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# THE CASE FOR FEDERALIZING RULES OF CIVIL JURISDICTION IN THE EUROPEAN COMMUNITY†

*Peter Hay\**

## I. THE LIMITS OF JUDICIAL JURISDICTION IN NON-UNIFIED FEDERAL SYSTEMS

### A. *The Rationale for Federal Limits*

The European Community is an "incipient federal structure,"<sup>1</sup> even if its scope of operation is limited in subject matter and its creation derives from "a network of treaties rather than [from] a formal constitution."<sup>2</sup> A federal structure at once protects, even nurtures, pluralism and coordinates the constituent units in the interest of a union.<sup>3</sup> Federal legislation promotes the interests of the larger unit; a limitation of powers in the constitutive document preserves the integrity of the members. In the American federation, the United States Supreme Court defines the balance between the reach of state and federal law. The balance, moreover, shifts over time as new or different concerns call for accommodation. In so doing, the Court not only deals with direct attacks on state or federal legislation or with problems of interpretation (or gap filling) raised by new or different concerns, but also performs a creative function. In the fashion of a common law court, it develops the law either by creating "federal common law" or by declining to do so, in the latter case thus preserving or extending the applicability of state law. Even when it does develop federal common law, the Court may derive the new federal rule from state law rather than fashioning one anew.<sup>4</sup>

The Court of Justice of the European Communities renders binding decisions in direct actions challenging the validity of Community legislation or administrative action,<sup>5</sup> thus contributing to the definition and develop-

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† It is with thanks and affection that I dedicate this essay to Eric Stein, who first introduced me to European Community law when he appointed me his research assistant in 1957. His contribution to teaching and scholarship has been singular and has earned him the respect of the profession around the world. Many of us owe him much more: for his help and support in our personal and professional development and for his friendship over the years.

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1. Stein, *Treaty-Based Federalism, A.D. 1979: A Gloss on Covey T. Oliver at the Hague Academy*, 127 U. PA. L. REV. 897, 901, 905 (1979); see also P. HAY, *FEDERALISM AND SUPRANATIONAL ORGANIZATIONS* 1-202 *passim* (1966).

2. Stein, *supra* note 1, at 901.

3. See Hay, *Full Faith and Credit and Federalism in Choice of Law*, 34 MERCER L. REV. 709, 722-27 (1983). On unified versus non-unified federal systems, see *id.* at 724-25.

4. See E. SCOLES & P. HAY, *CONFLICT OF LAWS* 133-48, particularly at 138-40 (1982).

5. See generally G. BEBR, *DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COM-*

ment of Community law. It can also render a preliminary ruling (under article 177 of the EEC Treaty)<sup>6</sup> on the interpretation of a question of Community law when such a question is relevant to the decision of a case pending before a national court and that court has referred the question to the Court of Justice.<sup>7</sup> In article 177 cases, the Court technically answers only a question put to it for purposes of a specific case pending in another (a national) court. However, "as the case law of the European Court becomes more abundant . . . national judges [may be expected] increasingly to follow a similar approach whether the 'precedent' is to be found in a judgment in a 'direct action' or in a ruling of the Court under article 177."<sup>8</sup> As in a common law system, the Court's influence thus extends beyond the particular case; its decisions serve as sources of Community law.<sup>9</sup>

Technically, perhaps, interpretation of a statutory text and even gap filling (the latter deriving from *some* pre-existing legislative action) are different from judicially declared rules of law (federal common law) in which a court takes the initiative. This difference, however, must not be overstated. In all cases, there must exist federal authority to adopt the statute, to extend a statutory rule through gap filling, or to bring a subject matter within the federal domain so that a federal rule can be fashioned for it.<sup>10</sup> The real difference between federal common lawmaking in the United States and in the Community may therefore lie in the respective extent to which there exists authority in the first place to extend the reach of federal law.

The European Court has made some Community (federal) law, primarily in the "constitutional" area. Thus, it "discovered . . . [a supremacy clause] in the interstices of the new legal order,"<sup>11</sup> undertook to extend the Community's treaty-making power,<sup>12</sup> declared the direct effect of directives,<sup>13</sup> and set itself up as "guardian of fundamental rights within the

MUNITIES, Pt. 2B (1981); E. STEIN, P. HAY & M. WAELEBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE* 145-69 (1976).

6. Treaty establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 (1958) [hereinafter cited as EEC Treaty].

7. G. BEBR, *supra* note 5, at 366; E. STEIN, P. HAY & M. WAELEBROECK, *supra* note 5, at 261-74.

8. Lord MacKenzie Stuart & Warner, *Judicial Decision as a Source of Community Law*, in *EUROPÄISCHE GERICHTSBARKEIT UND NATIONALE VERFASSUNGSGERICHTSBARKEIT* 273, 281 (W. Grewe, H. Rupp & H. Schneider eds. 1981); *see also* Bebr, *Preliminary Rulings of the Court of Justice: Their Authority and Temporal Effect*, 18 *COMMON MKT. L. REV.* 475 (1981); Hartley, *The Effects in National Law of Judgments of the European Court*, 5 *EUR. L. REV.* 366 (1980).

9. Lord MacKenzie Stuart & Warner, *supra* note 8, at 281.

10. E. SCOLES & P. HAY, *supra* note 4, at 133-37.

11. Stein, *supra* note 1, at 902. The Court first articulated the supremacy doctrine in *Costa v. ENEL* (Case No. 6/64), 1964 *E. Comm. Ct. J. Rep.* 585 (Preliminary Ruling). Its most complete statement of the doctrine is now found in *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (Case No. 106/77), 1978 *Comm. Ct. J. Rep.* 629 (Preliminary Ruling). The U.S. Supreme Court similarly derives rules from the "principles of interstate federalism embodied in the Constitution," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980), or, in the case of the act of state doctrine, bases the result on "'constitutional' underpinnings," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

12. Stein, *supra* note 1, at 903; *see also* van Houtte, *International Law and Community Treaty-Making Power*, 3 *NW. J. INTL. L. & BUS.* 621 (1981).

13. G. BEBR, *supra* note 5, at 584-88.

Community legal order."<sup>14</sup> The Court's case law thus promoted the goals of integration and the efficacy of Community law, while simultaneously safeguarding individual rights against governmental action.

