Another Look at the EEC Judgments Convention: Should Outsiders Be Worried?

Bruce M. Landay

Follow this and additional works at: http://elibrary.law.psu.edu/psilr
Part of the International Law Commons

Recommended Citation
Available at: http://elibrary.law.psu.edu/psilr/vol6/iss1/3
Another Look at the EEC Judgments Convention: Should Outsiders Be Worried?

Bruce M. Landay*

I. Introduction

The fear of being haled into an alien forum is neither new nor unique to citizens of the United States. During the development of the American federal court system, concern about prejudice prompted the creation of diversity jurisdiction. In those days, the United States seemed bigger and distant states more foreign. Europeans have attempted to minimize the dangers of prejudicial legal predicaments in foreign states by means of a tradition of treaties and conventions, conferences at the Hague, and the workings of the European Economic Community (EEC). These treaties and conventions demonstrate that although the world has grown smaller, effort is still necessary toallay the fears of litigants everywhere that the interests of fairness can be served only in their home forum. Cooperation among legal systems has increased and must continue to do so, but it would be naive to dismiss the current potential for unfair legal situations abroad.

In 1968, when the EEC member states signed the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (EEC Judgments Convention), giving "full faith and credit" to the judgments of member states, there was great apprehension in the American legal community. It was feared that European theories of "exorbitant" jurisdiction would now be invoked against American parties, with the resulting judgments en-

3. Id. arts. 26-30.
5. See infra p.2, section II A.
forceable throughout the EEC. This apprehension was not unfounded, for the EEC Judgments Convention specifically allowed for the use of exorbitant bases of jurisdiction against domiciliaries of countries outside the community, while protecting EEC domiciliaries from such practices.7

This article gives new consideration to the EEC Judgments Convention as it applies to exorbitant bases of jurisdiction. It explains the workings of these bases of jurisdiction and the concerns that they engender for parties outside the EEC. The article first examines the more traditional responses to the enforcement of exorbitantly based judgments, such as bilateral treaty negotiation, and the never-applied Hague Convention Draft (the Hague Draft). The events leading to the signing of the EEC Judgments Convention and the demise of the Hague Draft are then considered. Although the EEC Judgments Convention has not yet produced the untoward results American lawyers anticipated, American interests are still threatened by the potential use of the Convention to enforce exorbitantly based judgments. This article concludes with a discussion of possible remedies which address that threat.

II. Historical Background

A. Exorbitant Bases of Jurisdiction

Two bases of jurisdiction used in certain western European countries have long been regarded by the common law legal community as “exorbitant.” Most prominent in the EEC today is jurisdiction based upon the nationality or domicile of the plaintiff, which has its origin in article 14 of the French Civil Code. The other well known form of exorbitant jurisdiction is found in section 23 of the

---

6. EEC Judgments Convention, supra note 2, art. 4.
7. Id. art. 3.
9. Surprisingly, the United States has not concluded a single agreement with EEC member states to protect American litigants from exorbitantly based judgments.
10. The terms “exorbitant” and “excessive” are used interchangeably to refer to the bases of jurisdiction described in this section. Giardina, The European Court and the Brussels Convention on Jurisdiction and Judgments, 27 INT’L & COMP. L.Q. 263, 264 (1978).
German Code of Civil Procedure, which confers jurisdiction upon a German court over a defendant whose assets are present in Germany.13

The French article 14 jurisdiction is quite simple: a French national may sue anyone in a French court. The nationality or domicile of the defendant, or his complete lack of contact with the forum are irrelevant to imposition of jurisdiction under this article. The site of the occurrence that is the subject matter of the action at hand is also irrelevant to article 14 jurisdiction.14 The possible consequences of this provision are obviously far-reaching.15

One may speculate that article 14 was enacted because a powerful Napoleonic France regarded its courts as the only proper fora for litigation involving one of its citizens.16 The power of the French led in large part to the widespread adoption and adaptation of the Napoleonic Code, including article 14, elsewhere in Europe.17

Since that time, however, many European countries have restricted the breadth of article 14 jurisdiction. Belgium was one of the first countries to reduce the use of exorbitant bases of jurisdiction, deleting article 14 from its code as early as 1876.18 The only remaining trace of the prior law was a "retaliatory" provision, which enabled a Belgian to invoke jurisdiction against a foreigner upon any basis which would have been available to that foreigner against a Belgian under the foreigner’s own law.19 Italy has enacted a similar

