887* (1989), 795-804, at 797; and http://www.aseansec.org.

[59] These treaties were the result of several South American Governments working on unification and codification of private international law by holding the first Congress of Private International Law in Montevideo. See A. Garro, *Armonización y unificación del derecho privado en América Latina: Esfuerzos, tendencias y realidades* (1992), at 10-13; A. Villela, 'L'unification du droit international privé en Amérique latine', 73 *Revue critique de droit international privé* (1984), 233-265, at 245.

[60] The first International Conference of American States began in 1889, long after Simón Bolívar expressed his idea of unification of law within the region in 1826. In 1948, the Organisation of American States (OAS) was created. See J. Siqueiros, 'La Conferencia de La Haya y las Convenciones Interamericanas de Derecho Internacional Privado', in *Liber Amicorum Homenaje a la Obra Científica y Académica de la Profesora Tatiana B. de Maekelt* (2001), at 84; and Villela, 'L'unification en Amérique latine', at 235-239. The Bustamante Code was the result of the work of an International Commission of American Jurists in 1912. See OAS General Secretariat, 'Comparative Study of the Bustamante Code, The Montevideo Treaties and the Restatement of the Law of Conflict of Laws' (Washington D.C.: Inter-American Juridical Commitee OAS, 1964), at 6; Garro, *Armonización y unificación en América Latina*, at 13. See for an extensive historical overview of the Bustamente Code, J. Samtleben, *Internationales Privatrecht in Lateinamerika: Der Código Bustamante in Theorie und Praxis* (1979). The Code was ratified by many Latin American States. According to Caffrey, the U.S. never ratified the Code, claiming that they were unable to grant its approval 'due to constitutional grounds', see B. Caffrey, *International Jurisdiction and the Recognition and Enforcement of Foreign Judgments in the LAWASIA Region* (1985), at 14.

[61] For international jurisdiction provisions, see Arts. 314-339 of the Bustamante Code and Arts. 72-73 and 77-93 of the Montevideo Treaties.

[62] The permanent committee of the Inter-American Council of Jurists created at the Third International Conference in 1906, http://www.oas.org/speeches/speech.asp?sCodigo=06-0067. See General Secretariat, 'Comparative Study', at 3; Siqueiros, 'Convenciones Interamericanas', at 86.

[63] See General Secretariat, 'Comparative Study', at 3; and K. Nadelmann, 'The Need for Revision of the Bustamante Code on Private International Law', 65 *American Journal of International Law* (1971), 782-793, at 783. See http://www.oas.org/dil/PrivateIntLaw-HistDevPriLaw-Eng.htm. The

ternational law is in the hands of the Specialized Conferences on Private International Law (CIDIP),[64] whose works have been 'modest and realistic'[65] and limited to rules of applicable law and international judicial cooperation in very specific areas.[66] International jurisdiction has scarcely been touched.[67]

When the Southern Common Market – or *Mercado Común del Sur* (MERCOSUR) – was founded in 1991 by the Treaty of Asunción to promote economic integration by means of free trade and free movement of goods, peoples, and currency, the MERCOSUR Countries[68] also committed themselves to reconcile their legislations in pertinent areas in order to reinforce the integration process.[69] It is in this context that unification efforts made by MERCOSUR are sometimes referred to as the 'subregional' unification of private international law.[70] Three years after it was founded, one of the decisions of the Council of the Common Market involved the regulation of international jurisdiction in contractual matters in the Buenos Aires Protocol, underlining 'the importance of adopting common rules on international jurisdiction in contractual matters, for the purpose of promoting the development of economic relations among the State Parties' private sectors' and stating that in the area of international business 'contracting is the legal format of the commerce that takes place in connection with the integration process'.[71] The 1992 Protocol of

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Inter-American Council of Jurists ceased to exist in 1970, see Siqueiros, 'Convenciones Interamericanas', at 87.

[64] According to the OAS's Charter, Specialized Conferences 'deal with special technical matters or … develop specific aspects of inter-American cooperation', available at http://www.oas.org/dil/PrivateIntLaw-HistDevPriLaw-Eng.htm.

[65] Garro, *Armonización y unificación en América Latina*, at 6.

[66] Villela, 'L'unification en Amérique latine', at 247-256; G. Lucas Sosa, *El Derecho Internacional Privado Interamericano y Derecho de Integración (CIDIP V Mexico 1994)* (1996), at 26-29; Siqueiros, 'Convenciones Interamericanas', at 88-91.

[67] In 1984, CIDIP-III adopted international instruments on international civil law and international procedural law and these include the Inter-American Convention on Jurisdiction in the International Sphere for the Extraterritorial Validity of Foreign Judgments. The text is to be found in 56 *RabelZ* (1992), at 149-152. The Convention is not yet in force and focuses primarily on international recognition. Issues of international jurisdiction are programmed for the CIDIP VII (resolution AG/RES 2065 (XXXV-0/05), at http://www.oas.org/dil/CIDIP-VII_res.2065.htm).

[68] MERCOSUR is a regional trade agreement between Argentina, Brazil, Paraguay, Uruguay and recently Venezuela. The Treaty of Asunción was later amended and updated by the 1994 Treaty of Ouro Preto. Bolivia, Chile, Colombia, Ecuador and Peru currently have an associate member status.

[69] Art. 1 of the Treaty of Asunción.

[70] D. Fernández Arroyo, *Derecho Internacional Privado Interamericano: Evolución y Perspectivas* (2000), at 72.

[71] See the Preamble of MERCOSUR/CMC/DEC. Nº 01/94; Buenos Aires Protocol on International Jurisdiction in Contractual Matters available at http://www.sice.oas.org/trade/mrcsrs/decisions/AN0194_e.asp. Such protocols are similar to international conventions, which require ratification by each state individually. See on its legal effects, J. Samtleben, 'Der MERCOSUR als Rechtssystem', in *Wirtschaftsrecht des MERCOSUR – Horizont 2000: Tagung im Max-Planck-Institut für ausländisches und internationales Privatrecht am 21.-22. Januar 2000* (2001), 52-94, at 53 and fn. 10, who indicates that Uruguay has not yet ratified this jurisdiction protocol. See also J. Vervaele, 'Mercosur and Regional Integration in South America', 54 *The International and Comparative Law Quarterly* (2005), 387-410, at 392 *et seq.*

Las Leñas deals with mutual recognition of judgements and appears to be clearly inspired by the 1968 Brussels Convention.[72]