These developments are not surprising. They define and refine the relationship of the Community to its members and the role of the Court in the constitutional framework. Once the nature of the Communities as incipient federal structures and the notion of treaty-based federalism<sup>15</sup> are accepted, it follows that Community *public* law will evolve as in any federal structure.

Private law is the law of the individual states in the European Community, as it is for the most part<sup>16</sup> in the American union. An American<sup>17</sup> or European common market, however, requires some coordination of private law, that is, of the legal business that goes on in constituent states. In the United States, the due process clause of the fourteenth amendment sets outer limits on the exercise of state court jurisdiction and on a state court's freedom to apply local law to parties and to a cause of action with no or only minimal connection with the forum.<sup>18</sup> Further, the full faith and credit clause<sup>19</sup> secures the free movement of judgments rendered by a court with proper jurisdiction.

The Community has no due process clause. It sets no standard against which the exercise of state court jurisdiction (or the application of forum law) may be measured and, if improper, voided.<sup>20</sup> A "full faith and credit"

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14. *Id.* at 649; *see also id.* at 649-57; note 96 *infra*.

15. Stein, *supra* note 1, *passim*.

16. Federal common lawmaking does affect some areas of private law in the United States, *see* E. SCOLES & P. HAY, *supra* note 4, at 137-48, but does not represent a comprehensive body of law.

17. "In the Commerce Clause, [the framers] provided that the Nation was to be a common market, a 'free trade unit' in which the States are debarred from acting as separable economic entities." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980).

18. E. SCOLES & P. HAY, *supra* note 4, at 79-102.

19. U.S. CONST. art. IV, § 1.

20. In a sense, however, the Community does achieve some results essentially similar to those that flow from the due process limitation in the United States. Thus, the Convention on Jurisdiction and Enforcement of Judgment in Civil and Commercial Matters, Sept. 27, 1968, art. 3, para. 2, BULL. EUR. COMM., Supp. 2/69, at 17 [hereinafter cited as Jurisdiction and Recognition Convention] lists those jurisdictional rules (also known as "exorbitant" jurisdictional bases) that may no longer be invoked in order to obtain jurisdiction over defendants domiciled within the Community. Among these are jurisdiction based on the presence of property for a claim unrelated to that property (German Code of Civil Procedure, ZPO § 23) and the French nationality of a plaintiff suing a foreign defendant in French courts. The Convention is in force among the original six members of the Communities. The Accession Convention of 1978, 21 O.J. EUR. COMM. (No. L 304) 1 (Oct. 30, 1978) (not yet in force), provides for the accession of Denmark, Ireland and the United Kingdom. Ratification will result in the addition of a prohibition on the exercise of jurisdiction by service of process upon a person (transient jurisdiction). On exorbitant rules of jurisdiction, *see* Weser, *Bases of Judicial Jurisdiction in the Common Market Countries*, 10 AM. J. COMP. L. 323, 324-28 (1961).

The prohibitions of article 3(2) do provide due process standards: even though contained in an interstate *recognition* convention, the prohibitions of article 3(2) are domestic law in each of the six original member states and thus bar the assertion of jurisdiction on one of the prohibited grounds even when extrastate recognition is not in issue (for instance, when there exists local property sufficient to satisfy any judgment). Nevertheless, the prohibitions of article 3(2) are fixed. The American due process clause — with no fixed content — is perhaps more adaptable as different needs and problems of community building evolve. It is perhaps the lack of

requirement, however, does provide that judgments rendered in the exercise of specified jurisdictional bases are entitled to recognition and enforcement in other Community countries.<sup>21</sup> The proper assertion of jurisdiction thus is not a prerequisite for in-state validity under a federal due process standard as in the United States, but it is a prerequisite for mandatory<sup>22</sup> out-of-state recognition.

The full faith and credit requirement is a matter of federal law in the United States and of Community law in Europe.<sup>23</sup> And since the requirement of recognition and enforcement of a sister state's judgment depends on the rendering state's proper exercise of jurisdiction, this question — what makes for jurisdiction? — itself becomes a question of federal law for recognition purposes. Were it otherwise, that is, if it were up to the individual state to specify the reach of its judicial jurisdiction, each state would be in a position to affect and define other states' obligations to recognize and enforce its judgments. Yet a full faith and credit requirement represents a federal ordering of the interstate common market in judgments. It follows that the precondition to the federal requirement cannot be left to the unilateral action of those whose relations are to be ordered and whose divergent interests are to be accommodated.

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such a general device that underlies some of the problems with the proper interpretation of article 5(1). See text following note 40 *infra*.

21. See Bartlett, *Full Faith and Credit Comes to the Common Market: An Analysis of the Provisions of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters*, 24 INTL. & COMP. L. Q. 44 (1975).

22. Bilateral recognition conventions usually leave the treaty parties free also to recognize judgments rendered on jurisdictional bases other than those provided by the convention. See, e.g., London (July 1976) Draft of a proposed U.S.-U.K. recognition-of-judgments convention art. 3 (not in force) reproduced in Hay & Walker, *The Proposed Recognition-of-Judgments Convention Between the United States and the United Kingdom*, 11 TEX. INTL. L.J. 421, 453 (1976). In the Community, the Brussels Convention proscribes specified exorbitant rules of jurisdiction (article 3), provides certain special jurisdictional bases in article 5 (e.g., for contract and tort), and establishes specific rules for insurance (articles 7-12), credit sales (articles 13-15), and cases of exclusive jurisdiction (article 16). Thus, there is no room for further discretionary recognition and, as mentioned earlier, less need than in the United States for additional controls by means of a due process clause. See note 20 *supra*.

23. Spellenberg, *Das Europäische Gerichtsstands- und Vollstreckungsbereinkommen als Kern eines Europäischen Zivilprozessrechts*, 15 EuR 329, 339, 347 (1980), suggests that the Jurisdiction and Recognition Convention, *supra* note 20, does not represent "real" Community law but rather is a traditional international treaty, the interpretation of which should respect national interests and not intrude into concerns of national substantive law. This suggestion accords no or too little weight to the fact that the Convention represents the implementation of the mandate of EEC Treaty, *supra* note 6, art. 220, that "Member States shall . . . enter into negotiations . . . with a view to ensuring for the benefit of their nationals: . . . the reciprocal recognition of judicial decisions . . ." The Convention thus is very much part of the whole process of Community building — a process that also explains why the 1971 Protocol on the Interpretation by the Court of Justice of the Jurisdiction and Enforcement of Judgments Convention, June 3, 2 COMMON MKT. REP. (CCH) ¶ 6081 [hereinafter cited as Protocol], in force since September 1, 1975 as among the six original members, confers jurisdiction on the European Court of Justice to give preliminary rulings on the interpretation of the Convention in a manner akin to proceedings under EEC Treaty article 177. See note 7 *supra*. See also text at notes 38-39 *infra*.