13. ZivilprozeBordnung [ZPO] § 23, 1877 (Ger.).
14. C. Civ. art. 14 (Fr.).
15. As an example, if a French tourist in New York is involved in a car accident with a New Yorker, the New Yorker could find himself the defendant in a French proceeding. It is of no import that the New York driver has never been to France and has no contacts there. Carl, supra note 12, at 448.
16. See C. Civ. art. 15 (Fr.). Article 15 states, parallel to this discussion of article 14, that a French national (no matter where domiciled) may be called before a French court for obligations he incurs in another country, even towards an alien. This jurisdiction is considered exclusive, and a French court would therefore not recognize any foreign judgment against a Frenchman. Carl, supra note 12, at 448.
17. Luxembourg’s Civil Code provides for the same basis of jurisdiction. C. Civ. art. 14 (Lux.) (1807). The Netherlands was early in adopting the same provision, but since has slightly changed the jurisdictional basis to the domicile of the plaintiff. CODE CIV. PROCEDURE [CODE CIV. P.] art. 126(3) (Neth.) (1938), as discussed in Carl, supra note 10, at 448; Nadelmann, Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft, 67 COLUM. L. REV. 995, 999 (1967). (Professor Nadelmann, deceased, formerly professor emeritus at Harvard Law School, and a participant in the Hague Conference negotiations (see infra p. 4-5 section II(B)), has made numerous contributions to an understanding of the background and significance of the EEC, Hague and other judgment conventions. His work has been of great value to the author in the preparation of this article.) R. SCHLESINGER, COMPARATIVE LAW 315-16 (1980).
18. Nadelmann, supra note 17, at 999. Belgium does retain article 15, identical to its French counterpart. C. Civ. art. 15 (Belg.) (1973). For the French counterpart, see supra note 16.
19. For example, a Belgian could sue a Frenchman in Belgium using “article 14” jurisdiction only because the Frenchman could do the same to the Belgian within French jurisdiction. Law on Jurisd. of March 25, 1876, arts. 52-54, Pasinome (Belg.), as discussed in Nadelmann, supra note 17, at 1014.
reciprocity clause.  

The second major form of exorbitant jurisdiction, section 23 of the German Code of Civil Procedure, confers upon German courts in personam jurisdiction over any defendant who owns assets in Germany. The resulting judgment is not limited to the amount of these assets, nor is there a minimum amount of such assets necessary to invoke Section 23 jurisdiction. Like its Napoleonic counterpart, German Section 23 jurisdiction has been imitated in several countries. However, among EEC member states, only Germany and Denmark have this type of jurisdiction.

B. Protections Against Excessive Bases of Jurisdiction

Before the signing of the EEC Judgments Convention, an American or other party could ordinarily manage his assets to avoid
the exorbitantly based jurisdiction of a European court. Moreover, some countries typically would not recognize exorbitantly based judgments. However, additional protections were still needed by potential litigants based in Europe likely to do business in neighboring countries that exercised exorbitantly based jurisdiction. Thus, long before the advent of the Common Market, Europe had a significant history of bilateral treaties aimed at limiting the enforcement of these judgments.

Germany negotiated several judgment recognition treaties when its own experience with Section 23 jurisdiction began to sour. The German Code of Civil Procedure bases its recognition of foreign judgments on reciprocity requirements. One such reciprocity requirement dictates that the foreign court must have jurisdiction "according to German Law." Thus, in 1891, the German Reichsgericht (highest court) held that an Austrian decision against a German domiciliary, with jurisdiction based upon the presence of his assets in Austria, had to be enforced in Germany. Germany first approached Austria for treaty negotiation. A treaty was signed between the two countries in 1923, barring enforcement of Section 23 judgments by the requested country if rendered in default, or if the defendant had limited his appearance to the amount of his assets present in the forum. More recently Germany concluded a similar treaty with Greece.

Belgium had early success in treaty making, encouraged by its legislation in the nineteenth century of retaliatory reciprocity provisions. The French undertook negotiations with the Belgians soon after the 1876 enactment of the new Belgian legislation, and a treaty on the recognition and enactment of judgments was signed in 1899.

25. For example, one could be a judgment debtor in France and run a substantial business operation in Italy without any danger of Italian enforcement of the French decision against him.
28. ZPO § 328(1) (1877) (Ger.), as quoted in Nadelmann, supra note 17, at 1012.
32. See supra note 19 and accompanying text.
33. Convention Between Belgium and France Relative to the Enforcement of Judgments, July 8, 1899, Belgium-France, 187 Parry's T.S. 378, 1900 Pasinomie (Belg.) 329, as
This pact barred the use of article 14 in France against Belgians, thereby forestalling the impact of Belgium's reciprocity provision on French litigants. Soon after, Belgium and the Netherlands signed a treaty eliminating the use by the Dutch of exorbitant jurisdiction against Belgians.

The Belgians also executed a treaty with Germany in 1958, which made German section 23 judgments unenforceable against Belgian domiciliaries but recognized the enforceability of these judgments against parties from other countries. It remains uncertain why the Belgians conceded any recognition at all to section 23, in light of their clear and longstanding position against exorbitant bases of jurisdiction.

III. Judgment Conventions as Protection Against Exorbitant Jurisdiction

A. "Recognition" and "Double" Type Conventions

Two basic types of conventions have been implemented for the purpose of judgment recognition: the "recognition" convention, and the "double" convention. The simple "recognition" convention articulates the conditions under which a foreign judgment will be recognized by the petitioned court. These requirements typically include proper notice to the defendant, and jurisdictional criteria that must be satisfied if the judgment is to be recognized. The "double" convention provides the standards for recognition found in the "recognition" type convention as well as rules for assumption of original jur-

_34. Even more progressive was the 1904 case of _Marychurch et Cie. v. Compagnie Maritime Francaise_, in which the Belgian Cour de Cassation refused to recognize a French article 14 judgment against an English party. Cass. 2e, July 1, 1904 Pasircrise Belge 1 293, 319 (1904) Belgique Judiciare 1329, 1346, 1 REVUE DE DROIT INTERNATIONAL PRIVÉ 166 (1905) as discussed in Nadelmann, supra note 17, at 1014, 1015.