1.3.2 **Failed Efforts of Universal Unification: The Hague Project**

By far the most important institution for the unification of private international law at a global level is the intergovernmental organization of The Hague Conference on Private International Law (HCCH).[73] Its purpose is to work for the progressive unification of the rules of private international law[74] and to 'work for a world in which persons – as well as companies – can enjoy a high degree of legal security'.[75] Apart from conventions in family matters, the HCCH adopted three conventions directly and indirectly dealing with international jurisdiction in commercial disputes.[76] These conventions are 'simple' conventions, meaning that they principally deal with international recognition and enforcement of judgements and that the jurisdictional question is only dealt with indirectly by way of a jurisdictional requirement.[77] These conventions, however, are of very little practical relevance as one entered into force for three countries only.[78] The most recently concluded convention is the Convention of 30 June 2005 on Choice of Court Agreements, whose potential importance has been explained above. This Choice of Court Convention is the abridged result of a much wider project covering many specific issues of international jurisdiction and which started in 1993 as the 'Hague Project on International Jurisdiction and Enforcement in Civil and Commercial Matters'. In 1992, the U.S. Department of State proposed to Georges Droz, Secre-

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[72] According to Vervaele, 'Mercosur and Regional Integration', at 401. See MERCOSUR/CMC/DEC. Nº 05/92; see also MERCOSUR/CMC/DEC. Nº 10/96 on International jurisdiction in matters relating to consumers.

[73] As suggested by T.M.C. Asser and at the initiative of the Dutch Government, the HCCH began to organize *ad hoc* 'conferences'. The first was held in 1893. At its seventh conference in 1955, the HCCH became a permanent international organization. See H. van Loon, 'Quelques réflexions sur l'unification progressive du droit international privé dans le cadre de la Conférence de La Haye', in *Liber memorialis François Laurent, 1810-1887* (1989), 1133-1150, at 1133.

[74] Statute of the HCCH of 15 July 1955 (including amendments adopted, approved and entered into force on 1 January 2007). See Van Loon, 'Quelques réflexions', at 1142 and Graveson, 'A Century of Unification', at 798.

[75] At http://www.hcch.net/index_en.php?act=text.display&tid=26.

[76] The Convention of 15 April 1958 on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods, not in force, but signed by Austria, Belgium, Germany and Greece. The Convention of 25 November 1965 on the Choice of Court, not yet in force, only signed by Israel; and the Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters with its Supplementary Protocol, both entered into force on 20 August 1979, but are only ratified by Cyprus, The Netherlands and Portugal.

[77] The additional Protocol to the 1971 Hague Convention includes, however, a list of exorbitant jurisdiction grounds allowing Contracting States to not recognize a judgement if it is based on one of these jurisdiction grounds. See for more definitions Michaels, 'Some Fundamental Jurisdictional Conceptions', at 11.

[78] As noted by the HCCH 'even if the Conventions have not been ratified, they have an influence upon legal systems, in both Member and non-Member States. They also form a source of inspiration for efforts to unify private international law at the regional level.' At http://www.hcch.net/index_en.php?act=text.display&tid=26.

tary General of the HCCH, to prepare a convention on the recognition and enforcement of judgements.[79] From the U.S.'s perspective, the regional unification of the Brussels Model was disfavouring U.S. domiciled defendants: although the use of national exorbitant jurisdiction rules against defendants domiciled in Europe was prohibited, they could still be used against defendants domiciled outside the territory. Furthermore, judgements based upon these exorbitant jurisdiction grounds could be recognized and enforced in every other participating Member State.[80] In contrast, foreign judgements seem to be easily recognized in the U.S. on the basis of the Foreign Money Act.

At the Seventeenth Session of the HCCH in May 1993, it was decided to include on the agenda the work in the field of 'recognition and enforcement of foreign judgements in commercial and civil matters'. While considering the nature of a possible world-wide convention, the Working Group compared the double convention of the Brussels Model and the simple convention of the 1971 Hague Convention. The Working Group proposed a convention of a mixed type, as suggested by the American scholar Arthur von Mehren.[81] Such a 'mixed convention' would, like a double convention, include uniform rules for direct jurisdiction *and* rules for recognition and enforcement of judgements. However, as opposed to a double convention the jurisdiction rules would be divided in three groups:[82]

- *Permitted* jurisdiction rules on a *white list*: judgements obtained on the basis of such a white jurisdiction ground are required to be recognized and enforced by other states.
- *Prohibited* jurisdiction rules on a *black list*: judgements based on these jurisdiction grounds are to be refused recognition and enforcement by other states.
- All other national, not uniform, jurisdiction rules belonged to a *grey list*: enforcement and recognition of these judgements would be left to the law of the enforcing state.

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[79] According to Adler a letter was sent on 5 May 1992 by the former Legal Advisor of the U.S. Department of State, Edwin D. Williamson, to Georges Droz, see M. Adler, 'If We Build It, Will They Come? – The Need for a Multilateral Convention on the Recognition and Enforcement of Civil Monetary Judgements', *Law & Policy in International Business* (1994), 79-111, fn. 5, referring to a U.S. Department of State, Fact Sheet of February 1993.

[80] See Chapter 2, Sect. 2.2, for the mechanism and structure of this Brussels Model. On this point see the famous and critical articles by K. Nadelmann, 'Jurisdictional Improper Fora in the Treaties of Recognition and Enforcement of Judgements: The Common Market Draft', 67 *Columbia Law Review* (1967), 995-998, answered by L. de Winter, 'Excessives Jurisdiction in Private International Law', *The International and Comparative Law Quarterly* (1968), 706-720; F. Juenger, 'La Convention de Bruxelles du 27 septembre 1968 et la courtoisie internationale: Réflexions d'un américain', *Revue critique de droit international privé* (1983), 37-51, and K. Russell, 'Exorbitant Jurisdiction and Enforcement of Judgements: The Brussels System as an Impetus for United States Action', 19 *Syracuse Journal of International Law & Commerce* (1993), 57-92.

[81] Adler, 'The Need for a Multilateral Convention', fn. 99, refers to the suggestion of Arthur von Mehren for a mixed convention in a Final Report to the U.S. Department of State, 'Recognition Convention Study' (1992).

[82] See Prel. Doc. No. 1 of May 1994 – Annotated checklist of issues to be discussed at the meeting of the Special Commission of June 1994 (Permanent Bureau of the Hague Conference on Private International Law, 1994), at 6-8.

On 30 October 1999, the Special Commission, consisting of experts, adopted a preliminary draft Convention on Jurisdiction and Foreign Judgements in Civil and Commercial Matters. An extensive and clear Report drawn up by Peter Nygh and Fausto Pocar accompanied the draft and explained the compromises made. However, what was supposed to be a closing diplomatic conference in June 2001, with the adoption of the draft transforming it into an approved convention, turned into a 'complete disaster'.[83] The 1999 draft, which was based on consensus, turned into a 'bracketed' text in which any compromise reached was questioned and therefore withdrawn. After having established that consensus was lacking for a wide range convention, state delegations discussed the possibility of a 'bottom-up' approach rather than the 'top-down' approach previously taken by the HCCH. In April 2002, the Commission I of General Affairs and Policy of the HCCH identified a list of *hard-core issues* upon which negotiations should be continued, covering choice of court clauses, defendant's domicile, submissions, branches, trusts, physical torts and counter-claims.[84] Nonetheless, the drafts became dead letters. Finally it was decided to downscale the project to cover only choice of court agreements. This approach proved more successful. The fact that this ambitious world-wide project resulted in failure, illustrates the complexity of international unification of jurisdiction law. Yet, time, energy, costs and above all the efforts made by state delegates and experts to achieve a mutual understanding of one another's systems should not be thrown away; and 'throwing the baby *and* its bathwater' should be avoided.[85] The failure of The Hague negotiations should not be a permanent disappointment.