### B. *The U.S. and the European Experience*

In the United States, review of jurisdiction for full faith and credit purposes is readily understood as involving a question of federal law,<sup>24</sup> perhaps because review of jurisdiction *generally* — i.e., on due process grounds for in-state validity — is also an accustomed federal function. Federal review for either purpose (due process or full faith and credit) does not necessarily mean that a completely new rule will be fashioned.<sup>25</sup> Rather, as mentioned earlier, an existing rule of state law may be adopted as the federal standard<sup>26</sup> or state law may be left undisturbed — not because it “applies” of its own force but because the outer limits set by federal law as part of its interstate ordering function have not been transgressed.<sup>27</sup>

The European Court similarly is called upon to interpret the Community’s full faith and credit requirement in the interest of the uniform interpretation and application of the Jurisdiction and Recognition Convention (in response to a referral similar to one under article 177 of the EEC Treaty).<sup>28</sup> However, it has an uneven record in giving a federal meaning to the jurisdictional prerequisites of that requirement. Thus, in tort, the Convention provides for the recognition of judgments<sup>29</sup> rendered in the state “where the harmful event occurred.”<sup>30</sup> The phrase was deliberately left ambiguous in order “to overcome a fundamental disagreement whether jurisdictional competence in tort cases should be accorded to the courts of the place where the defendant ‘acted’ or to those of the place where the plaintiff sustained injury (where these lie in separate countries).”<sup>31</sup> The ambiguity could have been resolved by the Court in the same way in which it had dealt with the term “performance” in the contract section (to be discussed presently): leave it to the choice of law rules of the forum to localize the tort and recognize the exercise of jurisdiction by the state whose substantive law governs the tort. The result would have been — depending on the specific facts of a case — that one or two states, or even none, might have had jurisdiction. In any event, there would not have been a Community-wide

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24. *See* *Williams v. North Carolina*, 325 U.S. 226, 231 n. 7 (1945) (“Since an appeal to the Full Faith and Credit Clause raises questions arising under the Constitution . . . , the proper criteria for ascertaining domicile [the jurisdictional basis needed for ex parte divorce jurisdiction], . . . become matters for federal determination.”); *see also* *State ex rel. White Lumber Sales, Inc. v. Sulmonetti*, 252 Or. 121, 130, 448 P.2d 571, 575 (1968) (“[O]ne form of jurisdictional allocation is found in the full faith and credit clause . . . .”) (O’Connell, J., dissenting). *Cf.* *Wilson v. Kimble*, 573 F. Supp. 501, 503 (D. Colo. 1983) (When the existence of diversity for federal jurisdiction depended on whether the minor plaintiff’s domicile derived from her mother or her father, the determination had to be made “by reference to federal common laws.”) (citing *Stifel v. Hopkins*, 477 F.2d 1116, 1120 (6th Cir. 1973)).

25. *See* E. SCOLES & P. HAY, *supra* note 4, at 138-40.

26. *See* *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 729 (1979) (discussed in E. SCOLES & P. HAY, *supra* note 4, at 139 n.9).

27. *E.g.*, *Williams v. North Carolina*, 325 U.S. 226, 236-37 (1945).

28. *See* Protocol, *supra* note 23.

29. The Jurisdiction and Recognition Convention, *supra* note 20, provides for jurisdiction — for most personal actions — in the state of the defendant’s domicile (article 2), and then adds — for particular causes — “special” jurisdictional bases (articles 5-18).

30. Jurisdiction and Recognition Convention, *supra* note 20, art. 5(3).

31. I. FLETCHER, *CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW* 125 (1982).

rule. The Court did not choose this course. Instead, it provided its own interpretation of the provision, thus substituting a uniform rule for potentially divergent national approaches. The rule adopted does not select one of the two possible fora to the exclusion of the other, but rather — in keeping with modern, plaintiff-favoring choice-of-law rules in tort<sup>32</sup> — permits the plaintiff to sue in either state.<sup>33</sup> Similarly, the Court has developed extensive case law on the requirements of article 17 permitting parties to enter into choice-of-court clauses,<sup>34</sup> has held that a forum selection clause does not mean that the parties cannot also voluntarily submit to jurisdiction elsewhere,<sup>35</sup> has defined quite clearly what constitutes a branch, agency, or other dependent establishment for purposes of jurisdiction under article 5(5),<sup>36</sup> and has brought maintenance claims between spouses within the scope of the Convention.<sup>37</sup>

## II. THE PROBLEM ILLUSTRATED: JUDICIAL JURISDICTION IN CONTRACT

As the foregoing discussion shows, the European Court of Justice's decisions show consistent efforts to establish uniform rules of jurisdiction as part of the mandate to accord recognition to judgments properly rendered. The Court stated that the Convention's mandates override inconsistent national law<sup>38</sup> — a position consistent with its view of the supremacy of the EEC Treaty.<sup>39</sup> It is all the more surprising, then, that the Court should have left the jurisdictional rules relating to contract in their present uncertain state.

The provision at issue is article 5(1) of the Jurisdiction and Recognition Convention, which specifies that, in addition to being subject to suit at his

32. E. SCOLES & P. HAY, *supra* note 4, at 605.

33. *See* Bier B.V. v. Mines de Potasse d'Alsace S.A. (Case 21/76), 1976 E. Comm. Ct. J. Rep. 1735 (Preliminary Ruling); McClellan, *The Convention of Brussels of September 27, 1968 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters*, 15 COMMON MKT. L. REV. 228, 236 (1978).

