EXORBITANT JURISDICTION IN THE BRUSSELS CONVENTION

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I. EXORBITANT JURISDICTION IN PRIVATE INTERNATIONAL LAW: AN INTRODUCTION

A. HISTORICAL CONTEXT

While in all civilised countries much wisdom and energy have been spent in solving choice of law problems, only little attention has been given to questions concerning international procedure and more precisely to the problem of adjudicatory jurisdiction in international litigation.[1]

Indeed, in most civil law countries, statutory provisions governing internal jurisdiction (or venue) have been considered to be at the same time rules regulating adjudicatory jurisdiction in international cases.[2]

Special rules regulating jurisdiction in international cases have only been enacted when, according to the rules regulating internal jurisdiction, no competent court would be available within the territory of the State.

At the time these rules were elaborated,[3] international co-operation in that field was still unknown. This explains that chauvinistic character of most of these rules, as they were only inspired by the interests of the State's own nationals or residents.

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[1] L.I. DE WINTER, "Excessive jurisdiction in private international law", *I.C.L.Q.,* London, The British institute of international and comparative law, volume 17, 1968, (706) p.706.

[2] For example the Dutch Supreme court held in 1858 that "a Dutch court always has jurisdiction when the court has venue according to the Dutch law of procedure", *Weekblad van het recht*, No. 1922.

[3] For example the art. 14 of the French Civil Code was elaborated in 1804.

B. DEFINITION OF THE CONCEPT OF EXORBITANT JURISDICTION

RUSSELL describes exorbitant jurisdiction as "jurisdiction validly exercised under the jurisdictional rules of a State that nevertheless appears unreasonable to non-nationals because of the grounds used to justify jurisdiction".[4]

In other words jurisdiction is exorbitant when the court seized does not possess a sufficient connection with the parties to the case, the circumstances of the case, the cause or subject of the action, or fails to take account of the principle of the proper administration of justice. An exorbitant form of jurisdiction is one which is solely intended to promote political interests, without taking into consideration the interests of the parties to the dispute.[5]
Although those two definitions give us a good starting point, it seems necessary -in order to give a global view of what exorbitant jurisdiction is- to clarify the concept through other issues, notions and examples.

1. INTERNATIONAL PUBLIC LAW

Although in the *Lotus*-case[6] the majority of the Permanent court of International Justice suggested that a State's legislative jurisdiction is, under International Law, free from any restrictions whatever, this statement was condemned by the majority of writers[7] who discussed the case and can be considered today as overruled.[8] Indeed, there are limits to a State's legislative jurisdiction, as the national rules of jurisdiction have to be consistent with International Public Law.[9] In establishing bases for jurisdiction in the international sense, a legal system cannot confine its analysis solely to its own ideas of what is just, appropriate and convenient. To a degree it must take into account the views of other communities.[10]
As DAHM[11] says:

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[4] K.A. RUSSELL, "Exorbitant Jurisdiction and enforcement of judgements: the Brussels system as an impetus for the United States action", *Syracuse Journal of International Law and Commerce*, Spring 1993, p. 2.
[5] C. KESSEDJIAN, "International jurisdiction and foreign judgements in civil and commercial matters", *Hague conference on Private International Law*, Preliminary Document No. 7 of April 1997 for the attention of the Special Commission of June 1997 on the question of jurisdiction, recognition and enforcement of foreign judgements in civil and commercial matters, No. 138.
[6] International court of Justice, Series A, No. 10, 1927.
[7] BOURQUIN, Rec. 35 (1931 I) 5, 102-107, who states clearly that rules of jurisdiction "dérivent de l'ordre juridique international"; BRIERLEY, Rec. 58 (1936 IV) 145, 183; ROUSSEAU, Revue Générale, 37 (1930), 420,422, sqq.; BASDEVANT, Rec. 58 (1936 IV) p. 594; FITZMAURICE, Rec. 92 (1957 II) 56 sqq., cited by F.A. MANN, *o.c.,* note 8 p. 35.
[8] F.A. MANN, "The doctrine of legislative jurisdiction", *Collected Courses of the Hague Academy of international Law*, 1964, volume I, (24) p. 35.
[9] As embodied in the sources enumerated by art. 38 of the Statute of the International court of Justice.
[10] A. VON MEHREN and D.T. TRAUMAN, "Jurisdiction to adjudicate: a suggested analysis", *Harvard Law Review*, April 1966, Volume 79, Nr. 6, (1121) p. 1127.
[11] DAHM, Collected Courses of the Hague Academy of International Law, 1964, volume II, p. 256 and 260, cited by F.A. MANN, *o.c.*, note 8, p. 49.