1.3.3 **Other Instruments of Unification**

Another important legislative method of unification[86] is the elaboration of instruments principally drafted by experts in the field rather than by state delegates.[87] In contrast to international conventions, these instruments are not legally binding, but should be considered as 'recommendations' for national legislators.[88] The follow-

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[83] D. Bennet, 'The Hague Convention on Recognition and Enforcement of Foreign Judgments – A Failure of Characterisation', in *Intercontinental Cooperation through Private International Law: Essays in Memory of Peter E. Nygh* (2004), 19-25, at 20.

[84] Result of the meetings of 24th of April 2002, Minutes No. 5 (morning session).

[85] Brand, *The Hague Preliminary Draft Convention on Jurisdiction and Judgments: Proceedings of the Round Table* (2005), at 77; P. Nygh, 'Declining Jurisdiction under the Brussels I Regulation 2001 and the Preliminary Draft Hague Judgments Convention: A Comparison', in *Reform and Development of Private International Law – Essays in Honour of Sir Peter North* (2002), 303-334, at 308.

[86] Not to be confused with non-legislative means of, or 'spontaneous' unification of, law at the international level, which occurs through unification in practice, see B. Trompenaars, *Pluriforme Unificatie en Uniforme Interpretatie* (1989), at 13; J. Sauveplanne, 'Eenvormig Privaatrecht', *Themis* (1961), 225-280, at 240-241; F. De Ly, *Europese Gemeenschap en privaatrecht: Uitwerking van inaugurele rede Erasmus Universiteit Rotterdam* (1993), at 30.

[87] See in general, K. Nadelmann, 'The International Unification of Law: Uniform Legislation versus International Conventions Revisited', 16 *American Journal of Comparative Law* (1968), 28-50, David, 'The Methods of Unification', at 19-21; and J. Sauveplanne's contribution, in D. Kokkini-Iatridou, *Een inleiding tot het rechtsvergelijkende onderzoek* (1988), at 52; and G. Parra Aranguren, *Curso General de Derecho Internacional Privado: Problemas Selectos y Otros Estudios* (1998), at 71.

[88] According to Zweigert the method of a model law is less heavy-handed and is rather a matter of recommendation than of obligation, see Zweigert and Kötz, *Comparative Law*, at 25.

ing international non-governmental organizations drafted recommendations and general principles dealing with international jurisdiction. The International Law Association (ILA), founded in 1873 in Brussels, is (the most) widespread non-governmental organization with numerous branches world-wide, consisting of academics and practicing professionals whose main objective is 'the study, clarification and development' of public and private international law.[89] With respect to international jurisdiction in commercial matters, the most significant committee is the now defunct 'Committee on International Civil and Commercial Litigation'. Its work resulted in Resolution No. 1/2000, also known as the *Leuven/London Principles on declining and referring jurisdiction in civil and commercial matters* and in Resolution 4/2002 regarding the *Paris/New Delhi Principles on Jurisdiction over Corporations*.

Also in 1873, in Ghent, a group of eleven international lawyers, among whom P. Mancini and T.M.C. Asser, created the Institute of International Law or '*Institut de Droit International*' (IDI) to contribute to and to promote the development of international law.[90] In 2003 its 'Second Commission' adopted the 'Bruges Resolution' on 'the principles for determining when the use of the doctrine of forum non conveniens and anti-suit injunctions is appropriate'.

Although the Rome-based organization UNIDROIT[91] principally focuses on the unification of substantive law, in 2004 it adopted, together with the American Law Institute (ALI),[92] the Principles of Transnational Civil Procedure. These rules are meant to serve as 'guidelines for code projects in countries without long procedural traditions' and 'initiate law reforms even in countries with long and high quality procedural traditions'. They are to be applied 'by analogy in international commercial arbitration'.[93] Principle 2 of the ALI/UNIDROIT Principles of Transnational Civil Procedure deals with 'Jurisdiction over Parties'.

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[89] See http://www.ila-hq.org. The ILA has a consultative status with a number of the United Nations' Specialized Agencies.

[90] See Art. 1(2) of its Statute, at http://www.idi-iil.org. The IDI received the Nobel Peace Prize in 1904 in recognition of its action in favour of arbitration among states as a peaceful means of settling disputes.

[91] The International Institute for Unification of Private Law, at http://www.unidroit.org.

[92] The ALI, founded in 1923, addresses the uncertainty of law in the U.S. by developing Restatements of the Law. In the light of The Hague negotiations on a Worldwide Jurisdiction Convention and encouraged by State Department officials present at The Hague, the ALI started a project that would meet the needs of U.S. law on jurisdiction issues even if The Hague Negotiations would not result in an international convention. See A. Lowenfeld and L. Silberman, *International Jurisdiction and Judgements Project* (2000), at 18-30; on the jurisdiction aspects, see A. Lowenfeld and L. Silberman, eds., *The Hague Convention on Jurisdiction and Judgments: Records of the Conference Held at New York University School of Law on the Proposed Convention* (2001), at B-1-2 and see B-4.

[93] See Jr. Hazard, M. Taruffo *et al.*, *ALI/Unidroit Principles and Rules of Transnational Civil Procedure* (2003). Multiple references are to be found in 6(4) *Uniform Law Review* (2001), 739-925, which is dedicated to this particular project of the American Law Institute and UNIDROIT, with contributions from among others, H. Kronke, M. Storme, Ph. Fouchard, J. Walker, A. Gidi, and Th. Pfeiffer.