34. *See* McClellan, *Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters in the European Communities*, 16 COMMON MKT. L. REV. 268, 274 (1979); 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, 547 (1983). The Accession Convention of 1978 between the six original members and the three new members, not yet in force, contains amendments to article 17 relaxing the formal requirements contained in that provision and strictly construed by the Court. *See* Schlosser, Report on the Convention, 22 O.J. EUR. COMM. (No. C 59) 71, 124 (Mar. 5, 1979). A second Accession Convention, adding Greece, was signed in October 1982, but is also not yet in force. *See* Convention on the Accession of the Hellenic Republic to the Convention on jurisdiction and enforcement of judgments in civil and commercial matters, 82/972/EEC, 25 O.J. EUR. COMM. (No L 388) 1 (Dec. 31, 1982); Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 26 O.J. EUR. COMM. (No. C 97) 2 (Apr. 11, 1983).

35. McClellan & Kremlis, *supra* note 34, at 552-53.

36. Blanckaert & Willems PVBA v. Trost (Case No. 139/80), 1981 E. Comm. Ct. J. Rep. 819 (Preliminary Ruling).

37. De Cavel v. De Cavel (Case No. 120/79), 1980 E. Comm. Ct. J. Rep. 731 (Preliminary Ruling).

38. Sanicentral GmbH v. Collin (Case No. 25/79), 1979 E. Comm. Ct. J. Rep. 3423, 3429 (Preliminary Ruling); Duijnste v. Goderbauer (Case No. 288/82), 1984 COMMON MKT. REP. (CCH) ¶ 14,034 (Ct. J. Eur. Comm. Nov. 15, 1983), *digested in* 1983 ECJR 125.

39. *See* note 11 *supra*.

domicile,<sup>40</sup> a defendant may also be sued, "in matters relating to a contract, in the court for the place of performance of the obligation in question." Since bilateral contracts will involve obligations on both sides, one interpretive problem concerns the definition of the relevant obligation. A further question is how the "place of performance" of the relevant obligation should be defined.

A. *What is the Relevant "Obligation"?*

1. *The Obligation at Issue in the Litigation*

In *DeBloos v. Bouyer*,<sup>41</sup> the Court of Justice held that the term "obligation" in article 5(1) refers to the contractual obligation forming the basis of the legal proceedings. It is the purpose of the Convention, the Court noted, not to permit situations in which a number of courts have jurisdiction in respect of one and the same contract. Thus, a forum should not have jurisdiction when it has contact with just any obligation arising under the contract in question, but only if the obligation to be performed in the forum is the one on which the plaintiff bases his claim.<sup>42</sup> In *DeBloos*, a Belgian distributor sought compensation in a Belgian court from his French supplier for terminating the distributorship agreement in violation of the Belgian statutory notice requirement. What is the nature of his compensation claim: is it an "independent" (*i.e.*, primary) claim or is it ancillary to the notice requirement? That, said the Court in *DeBloos*, is a matter for determination by the national court under its conflicts rules. Under French conflicts law, Belgian law was applicable to the distributorship agreement. But Belgian law was unclear on the proper characterization of the claim, with the result that the tie-in between "obligation" and "performance" (to be discussed) might lead to contradictory results. If the obligation to provide compensation is independent, it has to be performed at the debtor's (supplier's) domicile. In contrast, if it is ancillary to the main obligation to give notice, it — like notice — should have been performed at the distributor's domicile.<sup>43</sup>

The Court's view has been criticized on several grounds. One argument is that splitting the contract into various obligations may bring into play the whole range of differences among national conflicts rules, since the law applicable to the contract will determine whether an obligation is to be characterized as a primary or secondary obligation.<sup>44</sup> National conflicts rules with respect to the sale of goods display at least four different approaches.

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40. See note 29 *supra*.

41. (Case No. 14/76), 1976 E. Comm. Ct. J. Rep. 1497 (Preliminary Ruling).

42. Both the German and the Italian Codes of Civil Procedure support this interpretation. See ZPO § 29; C.P.C. art. 20. While not determinative of the content of the "federal" standard, agreement in national law (or state law in the United States) may obviate the need for a different federal rule. See note 26 *supra* and accompanying text.

43. Ledoux, *Les concessions de vente en Belgique et les règles de compétence de la C.E.E.*, 70 JT 217 (1975).

44. See Linke, *Besondere Zuständigkeiten: Vorbemerkungen*, in DER INTERNATIONALE RECHTSVERKEHR IN ZIVIL- UND HANDELSACHEN § 606, at 59 (A. Bülow & K.-H. Böckstiegel eds. 1983); Spellenberg, *Der Gerichtsstand des Erfüllungsortes im Europäischen Gerichtsstands- und Vollstreckungsübereinkommen*, 91 ZEITSCHRIFT FÜR ZIVILPROZESS 38, 51 (1978).



In France, Belgium and Italy, the Hague Convention of June 15, 1955 is in force which, in the absence of a contrary stipulation between the parties, refers to the law of the seller's habitual residence as governing the obligation.<sup>45</sup> The Netherlands refers to the law of the place of contract formation,<sup>46</sup> the Federal Republic of Germany applies the law of the place of performance,<sup>47</sup> and the United Kingdom uses the proper law of the contract.<sup>48</sup> It is thus obvious that different fora may reach different conclusions when they consider where a "primary" obligation is to be performed. Illustratively, if the Belgian court in *DeBloos v. Bouyer*<sup>49</sup> had applied French law and if French law had characterized the claim as "ancillary," Belgium would have been the place where the principal obligation was to be performed and its courts would have jurisdiction under article 5(1). If a Belgian judge applying Belgian law were to arrive at an "independent" or "primary" characterization, neither Belgian nor French courts would have jurisdiction: each would consider jurisdiction to lie with the other. If one reverses the characterization (under French law the obligation is primary, while under Belgian law the obligation is secondary), a cumulation of courts with article 5 jurisdiction would result.<sup>50</sup>

Similarly, there may be multiple fora or there may be none with article 5(1) jurisdiction when money debts are involved. In Italy,<sup>51</sup> the Netherlands,<sup>52</sup> and the United Kingdom,<sup>53</sup> a monetary obligation is to be performed at the domicile of the creditor.<sup>54</sup> The other members — France, Belgium, Luxembourg, and Germany — provide for performance at the debtor's domicile.<sup>55</sup> A hypothetical may serve to illustrate: a German

45. Convention of the Law Applicable to International Sales of Goods, June 15, 1955, 510 U.N.T.S. 147 (1964). The Convention is also in force in Denmark, one of the states to accede to the Convention.