"The extreme extension of domestic law without regard to the foreign interests would involve the violation of the State's international duty to adopt in the international community an attitude consistent with the interests of the community. A State may subject foreign sets of facts to its jurisdiction and law only if their relationship with its own legal system is not too remote and the application of its domestic law to them does not lead to nonsensical or grossly unjust result."

Moreover, coming back to our subject, it is referring to International Public Law that a rule of jurisdiction can be considered as exorbitant or not.

Using International Public Law as a standard, MANN concludes that:

"A State has legislative jurisdiction, if its contact with a given set of facts is so close, so substantial, so direct, so weighty, that legislation in respect of them is in harmony with international law and its various aspects (including the practice of States, the principles of non-interference and reciprocity and the demands of inter-dependence). A merely political, economic, commercial or social interest does not itself constitute a sufficient connection."[12]

Exorbitant rules of jurisdiction are thus those rules that confer jurisdiction to a State, regardless to that close contact or based on that sole interest. Rules that thus are "unfair, unreasonable and illegitimate" from an international point of view.

The problem remains to know when a rule of jurisdiction can be considered as such.

WINTER states that, given these vague and subjective notions, the only test to ascertain whether a given jurisdiction is acceptable -and thus not exorbitant- is whether the courts of other States will recognise a judgement based on that ground of jurisdiction.[13]

I personally do not share that opinion, as States can easily commit themselves towards other States to recognise decisions even though based on exorbitant rules of jurisdiction.[14]

2. BASES OF JURISDICTION

As explained previously, exorbitant rules of jurisdiction are those rules that because of some grounds, confer jurisdiction to a State, without "looking" to the facts of the case itself.

[12] F.A. MANN, *o.c.,*note 8, p. 49.
[13] L.I. DE WINTER, *o.c.,* note 1, p. 712.
[14] As for example in the Brussels and Lugano Conventions member States commit themselves to recognise judgements against non-domiciliaries based upon exorbitant jurisdiction.

The most notorious examples of exorbitant jurisdiction, are jurisdiction based upon nationality, jurisdiction based upon assets and jurisdiction based upon "doing business".

a. Jurisdiction based upon nationality

When exorbitant jurisdiction is based upon nationality, the national -whether or not he is a resident- may always use the national courts for a suit against foreigners. An example of this kind of jurisdiction may be found in Article 14 of the French Code Civil.[15]
This article gives French citizens the possibility to sue in French courts even when the case and parties have no contacts with France other than the plaintiff's nationality.
Under the Article 14, a French person could sue a Japanese in a French court for injuries resulting from an accident in Tokyo. Similarly, a Turkish person who wrote a defamatory article concerning a French citizen in the local newspaper of El Carmen (Chilli) could be sued in France by that French citizen claiming infringement of his honour. In short, Article 14 provides a "legal trap into which foreigners, unaware of the existence of the privilege, may fall,"[16] anytime they encounter a French citizen, regardless of where the encounter occurred.[17]
Moreover, that same Civil Code, in its article 15[18]-as interpreted by French courts-[19] provides exclusive jurisdiction in French courts.
As a result, a foreign plaintiff who sued a French person in a foreign court and won, would not receive recognition of that decision in France, because the French courts would see themselves as possessing exclusive jurisdiction.
Just a few years ago, in 1990, the French Cour de Cassation repeated these principles.[20]

b. Jurisdiction based upon assets

Another good example of an exorbitant ground of jurisdiction, is jurisdiction based upon the presence of assets in a State.