_35. Convention Between Belgium and The Netherlands Concerning Territorial Jurisdiction, Bankruptcy, and the Authority and Execution of Judgments, Arbitral Awards and Notarial Acts, March 28, 1925, Belgium-Netherlands, 93 L.N.T.S. 443, as cited in Nadelmann, supra note 17, at 1015._


_37. Nadelmann, supra note 17, at 1014._

_38. Id. at 1014-15._

_39. Id. at 998._

_40. For example, a simple "recognition" convention might restrict bases of jurisdiction for recognition purposes, excluding article 14 type jurisdiction while allowing jurisdiction over a resident of the forum, but would not provide for the problem of non-recognition of decisions based on article 14 legitimately rendered in that forum. A "double" convention would fill this gap created by simple "recognition" conventions._

_41. Nadelmann, supra note 17, at 998. For an example of a "recognition" treaty, see the German-Belgian Treaty of 1958, supra note 36._
risdiction. Under the "double" type convention no court may entertain a claim unless these rules are followed. "Double" conventions are obviously far more complex than recognition conventions, and are therefore more difficult to negotiate, but they have the advantage of preventing states from rendering judgments which will not be recognized outside that state. "Double" conventions thus save time and embarrassment for the country of the judgment court, the country of the enforcing court, and the litigants as well.

B. The Development of the EEC Judgments Convention and the Hague Draft Convention

1. The EEC Judgments Convention.—The EEC Judgments Convention was mandated by article 220 of the treaty establishing the EEC. Article 220 provides that member states should negotiate to ensure "the simplification of the formalities governing the reciprocal recognition and execution of judicial decision . . .". The great variety among the member states' laws governing the recognition of foreign judgments and bases for assumption of original jurisdiction led the EEC experts to draft this as a multilateral "double" convention.

The EEC Judgments Convention was drafted to supersede bilateral judgment treaties then in force between the various member states. This promised significant changes in the several national policies regarding exorbitant bases of jurisdiction. After a long his-

42. E.g., the convention might require that a suit be filed in a court within the jurisdiction of the defendant's domicile or incorporation, or in the place of the contract or tort. Nadelmann, supra note 17, at 998.
44. Nadelmann, supra note 17, at 998.
46. Id. Professor Nadelmann has stated that "simplification of formalities," as referred to in the Treaty of Rome, was not needed so much as the reform of substantive law dealing with recognition of foreign judgments. Nadelmann, supra note 17, at 996.
48. E.E.C. Convention, supra note 2, art. 55.
tory of European effort to eliminate exorbitantly based jurisdiction, EEC member states would finally prohibit altogether the use of such jurisdiction against their domiciliaries. Thus, articles 2 and 3 of the EEC Judgments Convention barred the use of exorbitantly based jurisdiction.49

Under article 4 of the same document, however, the protection afforded to EEC domiciliaries did not reach those domiciled outside the EEC.60 By the terms of article 4, exorbitantly based judgments, which might not have been recognized by a member state prior to the adoption of the Convention, were now qualified for automatic enforcement anywhere in the EEC.61 This provoked some interesting questions about member states' internal policies. For example, Belgium, by acceding to the EEC Judgments Convention, effectively overruled its long held policy against enforcement of exorbitantly based judgments against litigants from third party countries, first enunciated in Marychurch et Cie.62 An Italian court might even face a constitutional question under the EEC Judgments Convention, because of Italy's stricture against the use of exorbitantly based jurisdiction except in the case of retaliation.63 The United Kingdom, as a common law jurisdiction, may not have shared concepts of exorbitant bases of jurisdiction with other EEC members under civil law jurisdiction,64 but having signed on to the EEC Judgments Conven-

49. Article 2
Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.
Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State.

Article 3
Persons domiciled in a Contracting State may be sued in the court of another Contracting State only by virtue of the rules . . . of this Title.

Id. arts. 2-3.

50. Article 4
If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall . . . be determined by the law of that State.
As against such a defendant, any person domiciled in a Contracting State may, whatever his nationality, avail himself in that State of the rules of jurisdiction there in force, and in particular those specified in the second paragraph of Article 3, in the same way as the nationals of that State.

Id. art. 4.

51. Id. art. 26.
52. Nadelmann, supra note 17, at 1015. See supra note 34.

Certainly an important legal problem may exist: Prelegge 31 (General Provisions Regarding Laws) Codice Civile, Italy, forbids giving effect to any foreign law or act when such is contrary to public policy. This expressly includes foreign judgments. See C.P.C. supra note 20, at art. 797(7).

54. It should be noted that common law transient jurisdiction is an exorbitant basis of
tion in 1978, the United Kingdom would now have to enforce EEC judgments based upon these jurisdictional concepts. Although such internal changes may have seemed troubling, the EEC Judgments Convention did harmonize to some degree conflicts among the member states. Furthermore, such conflicts themselves ultimately became less important as article 3 provided that EEC domiciliaries were to be protected from the harsh results of exorbitantly based judgments. It was therefore clear that the parties with true cause for worry were domiciliaries of countries outside the Community.

2. The Hague Draft Convention.—Members of the Hague Conference on Private International Law met in 1966 to work on their own Draft Convention. These meetings provided a forum for the fears of countries not in the EEC. The first such meeting took place after the 1964 publication of the Common Market Draft. At that time there ensued debate between the Community members and the other Hague delegates regarding the interplay of the two conventions. The Hague Draft was not to be enforceable between any two states until they concluded a supplementary agreement to that effect. This provision was intended to allow greater opportunity for jurisdiction to civil law minds. As such, this concept was added to the EEC Judgments Convention’s article 3, which lists bases of jurisdiction not applicable to EEC domiciles, when the United Kingdom acceded to the Convention. von Mehren, Recognition and Enforcement of Sister-State Judgments: Reflections on General Theory and Current Practice in the European Economic Community and the United States, 81 COLUM. L. REV. 1044, 1050 (June-Dec. 1981). See also supra note 24 regarding Scottish law exorbitant bases of jurisdiction.