46. O. SANDROCK, 1 HANDBUCH DER INTERNATIONALEN VERTRAGSGESTALTUNG 158 (1980).

47. O. SANDROCK, *supra* note 46, at 117.

48. O. SANDROCK, *supra* note 46, at 171; see also Droz, *L'interprétation, par la Cour de justice des Communautés, des règles de compétence judiciaire européennes en matière de contrat*, 1977 DALLOZ (Chronique) 287, 292. The same rule applies in Greece. See CODE CIVIL HELLÉNIQUE art. 25.

49. See text accompanying notes 41-43 *supra*.

50. In its decision of May 3, 1977, the Belgian Cour d'Appel de Mons, 92 JT 637 (1977), held that the duty to pay damages constituted an independent obligation. This would ordinarily have meant that jurisdiction lay with French courts. The Belgian court, however, affirmed its own jurisdiction because two of the three claims involved in the action bore a relationship to Belgium, and article 22 of the Convention permits connected claims to be decided by the same tribunal. This approach was subsequently disapproved in *Schuh GmbH v. Jacquain* (Case No. 150/80), 1981 E. Comm. Ct. J. Rep. 1671 (Preliminary Ruling).

51. C.C. art. 1182(3).

52. B.W. art. 1429(2).

53. See J. CHITTY, 1 CHITTY ON CONTRACTS ¶ 1419 (25th ed. 1983).

54. The rule is the same in Denmark, Lyngsø, *General Law of Obligations*, in H. GAMMELTOFT-HANSEN, B. GOMARD & A. PHILIP, DANISH LAW 119, 122 (1982), and probably also in Ireland, O. SANDROCK, *supra* note 46, at 180.

55. CODE CIVIL DE LA FRANCE art. 1247; CODE CIVIL BELGE art. 1247; CODE CIVIL DU LUXEMBOURG art. 1247; BGB § 269 (W. Ger.). The rule is the same in Greece. See CODE CIVIL HELLÉNIQUE art. 320. However, in Belgium, France, and Germany the Uniform Law on the International Sale of Goods is in force, as it is also in the Netherlands and the United

buyer sues an Italian seller in Germany for damages arising from an alleged breach of contract. Under the applicable German law, money debts have to be paid at the debtor's domicile. German courts, therefore, do not have jurisdiction. Italian courts also lack jurisdiction, if they apply Italian law and conclude that money debts are to be paid at the creditor's domicile. If, on the other hand, the German court had jurisdiction over the buyer's claim for damages and the seller sued for the contract price in Italy, the decision in *DeBloos*<sup>56</sup> would again result in an undesirable cumulation of jurisdiction.

## 2. *The Most Characteristic Obligation*

A number of authors suggest that money debts should be disregarded as "obligations," the performance of which confers jurisdiction within the meaning of article 5(1), precisely because money can be paid at so many different places. A principal reason for providing for jurisdiction at the place of performance of an obligation is the close connection between the performance and the availability of evidence, witnesses, expert opinions, and the like. Such a connection may not exist in the case of monetary obligations.<sup>57</sup>

The suggestion that the obligation to pay money be excluded as a place of performance for jurisdictional purposes is very much in tune with contemporary developments in European conflicts law, which adopt references to the place of the "closest connection"<sup>58</sup> or, in contract, to the place of performance of the obligation that is *characteristic* of the transaction.<sup>59</sup> The 1980 Convention of the European Communities on the Law Applicable to Contractual Obligations (not yet ratified)<sup>60</sup> takes the same approach. With respect to the topic under discussion, the two approaches coincide: in

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Kingdom. For cases involving transactions between parties in different member states, article 59 provides for payment at the seller's place of business or, if there is none, at his habitual residence. See von Cammerer, *Pflichten des Käufers*, in KOMMENTAR ZUM EINHEITLICHEN KAUFRECHT 349, 361 (H. Dölle ed. 1976).

56. See notes 41-43 & 49 *supra*.

57. Linke, *supra* note 44, § 606, at 49; Spellenberg, *supra* note 44, at 56; Droz, *Note*, 65 R.C.D.I.P. 120, 125 (1976); see also Schlechtriem, *Auslegung und Lückenfüllung im Internationalen Einheitsrecht: "Erfüllungsort" für Rückabwicklungspflichten im EuGVÜ und EKG*, 1 IPRAX 113 (1981). Schlechtriem criticizes the reference to national law on the ground that it places an undue burden on debtors to have to bear the risk of loss and delay in money transfers as well as to be subject to jurisdiction at the creditor's place of business. See *id.* at 114.

58. E. SCOLES & P. HAY, *supra* note 4, at 47; *Entwurf eines Gesetzes zur Neuregelung des Internationalen Privatrechts*, 3 IPRAX 254, 258 at art. 28(1) (1983) (German Draft Statute for the Reformulation of Private International Law) [hereinafter cited as German Draft Statute]; Hungarian Statute on Private International Law of 1979 § 25.

59. See CODE DE PROCÉDURE CIVIL art. 46 (Fr. 1976) (jurisdiction at the place of the characteristic obligation); German Draft Statute, *supra* note 58, art. 28(2); Switzerland: Draft Statute on Private International Law arts. 120-21, 42 RABELSZ 716, 739 (1978) (art. 115 of the 1982 version of the Draft Statute); see also Austrian Statute of 1978, § 36, BUNDESGESETZBLATT 1978, No. 304 at 1732-33.

60. 23 O.J. EUR. COMM. (No. L 266) 1 (Oct. 9, 1980), art. 4 [hereinafter cited as Contract Choice of Law Convention]. For discussion, in the context of an earlier draft, see d'Oliveira, "Characteristic Obligation" in the Draft EEC Obligation Convention, 25 AM. J. COMP. L. 303 (1977).

most cases the payment of money is not characteristic of the contract<sup>61</sup> and, as a result, does not have the close connection to the forum that is the premise underlying article 5(1). Adoption of a "characteristic obligation" approach<sup>62</sup> by the European Court of Justice would have the advantage that all litigation with respect to the contract would be concentrated at the place where the characteristic obligation has to be performed. It is a separate question whether the definition of this criterion should be left to national courts or be undertaken by the Court itself. As stated initially,<sup>63</sup> the definition of jurisdictional standards for recognition purposes is a federal function. The Court should either undertake such a definition or, as in other cases,<sup>64</sup> perform its federal function through its oversight in referral cases.