1.3.4 **Desirability of Unification at an International Level**

The 'driving force' behind the success of regional unification in Europe, and to a lesser extent in Latin America, clearly originates from a desire for economic and political integration. Although the opening of the First Preliminary Document of The Hague Judgment Project refers to a general process of liberalisation of the world economy, reasons for unification of jurisdiction rules at an international level differ and should therefore be placed in a different context.[94] The desirability for unification of jurisdiction rules at a world-wide level should be understood as a need for an international legal framework regulating cross-border commercial activities and its disputes in a 'globalizing world', rather than a process that forms part of an economic and a political integration.[95] Several scholars have argued that such a legal framework does not necessarily involve the unification of international jurisdiction. Instead they favour the approach of a simple convention whose primary aim is to guarantee international recognition and enforcement of judgements world-wide and which merely includes indirect jurisdiction grounds as jurisdictional requirements.[96] In their view, when economic and political reasons for unification are lacking, there is no need for unified jurisdiction rules, a framework for world-wide recognition and enforcement of judgements would suffice.[97] A more general malaise in the unification movement strengthens this view.[98] The ideology, or as Pierre Mayer calls it, 'the metaphysical interest' behind international unification of the law of the beginning of the 20th century has become unpopular.[99]

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[94] Prel. Doc. No. 1 of May 1994: Checklist Special Commission, at 4, places international jurisdiction in the context of present times in which 'the various economic regions in the world are becoming more interdependent every day – a process that will be further enforced by the creation of the World Trade Organization'. See also M. Reimann, 'Parochialism in American Conflicts Law', 49 *American Journal of Comparative Law* (2001), 369-389, at 387.

[95] See the statement of M. Kovar (U.S. Delegation) at the meeting of Monday, 22 April 2002, Morning Session: (United States) Commission I, General Affairs and Policy The Hague Conference. Kovar noted in Minutes (No. 1), at 7, that the 'original attempt to draft a double convention was perhaps a mistake as not all nations viewed the process from the point of view of economic and political integration. Rather, it should be seen as an international method for creating a civil law framework to enhance international trade and commerce.' See also his answer to Professor Beaumont in J. Kovar, 'The United States as an Actor in Private International Law', in *Private Law, Private International Law, & Judicial Cooperation in the EU-US Relationship* (2005), 153-159, at 154.

[96] See in particular comments by Pierre Mayer in *Proceedings of a Round Table*, at 93 and 98.

[97] Kovar, 'The United States as an Actor', at 158, refers to unification projects in the field of maintenance.

[98] The unification movement appears to be 'in crisis', see B. Fauvarque-Cosson, 'Comparative Law and Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple', 49 *American Journal of Comparative Law* (2001), 407-427, at 415; see also Zweigert and Kötz, *Comparative Law*, at 27.

[99] According to Pierre Mayer this metaphysical interest or this romantic idea behind unification of international jurisdiction rules 'which is associated with the spectacle of uniformity: in this globalised world, let us harmonise our rules, let us have uniform grounds of jurisdiction' is misplaced. He does not understand this desire outside a political union and does not think that 'uniformity is, in itself desirable, or that it serves any useful purpose; on the contrary, trying to achieve uniformity brings with it serious drawbacks', in *Proceedings of a Round Table*, at 95.

Why then is the unification of international jurisdiction rules desirable? As a general rule, unification of law is still considered to be desirable if it meets the 'specific needs of international legal business'.[100] In that respect it is undeniable that the desirability of unification of jurisdiction lies in the fact that the international community would benefit from jurisdictional certainty and predictability in cross-border activities and transnational commercial contracts.

This has been underlined in a 2003 survey presented by the International Chamber of Commerce (ICC) to government officials drafting the proposed Hague Convention on Jurisdiction. The survey revealed that businesses are faced with jurisdictional uncertainty in international contractual relations, which has in some cases even affected significant business decisions.[101] The regulation of jurisdiction in transnational commercial disputes between private entities carrying out activities across national borders requires a uniform and international approach, transcending national rules (and interests), if one wants to promote certainty, predictability and justice for international trade.[102] In view of these objectives of unification of international jurisdiction rules, a *simple* convention guaranteeing mutual recognition and enforcement on a world-wide scale will not eradicate the 'jurisdictional web' of rules in international litigation, and the 'anarchy'[103] of national jurisdiction rules will persist.[104]

The uncertainty, as a result of the lack of a set of unified national jurisdiction rules, also results in either positive or negative jurisdiction conflicts. Positive jurisdiction conflicts occur when several courts claim jurisdiction over the dispute by virtue of their national jurisdiction rules, resulting in multiple competent forums and consequently leading to forum shopping. The number of available courts increases especially when jurisdiction is asserted over a dispute on the basis of an exceedingly weak connection with the forum. Negative conflicts of jurisdiction arise when no forum, according to its national jurisdiction rules, confers jurisdiction over a dispute, leaving parties empty handed and with no available court to

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[100] Only then would 'the vast amount of energy which is required to carry through any project for the unification of law' be justified according to Zweigert and Kötz, *Comparative Law*, at 27. But see in contrast Mayer in *Proceedings of a Round Table*, at 94, disagreeing with promoting international trade as the 'official aim' for unification.

[101] See the news archives of the ICC at http://www.iccwbo.org/policy/law/iccef/index.html, Paris, 2 April 2003, 'Jurisdictional certainty is essential in international contracts'; and Paris, 29 August 2003, 'Business hails Hague jurisdictional treaty draft', available at http://www.iccwbo.org/policy/law/icced/index.html.

[102] The following statement also applies to unification of jurisdiction rules: 'the advantage of unified law is that it makes international legal business easier' and 'reduces the legal risks … and hereby gives relief both to the businessman who plans the venture and to the judge who has to resolve the disputes to which it gives rise. Thus unified law promotes greater legal predictably and security.' Zweigert and Kötz, *Comparative Law*, at 25.

[103] C. McLachlan, 'Interim Report Declining & Referring Jurisdiction in International Litigation', presented at the International Law Association, London Conference, 2000, at 4.

[104] However it should be noted that indirect jurisdiction rules as a requirement for international recognition and enforcement of foreign judgements, like those embodied in the first Protocol of The Hague Convention on Recognition of 1971, have a potential harmonising effect on direct jurisdiction rules, as they exclude recognition when the judgement is founded on exorbitant jurisdiction rules.

resort to. Such a 'jurisdictional vacuum'[105] often results in a '*déni de justice*'.[106] Regulating jurisdiction conflicts by mechanisms of *lis pendens* on the one hand, and the *forum necessitatis* rule on the other, will however not be sufficient to deal with jurisdictional uncertainty when it comes to the question of 'where to litigate' in the first place.[107]

Jurisdictional certainty through unification of international jurisdiction can be achieved by finding uniform jurisdiction rules suitable for international (contractual) disputes. This entails eliminating exorbitant jurisdiction rules, avoiding multiple forums and finding acceptable and feasible connecting factors for a uniform jurisdictional system.