55. Convention on the Accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on Jurisdiction and the Enforcement of Judgments, Oct. 9, 1978, 3 COMMON MKT. REP. (CCH) 91 7011, BII-191 [hereinafter Accession Convention]. The Accession Convention will enter into force after the original EEC members and one new member have each ratified it. Id. art. 39. The United Kingdom has enacted legislation to prepare itself to do so, at which point the Accession Convention will enter into force two months and one day later. BII ENCYCLOPEDIA OF EUROPEAN COMMUNITY LAW 91 B11-214.

56. von Mehren, supra note 54, at 1049.

57. Hague Draft, supra note 8. This was intended to be a multilateral convention with a special bilateral agreement feature, see infra note 61.

58. Present at the previous Tenth Session held in October 1964, were all 23 members: Austria, Belgium, Denmark, Finland, France, West Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Arab Republic, United Kingdom, United States and Yugoslavia. (Only six were EEC members, those marked in italics.) Nadelmann & Reese, The Tenth Session of the Hague Conference on Private International Law, 13 AM. J. COMP. L. 612, 612 n.1 (1964). At the “Extraordinary Session,” April, 1966, only Ireland and Yugoslavia were absent. Nadelmann & von Mehren, The Extraordinary Session of the Hague Conference on Private International Law, 60 AM. J. INT’L. L. 803, 804 (1966) [hereinafter Nadelmann & von Mehren].


60. See infra note 63-65 and accompanying text.

61. Draft Convention, supra note 8, art. 21 (at 366).
each contracting state to address areas of particular concern while still maintaining the general uniformity of the law contained in the Hague Draft.62

At the Extraordinary Session of the Hague Conference in April 1966, the Common Market countries asserted that the Hague Draft should go even further, and allow regional groups to make their own agreements, unbound by the terms of the Hague Document.63 The EEC Hague delegates from outside the Common Market understood this transparent reference to the EEC Judgments Convention to be an indication that the EEC meant to preserve its exorbitant base of jurisdiction vis-à-vis outsiders. In response, the American and British delegations submitted "Working Paper No. 30", which proposed that the Hague Draft include a provision against the enforcement abroad of exorbitantly based judgments.64 Debate over this proposal ended in the referral of this question to a Special Commission.65 Before that Special Commission was able to meet in October 1966, however, the EEC experts changed the course of discussion by adding a new provision, article 59, to their draft of the EEC Convention.66

C. Article 59 of the EEC Convention: A Hollow Promise

Article 59 of the EEC Judgments Convention draft allowed for bilateral treaties between EEC states and outsiders that barred the use of excessive bases of jurisdiction.67 Although article 59 was a very encouraging sign that EEC states wished to settle the issue, subsequent proceedings at the Hague indicated that it was meant merely to be a bargaining chip for EEC members in negotiating the status of their Judgments Convention.

Article 59's underlying purpose surfaced when the Hague Special Commission met in October, 1966. At that time, the Commission drafted a Supplementary Protocol to the Hague Draft (Supplementary Protocol),68 which listed exorbitant bases of jurisdiction and

62. Id. art. 23. See also Nadelmann, supra note 53, at 1283.
63. See Nadelmann infra note 64, at 411.
65. Nadelmann, supra note 53, at 1283-84. Interestingly, Belgium sided with the "outsiders" on Working Paper No. 30. Id. at 1286. The policies of the EEC states are far from uniform in this area. See supra text accompanying notes 52-56. The Working Paper was submitted on April 22, 1966. Working Paper No. 30, supra note 64, at 288. The conflict threatened the success of the entire session, until late at night on the last day, April 26, when the issue was delegated to the Special Commission. Nadelmann & von Mehren, supra note 58, at 804.
66. EEC Judgments Convention, supra note 2, art. 59.
67. Id.
68. Supplementary Protocol to the Hague Draft, 15 AM. J. COMP. L. 369 (1967) [herein-
denied extraterritorial enforcement of judgments founded on such bases of jurisdiction. In the ensuing debate over whether the Supplementary Protocol should be mandatory for Hague Draft signers, the EEC members were able to gather a majority of negative votes.\textsuperscript{69} Having thus swept aside the greatest obstacle to the implementation of their Judgments Convention, and its article 4, the EEC experts redrafted article 59. Under the new draft, a bilateral agreement to protect a non-member country from exorbitant jurisdiction under the EEC Convention's article 4 had to be in the form of a convention on the recognition and enforcement of judgments.\textsuperscript{70} This alteration made potential negotiation under article 59 far more difficult. Essentially, article 59 was rendered ineffective.