## B. Place of Performance

### 1. The National Law Interpretation: The Shortcomings of Tessili

Further uncertainty with respect to the interpretation of the "place of performance" in article 5(1) adds to the confusion. In *Tessili v. Dunlop*,<sup>65</sup> the European Court of Justice held that that phrase is to be interpreted by reference to the law applicable to the contract as determined by the conflicts law of the forum. National laws differ considerably in their definition of the place of performance.<sup>66</sup> Thus, there was no way to find a common solution and the definition of a community rule may have been rejected as an alternative because its substitution for the rules of national law may have been considered inappropriately intrusive.<sup>67</sup>

A principal substantive argument advanced in support of the national-applicable-law approach of *Tessili* (the "*lex causae*" solution) is the concern

61. See E. COLES & P. HAY, *supra* note 4, at 696-98 and references cited therein.

62. Droz, *supra* note 57, at 125; Huet, *Note*, 104 CLUNET 714, 717 (1977); Linke, *supra* note 44, § 606, at 59; Spellenberg, *supra* note 44, at 56, 58.

63. See text at notes 23-27 *supra*.

64. See, e.g., *Martin Peters Bauunternehmung GmbH v. Zuid Nederlandse Aannemers Vereniging* (Case No. 34/82), 1983 E. Comm. Ct. J. Rep. 987 (Preliminary Ruling) (obligation of a member of an unincorporated association to pay money is an obligation within the meaning of article 5(1) even if it derives from a decision by the association rather than from the membership agreement). For criticism see the annotation by Schlosser, *Europäisch-autonome Interpretation des Begriffs "Vertrag oder Ansprüche aus einem Vertrag" i.S.v. Art. 5 Nr. 1 EuGVÜ?*, 4 IPRAX 65 (1984).

65. *Industrie Tessili Italiana Como v. Dunlop AG* (Case No. 12/76), 1976 E. Comm. Ct. J. Rep. 1473 (Preliminary Ruling).

66. In Belgium (CODE CIVIL arts. 1247, 1609), Denmark (Lyngsø, *supra* note 54, at 121), France (CODE CIVIL arts. 1247, 1609), Greece (CODE CIVIL art. 320), Germany (BGB § 269), Italy (C. c. art. 1182(4)), the U.K. (see J. CHITTY, *supra* note 53, at ¶ 1419), and Ireland (Sale of Goods Act § 29(2)), the place of performance for delivery of goods is at the debtor's domicile. In the Netherlands, goods have to be delivered at the creditor's domicile. B.W. arts. 1429(2), 1513. However, the determination of the domicile in point of time differs: it is the domicile of the time of contract formation in Germany and the Netherlands, but the domicile at the time of performance in Belgium, France and Italy. Special rules apply when goods are unique. See generally Schlosser, *Vertragsautonome Auslegung, nationales Recht, Rechtsvergleichung und das EuGVÜ*, in GEDÄCHTNISSCHRIFT FÜR RUDOLF BRUNS 45-56 (J. Baltzer, G. Baumgärtel, E. Peters & H. Pieper eds. 1980); Spellenberg, *supra* note 23, at 59.

67. Martiny, *Autonome und Einheitliche Auslegung im Europäischen Internationalen Zivilprozessrecht*, 45 RABELSZ 427, 434 (1981).

that an autonomous concept of the place of performance might lead to a place which, in fact, differs from the real place of performance. In the view of some authors, this would defeat the reason for providing an alternative to domiciliary jurisdiction at the place where the performance of the obligation and any proceedings concerning it come together.<sup>68</sup> In addition, the government of the United Kingdom maintained in its statement in *Tessili*<sup>69</sup> that a Community definition of the place of performance would, for practical purposes, determine that place as a matter of substantive law of contract, to be applied as such in all member states. Given existing differences in national law, such a Community definition, the argument goes, could result in a change in the law of some, perhaps all, of the member states. The effect of the ruling would extend to all aspects of performance of contracts of the type in question and would have repercussions even beyond the performance of the contract. It would extend to those other aspects of the law that are directly or indirectly linked with performance. Moreover, the question of where performance is to take place would call for a separate answer for every type of contractual relationship, and would in every instance ultimately be a matter for referral to the Court of Justice. Serious uncertainty would be introduced into the law.<sup>70</sup>

Adoption of a Community meaning need not affect substantive law. Each state remains free to define the place of performance for substantive law purposes.<sup>71</sup> That, then, leaves the question of "harmony" between substantive law and the law of jurisdiction, on the one hand, and between choice-of-law rules and the law of jurisdiction, on the other. There is, of course, no magic — no necessity — in such harmony. The American experience (which indeed seems relevant<sup>72</sup>) shows that contacts for jurisdiction may well differ from those relevant for the determination of the applicable law.<sup>73</sup> Moreover, it may well be — as the concluding comments will try to show — that the elaboration of tight independent (Community level) jurisdictional standards may ultimately promote "harmony" between jurisdictional and applicable law. Standards in substantive law, finally, may still differ from those in jurisdictional law. But if, as a result of "harmony" between jurisdiction and applicable law, the forum neither has jurisdiction

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68. See, e.g., R. GEIMER & R. SCHÜTZE, 1 INTERNATIONALE URTEILSANERKENNUNG 563 (1983); Basedow, *Europäisches Zivilprozessrecht*, in 1 H. J. HERRMANN, J. BASEDOW & J. KROPHOLLER, HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS § 45 (1982); Geimer, *Zur Auslegung des Brüsseler Zuständigkeits- und Vollstreckungsübereinkommens in Zivil- und Handelssachen vom 27 September 1968*, 12 EUR 341, 356 (1977); Kropholler, *Internationale Zuständigkeit*, in 1 H. J. HERRMANN, J. BASEDOW & J. KROPHOLLER, *supra* at §§ 670, 355 (1982); Schultz, *Zwischenbilanz des europäischen Gerichtsstands- und Vollstreckungsübereinkommens*, 3 IPRAX 97, 99 (1983); Schlosser, *supra* note 66, at 57.

69. 1976 E. Comm. Ct. J. Rep. 1479, 1480.

70. See also Schultz, *supra* note 68, at 99; Schlosser, *Der EuGH und das Europäische Gerichtsstands- und Vollstreckungsübereinkommen*, 30 NJW 457, 459 (1977).