1.3.5 **The Next Step: Progressive Unification**

It is generally believed that the more difficult the unification is, the more valuable it gets, and the more ambitious the unification project, the harder it becomes to reach consensus. In the field of conflict of law rules, unification proceeded area-by-area: each convention carefully delimited its scope of application to specific *rationae materiae*; from the applicable law to specific contracts for the international sale of goods,[108] to the law applicable to specific torts such as traffic accidents.[109] The same path should be followed for the unification of international jurisdiction. This calls for rigorously delimiting the material scope and defining the subject matter autonomously in order to avoid problems of qualification.[110] Despite the HCCH's statutory mission of 'progressive unification',[111] the Jurisdiction Project followed the Brussels Model, and aimed at unifying a wide range of jurisdiction rules in the field of civil and commercial matters.[112] It proved to be too ambitious and too difficult. If one wants to achieve successful unification, it is necessary to restore the progressive unification approach.[113] Future work of the HCCH in the field of international jurisdiction should be carried out area-by-area, beginning with disputes arising out of contractual relationships.[114]

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[105] Schulze, 'The Leuven/London Principles', at 161.

[106] Either the court lacks jurisdiction because it does not have the legal basis to take jurisdiction, or the court has the competence but will not take the case because it has a discretionary power to refuse to do so. In those cases several systems apply the *forum necessitatis* rule. See in general F. Ibili, *Gewogen rechtsmacht in het IPR: Over forum (non) conveniens en forum necessitatis* (2007).

[107] These mechanisms harmonise jurisdiction rules but do not provide for uniform jurisdiction rules, which is needed for jurisdictional certainty. But the 'primary objective of harmonization is not uniformity', see Glenn, 'Unification of Law', at 783.

[108] Hague Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods.

[109] Hague Convention of 4 May 1971 on the Law Applicable to Traffic Accidents.

[110] Van Loon, 'Quelques réflexions', at 1142.

[111] See above Sect. 1.3.2.

[112] See Pocar, *Proceedings of a Round Table*, at 75; and see Van Loon, 'Globalisation and The Hague Conference', at 231.

[113] See the Minutes No. 1 Commission I General Affairs and Policy of the Conference, at 4, where Kovar states 'that the [U.S.] Delegation believed the widely desired trade-off with "general doing business" jurisdiction on the black list was more concrete and easier to sell in the area of product liability than when it applied to all civil and commercial litigation.' See Chapter 7.

[114] See also Brand, *Proceedings of a Round Table*, at 91: '[B]egin with the status quo in the multilateral system (where the world stands now) and try to move step-by-step forward to a more coopera-

1.4 Some Difficulties Due to the Nature of Civil Jurisdiction

1.4.1 International Law and State Sovereignty

International law does not impose restrictions on the reach of national jurisdiction rules.[115] In 1927, the Permanent Court of International Justice (PCIJ), the predecessor of the International Court of Justice (ICJ), ruled in its sole decision on jurisdiction that states can regulate jurisdiction as long as they do not interfere with the sovereignty of other states.[116] Based on the principle of territorial sovereignty, the Court argued that there is no 'general prohibition to states to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory.'[117] However, the PCIJ continued 'jurisdiction is strictly territorial' in the sense that jurisdiction 'cannot be exercised by a State outside its territory'.[118] In other words, State A cannot impose on the courts of State B to take jurisdiction in an international dispute. Yet, both states are free to regulate the reach of the judicial powers of their judiciary with 'a wide measure of discretion' and 'every state remains free to adopt the principles which it regards as best and most suitable'.[119] This explains why judicial powers of some states have a wider reach than others. Only international conventions can limit this freedom. Allocation of international jurisdiction by the unification of the rules means in practice that a state loses the freedom to decide in which cases it will take jurisdiction. By international agreement, the state will instead allow another state to have jurisdiction over the dispute. Judicial adjudication and state sovereignty are closely linked. Therefore, the unification of international jurisdiction rules is sometimes felt as an interference with state sovereignty and for that reason it remains a sensitive and political issue.

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tive, comprehensive approach. This approach would attempt to move private international law forward from where it is now, without necessarily saying "we have to go all the way"'.

[115] Johnston and Powles, 'The Kings of the World', at 21 *et seq*.; Wautelet, 'What Has International Private Law Achieved?', at 59; H. Schack, *Internationales Zivilverfahrensrecht* (2006), § 330, at 121; J. Bertele, *Souveränität und Verfahrensrecht: Ein untersuchung der aus dem Völkerrecht ableitbaren Grenzen staatlicher extraterritoriale Jurisdiktion im Verfahrensrecht* (1998), at 51-54; A. Neale and M. Stephens, *International Business and National Jurisdiction* (1998), at 18-19; F. Mann, 'The Doctrine of International Jurisdiction', 111 *Recueil des cours* (1964), 1-162, at 9; and see in general A. Strauss, 'Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts', 36 *Harvard International Law Review* (1995), 373-424; C. McLachlan, 'The Influence of International Law on Civil Jurisdiction', in *Hague Yearbook of International Law* (1993), 125-144, J. Verheul, 'The "*forum actoris*" and International Law', in *Essays on International & Comparative Law in Honour of Judge Erades* (1983), 197-206; Miaja de la Muela, 'Les principes directeurs', at 27 *et seq.*; M. Akehurst, 'Jurisdiction in International Law', 46 *British Yearbook of International Law* (1974), 145-257; and J. Stevenson, 'The Relationship of Private International Law to Public International Law', 52 *Columbia Law Review* (1952), 561-588.

[116] Please note however that the case dealt with criminal proceedings.

[117] *S.S. Lotus* case, 7 September 1927, 1927 PCIJ Series A, No. 10, at 19.

[118] Ibid., at 18-19.

[119] Ibid., at 19. See also F. Marchadier, *Les objectifs généraux du droit international privé à l'épreuve de la Convention Européenne des droits de l'homme* (2007), at 226-227.

1.4.2 Jurisdiction Rules, Connecting Factors and Territoriality

Although international law does not impose any particular restriction on the regulation of jurisdiction,[120] traditionally international jurisdiction is based on a particular *connection* with the forum.[121] Apart from jurisdiction based on consent, most *connecting factors* are found in jurisdiction on the basis of a specific connection with the territory of the state[122] and therefore the allocation of jurisdiction has long been indisputably linked with the principle of territoriality.[123] Territoriality in the narrow sense of the word requires a 'physical connection' with the territory.[124] For the purpose of the present study, territoriality will be considered in its broadest sense: i.e. any connection between the territories of the forum can be jurisdiction-creating, as long as it can be 'localized' or is 'situated' in that forum.

Today, the effects of globalisation, the world-wide web and e-commerce on transnational relationships challenge the foundation of jurisdiction based on traditional principles of territoriality which require a physical connection with the forum. Several scholars demand a different approach to jurisdiction, for instance abandoning the territoriality principle in its narrow sense.[125]

1.4.3 Interaction with the Applicable Law

Ideally the competent court should be determined independently from the applicable law. The civil law tradition generally applies a strict separation between the jurisdictional question and the question of applicable law.[126] Contrastingly, other

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[120] Except with respect to state immunity.