Following the vote, the United States, Sweden, and the United Kingdom reserved the right to reopen the question of the Supplementary Protocol’s status.\textsuperscript{71} In the meantime, the Common Market countries signed the EEC Judgments Convention, with article 59 as amended, on September 27, 1968, ten days before the meeting of the Eleventh Session of the Hague Convention.\textsuperscript{72} This prior signing closed the issue of the conflict between the Supplementary Protocol and EEC law, as the EEC Judgments Convention now took precedence.\textsuperscript{73}

Article 59 was further amended in 1978 by the Convention on the Accession of Ireland, the United Kingdom and Denmark to the EEC Judgments Convention.\textsuperscript{74} Under the new provision added by the amendment, no bilateral agreement under article 59 could affect the enforceability of judgments based upon section 23-type jurisdiction (presence of assets) where the action was in rem or where the

---

\textsuperscript{69} See Nadelmann supra note 53, at 1284-85. One possible factor accounting for this coup by the EEC may have been the negative votes of future community members. Professor Nadelmann noted that countries contemplating joining the EEC were caught in a dilemma: "If the Protocol were binding, then they [such countries] would not be able to use the Hague Convention if they subsequently became members of the Common Market." However, "the Protocol would protect them if they remained outside the Common Market." Nadelmann, supra note 53, at 1285. Great Britain indeed appeared to support a mandatory Protocol. Concessions were made to EEC interests, though, probably in order to reach some consensus. See Actes et documents, supra note 64, at 478-86 (Procès verbal No. 10). The Supplementary Protocol was in obvious conflict with article 4 of the EEC Judgments Convention, which all new EEC members are required to sign. (EEC Judgments Convention, supra note 2, art. 63; Treaty of Rome, supra note 45, art. 220.) At that time, the United Kingdom, Ireland, Denmark and Norway were all contemplating accession to the EEC Treaty. (Nadelmann, supra note 53, at 1285.) Remarkably though, France and Germany abstained from the vote on the Hague Protocol. See id. at 1284; Actes et documents, supra note 64, at 491-92.

\textsuperscript{70} EEC Judgments Convention, supra note 2, arts. 4, 59.

\textsuperscript{71} Nadelmann, supra note 53, at 1284; Actes et documents, supra note 61 at 491-92.

\textsuperscript{72} Nadelmann, supra note 53, at 1284-85.

\textsuperscript{73} Article 7 of the Supplementary Protocol reads: "This Protocol applies subject to the provisions of existing Conventions relating to the recognition and enforcement of foreign judgments." Supplementary Protocol, supra note 68, at 370.

\textsuperscript{74} Accession Convention, supra note 55, art. 26.
property involved constituted the security for a debt which was the subject matter of the action. This change, though far less than the first amendment to article 59, posed yet another limitation upon the potential for meaningful negotiation of bilateral agreements with states outside the EEC.

IV. The Conventions Today

A. *The Hague Convention*

The Hague Draft has never taken effect between any two countries.\(^75\) At least initially, the failure of the Hague effort probably stemmed in part from the EEC requirement that all new member countries accede to the EEC Judgments Convention.\(^76\) Another likely factor was the vote making the Supplementary Protocol optional.\(^77\) Although the original Hague Draft did not include a provision addressing the issue of excessive bases of jurisdiction, the subsequent struggle between the EEC states and the non-EEC states over those issues must have made clear to the non-EEC states the necessity of the Supplementary Protocol. The Hague Draft without the Supplementary Protocol provided insufficient protection. Furthermore, some states may have feared that if the Hague Draft did not bar enforcement of exorbitantly based judgments, such judgments would be enforced even outside the EEC. Absent very specific language in the various bilateral supplementary agreements required of countries entering into the Hague Convention,\(^78\) there would be nothing to prevent such a result. The draft that emerged from the Supplementary Protocol vote was too weak to garner the support of even the more enthusiastic contributors to the Hague effort.\(^79\)

B. *The EEC Convention*

It is curious that the EEC states fought so strenuously to retain their ability to use exorbitant bases of jurisdiction against outside domiciliaries.\(^80\) They may have done so in order to maintain bargain-

---

75. The Hague Convention is not effective between any two countries without a Supplementary Agreement under article 21. *See supra* note 61 and accompanying text. There are three signatories to the Hague Convention. These countries, Cyprus, Portugal and the Netherlands, have also ratified this Convention on June 8, 1976, June 21, 1983 and June 21, 1979, respectively. Information on file at Office of Treaty Affairs, United States Dept. of State. Under article 28 of the Hague Convention, two ratifications are necessary for the Convention to enter into force. No other ratification of the Hague Convention or Supplementary Agreements under article 21 have been made.

76. *See* EEC Judgments Convention, *supra* note 2, art. 63.

77. *See supra* note 69.

78. *See supra* notes 61-62 and accompanying text.

79. The Swedish delegate to the Hague Conference had foreseen that if the Convention were drafted too weak to provide states with reasonable protection of their interests, these states might refrain from ratifying. *Actes et Documents, supra* note 61, at 484.

80. *See supra* notes 27-38 regarding previous efforts to minimize the effects of exorbi-
ing power when negotiating treaties under article 59. However, the EEC experts had amended article 59 into a “dead letter” by the time the EEC Judgments Convention was signed, and it seems clear that they had no intention of making it a viable basis of negotiation. Evidently, article 59 itself was the bargaining chip, and the EEC experts perceived valid reasons to retain article 4 in the EEC Judgments Convention. A report from the EEC Commission supplies some justifications for the EEC’s retention of article 4’s jurisdiction against outside domiciliaries:

— First, without article 4, a judgment debtor might avoid his obligation simply by shifting his assets to another EEC country. This argument, however, does not account for the fact that the courts of several European states were already in the practice of allowing assignments of claims to nationals of the defendant’s domicile.