71. See Huet, *supra* note 62, at 716.

72. See text at notes 96-97 *infra*.

73. See Linke, *supra* note 44, at 51; Lüderitz, *Fremdbestimmte internationale Zuständigkeit?*, in Festschrift für Konrad Zweigert 233, 241, 242 (H. Bernstein, U. Drobnig & H. Kötz eds. 1981); Submission of the Gov. of the Fed. Republic of Germany in *Tessili v. Dunlop*, 1976 E. Comm. Ct. J. Rep. 1477, 1479.

nor furnishes the applicable law, what difference does the content of its substantive law make in the particular case?

The history<sup>74</sup> of article 5(1) shows that the choice of the place of performance was a compromise.<sup>75</sup> This choice was made to introduce a stable criterion for jurisdiction.<sup>76</sup> The provisions will not achieve that objective when the place of performance may point in as many different directions — as a result of national law divergencies — as do the various definitions of “obligation” discussed above. Instead, a “European answer”<sup>77</sup> is required.

## 2. Ivenel v. Schwab: *A Change of Heart?*

In Case 133/81, *Ivenel v. Schwab*,<sup>78</sup> the plaintiff, who resided in France, sued his German employer in France for sums due, including commissions, after his employment was terminated. Under *DeBloos*<sup>79</sup> there should not have been jurisdiction in France because the obligations — although there were several — all ran from the defendant to the plaintiff and, under both German and French law,<sup>80</sup> were payable at the debtor's address. The Court of Justice observed that one purpose of article 5(1) was to give jurisdiction to a court with a close connection to the case,<sup>81</sup> added that article 6

74. “One case where ‘travaux préparatoires’ are regularly referred to is the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.” Lord Mackenzie Stuart, *Introductory Talk*, Visit of the Court of Human Rights, Luxembourg, 29 April 1983, at 9 (mimeo).

75. Jenard, Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, 22 O.J. EUR. COMM. (No. C 59) 1, 23 (Mar. 5, 1979) [hereinafter cited as Jenard Report]; G. DROZ, COMPÉTENCE JUDICIAIRE ET EFFETS DES JUGEMENTS DANS LE MARCHÉ COMMUN: ÉTUDE DE LA CONVENTION DE BRUXELLES DU 27 SEPTEMBRE 1968, at 57, 58 (1972).

76. G. DROZ, *supra* note 75, at 57, 58; Linke, *supra* note 44, at 56; Linke, *Anmerkung*, 23 RIW/AWD 43, 44 (1977).

77. Pescatore, *Le Recours, dans la jurisprudence de la Cour de Justice des Communautés Européennes, à des normes déduites de la comparaison des droits des états membres*, 32 REVUE INTERNATIONALE DE DROIT COMPARÉ 337, 344 (1980); see also R. SCHÜTZE, INTERNATIONALES ZIVILPROZESSRECHT 74 (1980); M. WESER, CONVENTION COMMUNAUTAIRE SUR LA COMPÉTENCE JUDICIAIRE ET L'EXÉCUTION DES DÉCISIONS 248 (1975); Jeantet, *Un droit européen des conflits de compétence judiciaire et de l'exécution des décisions en matière civile et commerciale*, 1972 CAH. DR. EUR. 375, 388.

78. 1982 E. Comm. Ct. J. Rep. 1891 (Preliminary Ruling). For discussion, see Mezger, *Einheitlicher Gerichtsstand des Erfüllungsorts verschiedenartiger Ansprüche eines Handelsvertreters (Article 5 Nr. 1 GVÜ)*, 3 IPRAX 153 (1983).

79. (Case No. 14/76), 1976 E. Comm. Ct. J. Rep. 1497.

80. McClellan & Kremlis, *supra* note 34, at 540.

81. The Court had made the same point in an interesting earlier decision. See *Zelger v. Salinitri* (Case No. 56/79), 1980 E. Comm. Ct. J. Rep. 89 (Preliminary Ruling). In this case, the parties had agreed orally that Munich should be the place of performance. The question was whether this agreement made for jurisdiction in Munich under article 5(1), even though article 17 requires that forum selection clauses be in writing. The Court noted that article 17 permits the selection of any court, without regard to a connection between it and the transaction, while article 5(1) provides for jurisdiction at a place where there is a direct link to the transaction. If the parties structure their transaction so as to bring about a close connection to the particular place, the objectives of article 5(1) are fulfilled. The protection against overreaching that the formal requirements of article 17 provide then is no longer needed and jurisdiction may be exercised at the place of the (stipulated) performance.

of the Contract Choice of Law Convention<sup>82</sup> applies to employment contracts the law of the country where the employee habitually does his work, and then concluded that for claims arising out of employment contracts, the close connection for jurisdictional purposes is at the place whose law governs the contract. That law, in turn, "is determined by the obligation characterising the contract . . . and is normally the obligation to carry out work."<sup>83</sup>

Employment contracts have long had a special place in conflicts law, perhaps even earlier in Europe than in the United States. This importance was the result of concern over providing protection for the weaker party. Experience has been similar in insurance contracts. However, by the same token, there is something special about all contract types — hence the growing importance for choice-of-law purposes of the place where the characteristic obligation is to be performed.<sup>84</sup> Particularly for those who seek "harmony" between jurisdiction and choice of law,<sup>85</sup> an interpretation of article 5(1) along these lines should suggest itself as natural.

The suggestion, by implication, is that the Court should opt for the characteristic obligation approach in dealing with "obligation" and "place of performance" under article 5(1). This is not the only possibility, of course. The Court could also select one of the national rules, such as section 29 of the German Code of Civil Procedure, which is said to have been a model for article 5(1).<sup>86</sup> However, suggestions in the literature<sup>87</sup> favor the "characteristic obligation" approach, as does newer legislative reform.<sup>88</sup> Adoption of this approach would also have the advantage of eliminating from the range of jurisdictional alternatives the place of payment of a money debt. This effect is especially desirable when such payment is to occur at the creditor's address since it would then also accord with the Convention's objective to eliminate the *forum actoris* (exorbitant jurisdiction).<sup>89</sup>

All this said, however, it is important to remember that *Ivenel*<sup>90</sup> was an employment case and that, despite the generally applicable rationale which underlies that decision, the Court of Justice has said nothing expressly that would indicate a wider reach, let alone signal a general departure from (the

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82. See note 60 *supra*.