[121] Some countries use internal or territorial jurisdiction rules – allocating jurisdiction for national disputes within their territory – to determine whether their courts have international jurisdiction. This is also known as the 'transposition' of internal jurisdiction rules to international cases. See also Fawcett, *Declining Jurisdiction*, at 2. Other countries however have developed jurisdiction rules specifically designed for international disputes.

[122] In some cases jurisdiction has been based on the ground of 'personal connections' with the forum. Nationality-based jurisdiction is the best illustration of this.

[123] '*Rien n'est plus territorial que de rendre la justice. C'est là que chaque Etat est le plus chatouilleux de son indépendance. La justice ne peut être rendue que sur le territoire même de l'Etat auquel appartient l'autorité judiciaire instituée*', J.-P. Niboyet, *Cours de Droit International Privé Français* (1949), at 436. See also A. Huet, 'Compétence des Tribunaux français à l'égard des litiges internationaux', Fascicule 581-10-51 *Juris-Classeur Droit International* (2002), at 13; and R. Michaels, 'Territorial Jurisdiction after Territoriality', in *Globalisation and Jurisdiction* (2004), 106-130, at 128; Glenn, 'Unification of Law', at 162.

[124] Such as the U.S. territorialist theory of the *Pennoyer* Regime. See for more details, Chapter 5 which is dedicated to the situation in the U.S.

[125] See in general M. Berliri, 'Jurisdiction and the Internet, and European Regulation 44 of 2001', in *E-commerce: law and jurisdiction* (2003), 1-13 and R. Freer, 'American and European Approaches to Personal Jurisdiction Based upon Internet Activity', http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1004887 (2007); but see Michaels, 'Territorial Jurisdiction', at 121 and 127 on 're-territorialization' of jurisdiction law; and Johnston and Powles, 'The Kings of the World', at 13 *et seq.*

[126] This is the classic concept of separation of the two questions or '*Eigenständigkeit der Zuständigkeitsregelung*' and contrasts with the *Gleichlauf* principle. H. Batiffol, 'Observations sur les liens entre la compétence judiciaire et la compétence législative', in *De conflictu legum* (1962), 55-66; Miaja de la Muela, 'Les principes directeurs', at 24-25 and 60; Von Mehren, 'Theory and Practice', at 36 and 157; and for general works, A. Heldrich, *Internationale Zuständigkeit und anwendbares Recht*

legal systems favour the *lex fori* rule, in which case the jurisdictional question is inseparably mingled with the applicable law question, and asserting jurisdiction to a particular forum automatically means applying the law of the court to the dispute. Several examples show that questions of applicable law sometimes interfere with the jurisdictional question and that in order to determine the competent court the applicable law to the dispute becomes relevant. Under English common law, for instance, the English courts are, under specific circumstances, competent when English law governs the contract.[127] In Europe, the court of the place of performance is competent to hear disputes related to contractual matters, but courts often need to turn to the applicable law to the contract (*lex causae*) in order to determine the place of performance.[128]

Some of the same connecting factors for jurisdiction are also to be found in conflict rules. However, two fundamental differences between the nature of conflict of law rules and jurisdiction rules should be underlined. First, with respect to international jurisdiction it is possible to have multiple competent forums to rule over an international dispute, but only one substantive (national) law can apply to it.[129] Moreover, and setting aside uniform rules of allocation of jurisdiction, national jurisdiction rules are unilateral, as they are unable to allocate jurisdiction to a foreign court, as opposed to conflicts of laws rules which are generally multilateral and can determine the application of foreign law.[130]

In this context, it is worth mentioning that the civil law tradition generally applies the principle of *jura novit curia*; the court is supposed to know the law, including foreign law. As a consequence, the court seized is expected to examine, investigate and apply foreign law when raised by a party and sometimes at its own motion.[131] This stands in contrast to the common law tradition where courts have a more passive role towards the application of foreign substantive law. The status of foreign law is considered a fact to be raised, pleaded and proved by the parties during proceedings.[132] In a world-wide context, the relevance of international jurisdiction varies as to the different attitudes towards the application of conflict of law rules.[133]

(1969) and P. Mayer, 'Droit international privé et le droit international public sous l'angle de la notion de la compétence', 68 *Revue critique de droit international privé* (1979), 1 *et seq.*, at 349 *et seq.*, at 537 *et seq.*

[127] Rule 6.20(5)(c) CPR. This is also called *forum legis*. See Chapter 4 of this book.

[128] See Art. 5(1) of the Brussels Regulation.

[129] P. Lagarde, 'Le principe de proximité dans le droit internationale privé contemporain. Cours général de droit international privé', 196 *Recueil des cours* (1986), 9-238, at 129-130; and Lowenfeld, *The Quest for Reasonableness*, at 3.

[130] See also Lagarde, 'Le principe de proximité', at 130.

[131] According to J. Mance, 'The Future of Private International Law', 1 *Journal of Private International Law* (2005), 185-195, at 191: 'Common law courts expect parties to plead and by expert evidence prove foreign law. German courts tend to look to academics and institutes, such as the Max Planck Institute for opinions on the relevant foreign law.'

[132] See C. Pejovic, 'Civil Law and Common Law: Two Different Paths Leading to the Same Goal', 32(3) *Victoria University of Wellington Law Review* (2001), 817-841, at 831, when foreign law is not proven, then the *lex fori* is the default applicable law.

[133] Some scholars have identified a general 'homeward trend' in the determination of the applicable law, arguing that the *lex fori* is more often applied. The result is that 'the designation of the

1.5 Problem Statement and Objective

At present, the road to international court litigation remains a very uncertain one. Apart from regional unification and unification in specific areas, the current state of affairs of jurisdiction rules in international court litigation is characterized by its complexity and does not provide legal certainty, predictability and justice which are needed by the international community in this dynamic world. Although parties can either choose a specific court or an arbitral tribunal to settle their dispute, there are still many cases where litigators will be left in the hands of ordinary jurisdiction rules.[134] There is an evident necessity for uniform rules governing issues of international jurisdiction in international disputes in general and in cross-border commercial contract disputes in particular.

The objective of this study is to contribute to a better understanding of the different approaches to international jurisdiction and its aim is to explore the possibilities of reconciling these differences in order to come to common grounds of jurisdiction in international commercial litigation. More specifically, by building a bridge of mutual understanding between common law and civil law traditions by way of analysing existing jurisdiction rules emanating from these traditions, this study will examine to what extent acceptable uniform jurisdiction rules can be found for disputes arising out of cross-border commercial contracts.