— Second, if exorbitantly based judgments were not enforced against domiciliaries outside of the EEC, then a Community domiciliary could find himself without remedy anywhere in the Community. Had the motivation of the EEC experts really been to ensure the availability of an EEC community forum for claims against outside domiciliaries, a unification of jurisdictional criteria would have been in order, giving all EEC states the use of exorbitant bases of jurisdiction.

— Third, article 4 treats people equally, regardless of nationality, so long as they are domiciled in the Community. The exclusion of outsiders from protection against exorbitant bases of jurisdiction is not new. Such a framework was used in the conventions between Belgium and France, Belgium and Holland, and the Benelux treaty. Nevertheless, foreign interests are still unfairly threatened by article 4, and past errors do not justify a similar error on a grander scale. One domiciled outside the EEC still bears the risk of exorbitantly based judgments originating in fora with which he has

---

82. von Mehren, supra note 54, at 1059 n.60.
84. Id. See Nadelmann, supra note 17, at 1002-03.
85. Nadelmann, supra note 17, at 1003. These countries include France, the Netherlands and Luxembourg.
86. Report, supra note 83, at 37. For example, the Netherlands has no “presence of assets” jurisdiction. A Frenchman could have a claim against a Belgian, currently domiciled in the United Sates, whose major assets are located in the Netherlands. If the Dutch courts did not recognize judgments based upon French article 14 jurisdiction, then the Frenchman would have no place to sue but the United States. However, this argument neglects the fact that a German, who cannot avail himself of article 14 jurisdiction, would still have to sue the Belgian in the United States.
87. Id.
no relation being enforced against him anywhere in the EEC.

A fourth argument, though not suggested by the EEC report, is frequently implied by a comparison of the EEC with the American federal system, with its "full faith and credit" clause. The United States often exercise jurisdiction on bases that Europeans regard as insufficient, such as transient presence in the forum state. However, these bases of jurisdiction can be distinguished from the EEC's exorbitant jurisdiction in that they apply equally to defendants from any of the fifty states and foreign countries.

The EEC members may have indicated a willingness to compromise in 1968 by joining in the unanimous vote at the Eleventh Session of the Hague Conference favoring a "Recommendation Relating to the Connection Between the Convention . . . and the Supplementary Protocol." The recommendation encourages states to sign both the Hague Draft and the Supplementary Protocol at once, or, if that cannot be done due to prior treaty obligations, to take all possible steps to comply with the principles of the Protocol. While this vote was encouraging, in fact it has changed nothing. Nearly two decades later the promise of article 59 agreements brought by the recommendation has not materialized. Perhaps the EEC delegates at the Eleventh Session were aware that the Hague Draft would never take hold, and that their recommendation would thus be meaningless; or they may have simply been willing to sign yet another document, with which compliance would be completely optional, in order to avoid further attention to their own refusal to give up article 4. Yet, hindsight also demonstrates that excessive bases of jurisdiction have seldom been used in recent years, and the

---

88. Mendes, supra note 11, at 78. The "full faith and credit" clause is U.S. Const. art. IV, § 1.

89. In fact, both the United Kingdom's and Ireland's equivalents of transient jurisdiction are now considered exorbitant under art. 3 of the EEC Convention, supra note 2, as a result of the Convention of October 9, 1978, on the Accession Convention, supra, n.55, and the Protocol on its Interpretation by the Court of Justice, O.J. EUR. COMM., L304/1, 1978, art. 4.


91. Indeed, article 4 of the Brussels Convention had not been invoked at all as of December 31, 1982. F. Pocar, Codice delle convenzioni sulla giurisdizione e l'esecuzione delle sentenze straniere nella C.E.E. (1980, with update 1983).


France, for example, very seldom if at all sought enforcement of any article 14 judgments even in the years before the EEC Judgments Convention. (Nadelmann, supra note 17, at 1016.)

In Germany, even since the EEC Judgments Convention went into force on Feb. 1, 1973 section 23 has rarely been used. (McClellan & Kremlis, The Convention of September 27, 1968 on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 20 COMMON MKT. L. REV. 529-30 (1983)). Furthermore, no German section 23 judgment has
EEC states may well have been sincere in their recommendation vote. Quite simply, the consequences so feared by the legal and business community since the EEC Judgments Convention was published have not ensued. The hearts of the European Community members may not be in the perpetuation of exorbitant bases of jurisdiction against non-member states.

Italian courts have recently demonstrated a willingness to deny enforcement of decisions from countries with which Italy has recognition treaties when such enforcement would violate Italian public policy. Although the EEC Judgments Convention’s public policy exception does not apply to the rules relating to jurisdiction, the Italian Code of Civil Procedure prohibits recognition and enforcement of a foreign judgment inconsistent with Italian public policy.

In Wilson, Smithett & Cope Ltd. v. Terruzzi, the Corte di Cassazione refused to enforce an English decision because to do so would have been to enforce a contract which was in breach of Italian Exchange Control regulations. The Court of Appeals of Bologna has followed the Terruzzi case, again based upon the Exchange Control Regulations, in denying recognition to a French decision. These decisions do not pertain to exorbitant bases of jurisdiction, and it is not at all clear that any EEC member would invoke the public policy exception against their enforcement.