For instance under Article 23 of the German Civil Procedure Code (Zivilprozessordnung), German courts have jurisdiction over any defendant

[15] The article says that an alien, even not residing in France, may be summoned before a French court for the fulfilment of obligations contracted by him with a Frenchman, even if these obligations have been contracted in a foreign country.
[16] G.R. DELAUME, American-French Private International Law, 1953, p. 57.
[17] Remark: the Luxembourg Civil Code has taken over (in its article 14), the same article.
[18] The article says that a French national may be called before the French court for obligations incurred by him, in a foreign country, even towards an alien.
[19] For example: La métropole v. W.H. MULLER, Cour de Cassasion, March 21, 1966, Dalloz 1966, II, 429.
[20] Cour de Cassation, December 18th 1990, R.C.D.I.P. 1991, 759, Note Ancel B.

who owns assets in Germany, regardless of their value.[21]
This provision does not require a prior attachment or any nexus between the litigation and Germany[22] and jurisdiction exercised under the article is not limited to the value of the assets located in Germany.
As such, a Chinese who forget his camera in his hotel in Germany can be sued before the German court for an amount of 200.000 D.M.

In 1991, the German Bundesgerichtshof[23] weakened the effects of this provision by stating that some reasonable connection is required between the facts of the case and Germany, other than just the presence of assets.

Nevertheless the articles poses a particular threat as practically any large company in the world is likely to have some assets in Germany.

c. Jurisdiction based upon "doing business"

A number of American States have enacted statutes the so-called "long arm statutes". Some of them provide the exercise of jurisdiction over persons or corporations who transact business in the State and will even entertain causes of action that do not arise from this business.

In the case *Bryant v. Finnish National Airlines*,[24] a resident of New York sued the defendant for injuries incurred at a Paris airport through the alleged negligence of the defendant. The Court of Appeal held that it had jurisdiction because the Finnish National Airlines maintained a one and a half-room office in New York City, where some publicity work was done. No flight operations were conducted within the U.S., no stockholders, officers or directors were residents of New York, the plaintiff's cause of action was totally unrelated to the defendant's activities in New York.

[21] Austria has a similar article namely it's Article para. 99, Austrian Jurisdiktionsnormen.
[22] F. JUENGER, "Judicial jurisdiction in the United States and in the European Communities: a comparison", *Michigan Law Review*, April/May 1984, (1195) No. 1204.
[23] 2nd of July 1991, Neue Jurischtische Wochenschrift (1992) No. 3092, 44.
[24] 1965, 15 New York, 2nd 426, 432, 260 N.Y.S. 2nd 625, 629, 208 N.E.2nd 439, 441 (1965).

d. Other bases

Apart from the three above mentioned and most significant grounds of exorbitant jurisdiction, the other bases, generally[25] considered as such are:

- The domicile, habitual or ordinary residence of the plaintiff, except in specific cases.
- The service of a writ, a summon or other document instituting proceedings during a temporary stay by the defendant.
- Unilateral designation of the court by the plaintiff (particularly in an invoice), without any consent by the defendant.
- The mere presence of a product manufactured by the defendant which has caused damage on another territory, although he could not anticipate that this product would be found on this particular territory.
- The rendering of a provisional or protective measure in order to adjudicate on the merits.
- The enforcement or registration of a judgement in order to adjudicate on additional or supplementary claims.

One factor all these bases have in common, is that they are favouring plaintiffs rather than defendants.

C. RATIO LEGIS

Although exorbitant jurisdiction may, as I explained, seem very unreasonable (at least for the defendant), some considerations have to be made.