83. *Ivenel*, 1982 E. Comm. Ct. J. Rep. at 1900.

84. See notes 59-61 *supra* and accompanying text.

85. See notes 68 & 71 *supra*.

86. Jenard Report, *supra* note 75, at 23.

87. Linke, *Anmerkung*, *supra* note 76, at 45; Spellenberg, *Die Vereinbarung des Erfüllungsortes und Article 5 Nr. 1 des Europäischen Gerichtsstands- und Vollstreckungsübereinkommens*, 3 IPRAX 75 (1981).

88. See note 59 *supra*.

89. Droz, *supra* note 57, at 125. See also Stoll, *Gerichtsstand des Erfüllungsortes nach Art. 5 Nr. 1 EuGVÜ bei strittigem Vertragsschluss*, 3 IPRAX 52, 54 n.16a (1983) who notes the tendency of national courts to define jurisdiction at the place of performance as "a 'one-way street' leading to the courts at the domicile of the plaintiff . . ." [author's translation — Ed.]. Since the basic rule of the Convention (article 2) provides for jurisdiction at the debtor's domicile, "the exception of article 5(1) should not entail the result that, contrary to the basic rule, the debtor may routinely be sued at the plaintiff's domicile for certain categories of contract claims." *Id.* at 54 [author's translation — Ed.].

90. (Case No. 133/81), 1982 E. Comm. Ct. J. Rep. 1891; see text at note 78 *supra*.

"overruling" of) *DeBloos*.<sup>91</sup> Indeed, *Ivenel* has been criticized: "[T]he *DeBloos* decision appears to be the most realistic in the light of the wording of article 5(1) [. . . the place of performance of the obligation in question] which makes no distinction between contracts of employment and other contracts."<sup>92</sup> True, but neither does the wording require that the definition of "obligation" and "place of performance" be determined by national law. Instead, the suggestion is that the characteristic obligation approach, *qua* Community definition, be extended beyond employment contracts.

### III. CONCLUSION

Advocate-General Warner gave an impressive list in his submissions in a 1980 case<sup>93</sup> of the many instances in which the Court has opted for an independent interpretation. In general, that trend continues.<sup>94</sup> This is as it should be if the legal integration, which article 220 of the EEC Treaty and, in implementation, the Brussels Convention have as their objective, is to be achieved.<sup>95</sup>

Both the United States and the Community are non-unified legal systems. Beyond the subject matter of delegated federal (Community) powers or those areas touching upon federal concerns,<sup>96</sup> there is no *general* law-making power on the federal level, either for making substantive private law or for establishing choice-of-law rules. With respect to the latter, there are some minimal federal constitutional limitations in the United States.<sup>97</sup> Even these do not exist in the Community to the same extent. An earlier attempt to unify choice-of-law rules for tort and contract by convention failed,<sup>98</sup> and the current (1980) convention unifying only contracts choice-of-law rules has, so far, received only one ratification (France).<sup>99</sup>

It is against this background of substantive and conflicts law divergence that jurisdictional standards must receive federal/Community-level defini-

91. (Case No. 14/76), 1976 E. Comm. Ct. J. Rep. 1497.

92. McClellan & Kremlis, *supra* note 34, at 542.

93. Netherlands State v. Ruffer (Case No. 814/79), 1980 E. Comm. Ct. J. Rep. 3807, 3833 (Preliminary Ruling).

94. See *Ivenel v. Schwab* (Case No. 133/81), 1982 E. Comm. Ct. J. Rep. 1891; *see also* text at notes 78-83 *supra*.

95. See Linke, *Anmerkung*, *supra* note 76, at 44.

96. When federal concerns are implicated, the United States federal courts have limited power to make common law. E. SCOLAS & P. HAY, *supra* note 4, at 133-48. The existence and extent of similar power in the Court of Justice, as distinguished from the legislative self-amendment possibility offered by EEC Treaty, *supra* note 6, art. 235, is at best uncertain and, in any event, largely unexplored. But there are beginnings: "[The decision in *AM & S Europe Limited v. Commission* (Case 155/79), 1982 E. Comm. Ct. J. Rep. 1575] is . . . important . . . also for the reason that, I think for the first time, the Court, having deduced an unwritten principle of Community law from a study of the comparative law of the Member States, has invoked it to limit the application of what would otherwise be the unqualified terms of a Community regulation . . ." Lord Mackenzie Stuart, *supra* note 74, at 13; *see also* Goffin, *Observations* [on the *AM & S* Case], 18 CAH. DR. EUR. 391, 394, 405 (1982).

97. See Hay, *Reflections on Conflict-of-Laws Methodology*, 32 HASTINGS L.J. 1644 (1981).

98. Unofficial translation in 21 AM. J. COMP. L. 587 (1973); *see* EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATION (O. Lando, B. von Hoffmann & K. Siehr eds. 1975).

99. Convention on the law applicable to contractual obligations, 80/934/EEC, 23 O.J. EUR. COMM. (No. L 266) 1 (Oct. 9, 1980).

tion, if there is to be a basis for mandatory recognition and enforcement of judgments. Litigation at the place of the closest connection will prevent forum shopping, just as uniform substantive and conflicts law will lead to predictable results. To accomplish these aims, however, the definition of the jurisdictional standards cannot be left to the individual units that are to be integrated.

Will the suggested federal/Community-level definition of jurisdictional standards then result in a greater, and perhaps undesirable, divergence between them and choice-of-law standards? In the United States, minimal contacts to the forum have been accepted for the sake of the plaintiff's convenience in the choice of forum. In a system with a federal due process prescription it should follow — but has not as fully as some would wish — that a much closer connection of the forum to the transaction or the parties should be required before the forum may apply its own law.<sup>100</sup> Europe lacks this kind of express due process provision. The Jurisdiction and Recognition Convention, however, provides an analogue: specific jurisdictional provisions to be interpreted on the Community level. An evolution of a jurisdictional standard that localizes litigation at the place of the closest connection or the characteristic obligation should, in logic, often lead to the application of forum law. If national choice-of-law rules continue to evolve toward similar tests (even without the benefit of a Choice-of-Law Convention), Europe may have a measure of harmony between choice-of-law and judicial jurisdiction long before the United States.

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100. See Hay, *supra* note 97.