1.6 Scope

This study will focus on all jurisdiction rules to which parties, individuals and corporate entities, involved in disputes arising out of regular commercial contractual relationships can be subjected, for which purpose each jurisdictional provision asserting jurisdiction over disputes arising out of a contract will be studied. Furthermore, it involves examining rules of *general jurisdiction* designed to establish jurisdiction regardless of the nature of the claim; rules of *special jurisdiction* primarily designed for jurisdiction over contractual matters, as well as provisions establishing jurisdiction on the basis of commercial activities carried out by individual and corporate defendants. The complexity of corporate entities and large economic operators requires detailed study of international jurisdiction over corporations. However, this study is not limited to business-to-business (B2B) contracts and will include claims involving natural persons carrying out business activities and concluding commercial contracts, as long as they are not consumers.[135]

The scope of this study is limited to 'regular' or 'general' commercial contracts. Specific or 'protected' contracts, such as consumer, employment and insurance

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applicable law is now coming to depend on jurisdictional standards'. See for example, Th. de Boer, 'Forum Preferences in Contemporary European Conflicts Law: The Myth of a "Neutral Choice"', in *Festschrift für Erik Jayme* (2004), 39-55, at 47 and 51.

[134] Either because the parties have not agreed on a dispute resolution clause, or when one of the parties successfully invokes the invalidity of a dispute resolution clause. Many arbitral and court proceedings involve the preliminary question on the validity of the dispute settlement clause.

[135] See below. Jurisdiction rules in consumer contracts fall outside the scope of the present study, but see for an exhaustive overview J. Hill, *Cross-border consumer contracts* (2008).

contracts will not be covered and given the specific legal problems and jurisdictional implications arising out of e-commerce, international jurisdiction over disputes arising out of e-contracts will also not be discussed in the present study. Excluded are also (contractual) claims concerning infringements of intellectual property rights,[136] admiralty or maritime matters, insolvency and related matters, (contractual) rights *in rem* in immoveable property and tenancies of immoveable property, the carriage of passengers and goods[137] and family matters.[138]

Since this study is limited to claims originating out of a contractual relationship between the parties, it excludes any dispute arising out of tortuous acts, whether they involve product liability, personal injury tort or environmental torts or claims based on human rights violation.[139] For the same reason, (anti-) trust claims and claims for damages based on an act giving rise to criminal proceedings will be excluded.

Any jurisdiction based on consent or prorogation of jurisdiction by way of a choice of court agreement included in international contracts is left outside the scope of this study since this is covered by The Hague Convention on Choice of Court Agreements. Finally, and, notwithstanding their practical importance, the same goes for provisional and protective measures. Although jurisdiction rules of a more procedural nature such as jurisdiction over third parties, multiple defendants – or class actions, related actions, counter-claims and *lis pendens* also affect the exercise of jurisdiction over contractual claims, they will not be considered as such. Nor will jurisdiction arising out of necessity, the *forum necessitatis*, be dealt with either.

The question of recognition and enforcement of foreign judgements around the world is indisputably linked to the jurisdictional question, but is not the main concern of this study. As this book is principally limited to examining direct jurisdiction rules, it excludes issues of recognition and enforcement and indirect jurisdiction rules as requirements for the recognition of judgements.[140]

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[136] This includes the validity of intellectual property rights other than copyright and related rights.

[137] This study will exclude any specialized conventions dealing with areas relating to international carriage, transport and maritime matters, such as the Rhine Navigation Convention of 17 October 1868; the Warsaw Convention 1929 for the Unification of Certain Rules Relating to International Carriage by Air and protocols; the Brussels Convention 1952 on Certain Rules concerning Civil Jurisdiction in Matters of Collision; the Brussels Convention 1952 on Certain Rules relating to the Arrest of Sea-going Ships; the Geneva 1956 Convention on the Contract for the International Carriage of Goods by Road (CMR Convention); the International Convention 1969 on Civil Liability for Oil Pollution Damage and protocols; the Bern Convention 1980 Concerning International Transport by Rail and protocols; the Montreal 1999 Convention for the Unification of Certain Rules for International Carriage by Air; the Geneva 1999 International Convention on Arrest of Ships; the Hamburg Rules 1978 and the Rotterdam Rules 2009.

[138] By analogy of the scope of the Hague Convention on the Choice of Court Agreement and the Brussels Regulation, this includes the status and legal capacity of natural persons; maintenance obligations; other family law matters, including matrimonial property regimes and other rights or obligations arising out of marriage or similar relationships; and wills and succession.

[139] See in this respect the ECJ's *Lechouritou* decision of 15 February 2007, C-292/05 ECR I-1519.

[140] Also discussed above in Sect. 1.3.4.

Narrowing down the present study to conflicts arising out of contractual disputes is first of all justified by the fact that there are an extensive number of cases dealing with jurisdiction over claims relating to contractual matters. This not only indicates the need for uniform jurisdiction rules in contractual disputes, but also the lack of legal certainty and predictability in international commercial disputes.[141] Second, as explained above, the work of the HCCH should be continued with a step-by-step approach. Progressive unification starting with claims arising out of contracts will have more chances of success, as contractual disputes are closest to the freedom of contract and the self-determination of parties' contractual rights. Contractual parties are 'linked by a voluntary bond'.[142]

1.7 The Comparative Approach

> 'Unification of law cannot be achieved by simply conjuring up an ideal law on any topic and hoping to have it adopted. One must first find what is common to the jurisdictions concerned and incorporate that in the uniform law. Where there are areas of difference, one must reconcile them either by adopting the best existing variant or by finding, through comparative methods, a new solution which is better and more easily applied than any of the existing ones.'[143]

The chosen approach for the present study is the comparative approach.[144] Traditionally, the 'universal legal science'[145] of comparative law is a valuable instrument in private international law.[146] On numerous occasions, the negotiators at The Hague Conference have expressed the need for a comparative study to

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[141] See Sect. 1.3.4 and see M. Keyes, *Jurisdiction in International Litigation* (2005), at 159.

[142] See also U. Magnus and P. Mankowski, eds., *Brussels I Regulation* (2007), § 23, at 100, and § 27, at 101: 'Consensual transactions are contracts. Obligations voluntarily assumed by agreements are contractual by their nature.'

[143] Zweigert and Kötz, *Comparative Law*, at 24.

[144] Ibid., at 2: 'Comparative law is the comparison of different legal systems of the world' with an extra dimension of internationalism. This study will therefore not take the approach of legal theory analyzing the role of the Sovereign State with respect to international jurisdiction. For an extensive study in this field see the works of Bertele, *Souveränität und Verfahrensrecht*, specifically at 112-193; T. Pfeiffer, *Internationale Zuständigkeit und prozessuale Gerechtigkeit: Die internationale Zuständigkeit im Zivilprozess zwischen effektivem Rechtsschutz und nationaler Zuständigkeitspolitik* (1995); J. Schröder, *Internationale Zuständigkeit: Entwurf eines Systems von Zuständigkeitsinteressen im zwischenstaatlichen Privatverfahrensrecht, aufgrund rechtshistorischer, rechtsvergleichender und rechtspolitischer Betrachtungen* (1971); J. Hudault, 'Sens et Portée de la compétence du juge naturel dans l'ancien droit français', 61 *Revue critique de droit international privé* (1972), 27-54 and 249-268; P. Neuhaus, *Grundbegriffe des Internationalen Privatrecht* (1976), in particular at 418; Ph. Thery, *Pouvoir juridictionnel et compétence* (1981); De Vareilles-Sommières, *La compétence internationale de l'état*; E. Pataut, *Principe de souveraineté et conflit de juridictions* (1999); and R. Michaels, 'Globalizing Savigny? The State in Savigny's Private International Law and the Challenge of Europeanization and Globalization', 74 *Duke Law School Legal Studies Paper* (2005), available at SSRN: http://ssrn.com/abstract=796228. See also the observations of Von Mehren, 'Theory and Practice', at 150-154.