The EEC Judgments Convention has doubtless been of great
benefit to the EEC, despite persistent problems. This Convention is yet another sign of progress toward a stable, unified Western Europe. It has even been suggested that American negotiators would be making a mistake in trying to obtain revision of article 4, since this rule represents a step toward greater European cohesion, and thus a stability in this area, "a stability which is surely in the interests of the United States." This statement may be true, but in the opinion of this author, it puts the cart before the horse — Americans and other "outsiders" cannot wait for European stability to put an end to the threat of article 4.

V. The Need for Improvement

Although foreign judgments are routinely recognized by American courts, American judgments are more often denied recognition than enforced by foreign governments. Even in a time of progressive judicial relations among EEC states, most European courts recognize American judgments grudgingly if at all. Courts of various European states either reevaluate American decisions on the merits, completely refuse them recognition absent a treaty, or require proof of reciprocity. Such proof of reciprocity naturally must be made on the basis of common law decisions, and is difficult for a civil law judge to accept. Remarkably, despite our liberal policy in the enforcement of foreign judgments, American interests in Europe remain as threatened by the EEC Judgments Convention now as they were in 1968.

Few treaties have been concluded under article 59, none of

100. Mendes, supra note 9, at 104.
102. Carl, supra note 12, at 451; Nadelmann, supra note 53, at 1288-89.
103. In French civil law, such review was called révision au fond. This doctrine is described in G. DELAUME, AMERICAN-FRENCH PRIVATE INTERNATIONAL LAW, 2 PARKER SCHOOL OF FOREIGN AND COMPARATIVE LAW, BILATERAL STUDIES IN PRIVATE INTERNATIONAL LAW 161-65 (1961). This doctrine still exists in Belgium. Carl, supra note 12, at 451. Foreign decisions are no longer subject to révision au fond in France, however. Munzer v. Munzer-Jacoby, Cass. Civ. Ire, Fr., 1964.

In this case, the Cour de Cassation granted the execution of two foreign judgments. Plaintiff had obtained a New York divorce from defendant husband in 1926. In 1958, plaintiff again successfully sued defendant in New York. This suit was for 28 years of unpaid alimony. Defendant, meanwhile, had moved to Nice. The French Cour de Cassation enforced the New York decisions without reviewing them on their merits. The Court set forth five grounds for the enforcement: 1) that the foreign court had jurisdiction, 2) that regular procedure was followed, 3) that proper law was applied according to French rules for conflicts of law, 4) that the decision conformed with international public policy and 5) that the decision was free of fraud. 53 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVE (R.C.D.I.P.) 344 (1964).

104. Nadelmann, supra note 53, at 1288-89. The adoption by several states of versions of the Uniform Foreign Money Judgments Act (1962) may mitigate this reaction to some degree. However, such a result is merely speculative and would be limited to those states with the uniform legislation. See infra note 119 and accompanying text.
which involve the U.S. Americans had been optimistic, before the EEC Judgments Convention went into force, that several states would be inclined to negotiate treaties under article 59. This hope, however, has not been borne out. In general, little effort has been expended in negotiating treaties under article 59. Moreover, future negotiations will probably be difficult as few states share the same jurisdictional laws, and thus treaties will require much compromise. The recent convention between the United Kingdom and Canada should not dispel this impression, as the experience of the United States and United Kingdom demonstrated.

The United States' only effort to conclude an agreement under article 59 was an approach to the United Kingdom in the early seventies. An *ad referendum* text was initialled in 1976. The negotiations had been lengthy, and skillfully executed on both sides. However, differences between these two common law countries proved insurmountable, and on May 14, 1980, the British informed the State Department that, for the time being, an agreement could no longer be reached. Foremost among the vast differences between the United Kingdom and the United States lay British wariness of large American money judgments. This apprehension led the powerful British insurance industry to voice the most vehement and effective objections to the negotiated draft. In addition, the British wanted to except American antitrust judgments from the proposed agreement, which displeased American negotiators. In fact, the extraterritorial exercise of antitrust and competition powers by American courts and agencies had contributed significantly to a general decay in American-British forensic relations in recent years.

In response, the British have gone so far as to enact a retaliatory provision in this area. Obviously, a convention under article 59

---

105. Present research reveals that the only such treaty concerning the United States was never concluded. *See infra* notes 109-15 and accompanying text.

106. In fact, Germany and Norway had already done so by the time this Convention was signed. Nadelmann, *supra* note 53, at 1287.


110. von Mehren, *supra* note 54, at 1060 n.61.

111. *Id.*


113. *Id.* For an example as to why the United Kingdom desired this exception, see the I.C.I.-Dupont-Nylon Spinners cases, in which the English courts resisted an American attempt to enforce antitrust law extraterritorially. *J. Sweeney, C. Oliver & N. Leech, Cases and Materials on the International Legal System* 453-65 (2d ed. 1981).
would be no mean accomplishment even when negotiated between two friendly and jurisprudentially related nations.

Although the wording of article 59 makes it difficult to conclude effective agreements, there may be additional reasons behind the United States' failure to do so. The United States' very liberal approach in recognizing foreign judgments may have weakened the American bargaining position as to the EEC countries and article 59. There may have been overabundance of faith on the part of the United States that other states would follow the American practice of liberal recognition, and too little energy in the pursuit of protection from the EEC Judgments Convention's enforcement of exorbitantly based judgments. The ideal of comity is a worthy one, but this alone has not served to protect American litigants.

VI. Policy Recommendations

A different approach to the problem of enforcement of judgments by both American and foreign governments would markedly improve the United States' position. Eventually, the United States will be forced to conclude mutual recognition conventions with the EEC states, and the agreements must include article 59 obligations on the part of these states. Given this situation, two basic changes in the United States' policy would undoubtedly improve its leverage in the negotiation of these treaties. First, the United States must make greater efforts in this area. Second, the United States must adopt national legislation clarifying its position on exorbitant bases of jurisdiction, which state by state enactment of uniform legislation has failed to do.

European courts may be justifiably uneasy about accepting state, rather than federal, legislation as proof of reciprocity. Although sixteen states have adopted the Uniform Foreign Money Judgments Recognition Act, there has been a tendency on the part of some states to make changes in the act upon adoption. Europeans may still be suspicious of this mixed collection of statutes enacted by a minority of states, each in effect providing for reciprocity with only one fiftieth of the United States.

Thus, the United States should enact some form of federal reciprocity standard as a condition for its enforcement of foreign judg-

117. Id. at 1290-91.
118. Id.
119. UNIF. FOREIGN MONEY JUDGMENTS RECOGNITION ACT, 1962 13 Uniform Laws Annotated 261-75 (1962) [hereinafter UFMJRA]. The most substantial changes are reciprocity requirements by some states. Id. at § 4. Georgia also limits the possibility of recognition of "other bases of jurisdiction", i.e., those not specified in the UFMJRA to non-business contexts. O.C.G.A. §§ 9-12-110 to 9-12-117.
ments. The United Kingdom opted for this solution as early as 1933. In turn, a show of concern about this issue by the federal government would more likely inspire greater European receptiveness to American needs under article 4 of the EEC Judgments Convention.

Moreover, the United States has other bargaining tools at its disposal. Certain American common law bases of jurisdiction are as troublesome to the civil law attorney as exorbitant bases of jurisdiction are to the common law attorney. The United States could seek to reach an agreement limiting judgments against EEC domiciliaries based upon common law transient jurisdiction, or jurisdiction over a corporation “doing business” in a forum state, in exchange for similar limitations upon the use of EEC article 4.

A bilateral convention under article 59 is the most obvious and straightforward objective which the U.S. could pursue. One proposal has suggested that the conclusion of “shell,” or “most favored nation” conventions, would be most useful in this context. A “shell” convention would simply contain two components. First, there would be an agreement to recognize and enforce the other country’s judgments to the same extent as any other country’s judgment would be recognized and enforced. Second, there would be an agreement not to recognize exorbitantly based judgments. By virtue of their simplicity, these “shell” agreements could be concluded without any difficulty. “Shell” agreements have the potential of being challenged as falling short of being “conventions on the recognition and enforcement of judgments” within the proper meaning of article 59. However, these agreements would probably withstand such a challenge in the EEC Court of Justice.

Multilateral conventions provide an improbable solution, as much more effort would be required for their negotiation than the United States has been willing to make thus far. Furthermore, it is likely that any such convention would, like the Hague Draft, be unable to engender the support of the EEC countries unless exorbitant bases of jurisdiction were not barred by its terms. Nor does a revival of the Hague draft appear feasible. Although the United States, Sweden and the United Kingdom reserved the right to reopen discussion of the relation between the Supplementary Protocol and the

120. See Foreign Judgments (Reciprocal Enforcement) Committee Report, 1932 CMD No. 4213; and Foreign Judgments (Reciprocal Enforcement) Act, 1933, 23 & 24 Geo. 5, ch. 13, § 9, as cited in Nadelmann, supra note 52, at 1290.
121. The “doing business” test is not a sufficient ground for jurisdiction in civil law. See Carl, supra note 12, at 447.
122. Kerr, supra note 4, at 357.
123. Id.
Hague Draft, the United Kingdom is now a member of the EEC, and thus it would be inconsistent for it to support a mandatory protocol. In any case, the best efforts of Sweden and the United States would not be sufficient to overcome the will of the EEC, now far larger than it was when it commanded a majority vote at the Hague in 1966. The Hague Draft would thus provide an unsatisfactory solution when confronted with the EEC Judgments Convention.

VII. Conclusion

Even Europeans consider exorbitant bases of jurisdiction to be unfair. This is clear both from their long tradition of treaty making and from the fact that the EEC Judgments Convention protects EEC domiciliaries from their use. Yet the EEC Judgments Convention perpetuates the potential of exorbitantly based decisions against parties domiciled outside the EEC. As yet, the fears of non-member states over the past two decades have gone unrealized. Though no EEC country has yet enforced an exorbitantly based judgment, the Community itself has intentionally kept that possibility alive. As the EEC becomes larger, the potential threat of the EEC Judgments Convention’s exorbitantly based jurisdiction grows proportionately.

It is thus imperative that the interests of international commerce and individual rights be protected against bases of jurisdiction which the EEC member states themselves regard as intolerable. The conclusion of bilateral agreements under article 59 of the EEC Judgments Convention is currently the only vehicle by which non-member states can protect those domiciled outside the EEC. In addition to pursuing these agreements, the United States should adopt a clear, unified position from which to negotiate. Given the general dormancy of exorbitant bases of jurisdiction in the EEC, perhaps a renewed and vigorous pursuit of protective agreements will not be unrewarded.

124. See supra note 71 and accompanying text.
125. See supra notes 68-69 and accompanying text.
126. See supra note 4.