[145] Zweigert and Kötz, *Comparative Law*, at 46.

[146] Ibid., at 6; Fauvarque-Cosson, 'Comparative Law and Conflict of Laws: Allies or Enemies?', at 409; and Miaja de la Muela, 'Les principes directeurs', at 12.

come to a better understanding of each other's jurisdictional systems.[147] Such a comparative 'education' is needed in order to overcome 'impatience', scepticism, legal pessimism or the so-called 'realism'.[148] Comparative law contributes to the (systematic) unification of law.[149] Although, it has been argued that comparative law and conflict of laws have different objectives, since comparative law seeks international unification and conflict of law rules seeks to 'coordinate' different substantive laws,[150] the opposite is true with respect to the 'jurisdictional pillar' of private international law. Especially because the objective is to find common grounds, comparative law is certainly not an 'enemy', but an ally in the unification process.[151] The ability of comparatists to '[free] legal thought from inhibiting conceptual constraints by paving the way to new ways of reading the law'[152] is crucial in such a process.[153]

Due to the complexity of sources of jurisdiction rules, a rule-based comparison will be carried out at three levels, namely at the national, regional and international level. At the national level, jurisdiction rules of the following individual countries will be analysed. France has been chosen not only because it is generally considered to be the 'parent system' of the Romanistic Systems in Continental Europe, but also because it uses the highly controversial nationality-based jurisdiction rules.[154] The German jurisdictional regime is indispensable, not only as the 'parent system' of the Germanic legal family, but also for its particular 'property-based' jurisdiction. The particularities and originality of the Swiss jurisdictional system justify a brief examination of this so-called 'affiliated' legal system of the Germanic family.[155] Although, the 2001 reform of the Dutch Code of Civil Procedure also partially followed the jurisdictional scheme of the Brussels Model, the Dutch system has retained some features typical of the assertion of jurisdiction to courts in The Netherlands.[156]

The common law tradition will be represented by England and the U.S.[157] The selection of these national systems is justified by the fact that they represent the

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[147] Baumgartner, *The Proposed Hague Convention*, at 70, referring to a mutual comparative education for the successful conclusion of the proposed Convention.

[148] Reimann, 'Parochialism', fn. 66, at 385.

[149] Zweigert and Kötz, *Comparative Law*, at 16.

[150] Fauvarque-Cosson, 'Comparative Law and Conflict of Laws: Allies or Enemies?', at 407. See also A. von Mehren, 'The Role of Comparative Law in Practice of International Law', in *Festchrift für Karl Neumayer zum 65. Geburtstag* (1985), 479-486, at 483.

[151] The title of the article by Fauvarque-Cosson, 'Comparative Law and Conflict of Laws: Allies or Enemies?', makes a reference to this.

[152] Muir Watt, 'La fonction subversive', at 504 (English summary).

[153] See also Von Mehren, 'The Role of Comparative Law', at 486; Zweigert and Kötz, *Comparative Law*, at 16.

[154] Other systems traditionally belonging to the 'Romanistic' legal system, such as those of Italy and Spain, will be examined to illustrate the impact of the Brussels Model on national jurisdiction systems.

[155] Zweigert and Kötz, *Comparative Law*, at 41.

[156] The Dutch jurisdictional system is both of Germanic and Romanistic origin.

[157] Australian jurisdiction law will be, where relevant, considered as a variation on the traditional English common law system.

two main legal traditions, the common law and the civil law tradition.[158] These two legal traditions are at the origin of many other jurisdictional regimes around the world.[159]

The regional unification in Europe will be discussed in an exhaustive study of the Brussels Regulation. As far as relevant, the uniform jurisdiction derived from the regional organizations in Latin America will also be taken into account, but will not be dealt with separately.[160] Finally, at the international level the efforts of unification within the HCCH, the ILA and the IDI will also be examined.

1.8 Outline

This book could be divided in two parts: namely, the first part provides a successive, rather than a 'simultaneous', description of the selected jurisdictional regimes,[161] the second part deals with the comparison, analysis, explanation and assessment of the jurisdictional regimes.

In Chapter 2 the uniform jurisdiction rules as found in the Brussels Regulation No. 44/2001 representing the regional unification in Europe are outlined and this is followed by a description of national jurisdiction rules. Chapter 3 sets out with national reports describing the civil law tradition in France, Germany, Switzerland, and The Netherlands. The traditional English common law rules on jurisdiction are explained in Chapter 4, followed by the regulation of international jurisdiction in the United States of America in Chapter 5. In order to get a proper understanding of the diversity of U.S. jurisdiction law, the states of California, Florida, Michigan and New York have been selected as illustrations.[162]

The analysis commences in the second part with Chapter 6, in which the fundamental differences and contrasting approaches to international jurisdiction are analysed and explained. This chapter also develops parameters and assessment criteria that uniform rules should meet. Chapter 7 provides a detailed comparison of individual jurisdiction rules and connecting factors as encountered in the jurisdictional systems surveyed in the first part. Chapter 8 compares the discretionary powers and correction devices found in some legal systems. The comparison carried out in Chapters 7 and 8 will also consider, where relevant, the provisions of the Drafts of The Hague Convention on Judgements and the recommendations of the ILA and the IDI. Additionally, on the basis of the parameters and assessment criteria developed in Chapter 6, jurisdiction rules and correction devices are evaluated in order to find common grounds for uniform rules. The final chapter, Chapter 9, draws conclusions and suggests uniform jurisdiction rules for international commercial disputes.

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[158] Zweigert and Kötz, *Comparative Law*, at 41; and Kokkini-Iatridou, *Inleiding tot het rechtsvergelijkende onderzoek*, at 137.

[159] This includes the mixed regimes of Quebec, Japan, China and Israel.

[160] Any uniform jurisdiction rules elaborated within MERCOSUR will be dealt with in Chapter 7, see the outline in Sect. 1.8.

[161] See Zweigert and Kötz, *Comparative Law*, at 43.

[162] See Chapter 5 for the selection criteria.