First of all an exorbitant rule of jurisdiction will not always lead to unreasonable results. If for example, a Frenchmen was injured in an accident in France by a drunken South-African, the fact that Article 14 applies and thus that the French courts are competent is not unreasonable.

Secondly, it is possible that a defendant may have to meet all the trouble and expenses of going to another country to defend himself in another language even against a claim which may be entirely without foundation, or even if the fault of the defendant still has to be proved.
No legislator, however, as the claims will not always be without foundation or without some reasonable doubt about the innocence of the defendant, can disregard entirely the interests of a plaintiff in international litigation, certainly not if the plaintiff is a national or resident of his State. Sticking under all circumstances to the traditional *actor sequitur forum rei*, would in practice often result in a denial of justice.

[25] By the delegations of the Hague Conference on the 25th of April 1966 and by the Working Group and the Special Commission of June 1994, Proceedings of the Seventeenth Session, (*), (Tome I p. 26) 1, both working on a Convention on Recognition and Enforcement of Foreign Judgements.

The plaintiff, whose position is already not enviable given the fact that he will certainly meet difficulties, even if the judgement was pronounced in his own country, to make this judgement effective, needed -according to the legislators- "protection".

This may explain (not justify) the existence of exorbitant jurisdiction as in many cases these jurisdictions compel with important practical needs. They were elaborated to prevent that the plaintiff would have to meet all the troubles and expenses (the same way as the defendant under exorbitant grounds of jurisdiction) to go to a foreign court, in a foreign language maybe just to obtain what he deserves, but then in terms of the rights that he is entirely entitled to.

II. EXORBITANT JURISDICTION IN THE BRUSSELS CONVENTION: ARTICLES 3 AND 4

A. HISTORICAL CONTEXT: HOW THE EEC HANDLED THE PROBLEM OF EXORBITANT JURISDICTION

1. THE BRUSSELS CONVENTION

As the drafters of the Treaty of Rome[26] were concerned about the possible effects that different national legal systems and exorbitant jurisdictional rules would have upon European unity,[27] they included in article 220 of the Treaty a requirement for further negotiations between member States …"with a view to securing for the benefit of their nationals […] the simplification of formalities governing the reciprocal recognition and enforcement of judgements of courts or tribunals".

One of the goals was to ensure the functioning of the Common Market by securing "free circulation" of judgements.[28] In order to encourage economic actors to take the fullest advantage of the opportunities offered by the common market, they had to be confident of receiving adequate legal protection.[29]
Moreover, under existing rules, Member States nationals taking advantage of the free circulation of goods in the common market could be subject to discriminatory application of national law,[30] prohibited by the Treaty of Rome.[31]

[26] With as members France, the Netherlands, Luxembourg, Italy, Germany and Belgium.
[27] K.H. RUSSELL, *o.c.*, note, 63.
[28] Report on the Convention of Brussels of September 1968 on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, 1979, O.J. (C.59), 1, 3.
[29] A. DASHWOOD, R HACON and R WHITE, *A guide to the civil jurisdiction and judgements convention,* Kluwer, Deventer, Antwerp, (1987), p. 82.
[30] S. BARTLETT, "Full faith and credit comes to the common market: an analysis of the provisions of the Convention on Jurisdiction and enforcement of Judgements in civil and commercial matters", *I.C.L.Q.*, 24 (1975), p. 44.
[31] The Treaty of Rome prohibits in its article 6 discrimination based upon nationality.

In 1960 the Member States decided to set up a committee of experts.[32] The committee chose to elaborate a "double" convention.[33] That is a convention that in addition to standards for recognition provides detailed rules on assumption of jurisdiction.[34] On September 27, 1968, the Convention was signed in Brussels and came into force on February 1, 1973 after ratification by the 6 member States.

2. THE HAGUE CONFERENCE

In the meantime (since 1962) the Hague Conference on Private International Law with delegations from different countries (including EEC-countries), was working on a multilateral convention on the recognition and enforcement of foreign judgements.

When in December 1964 the first Draft of the European Convention was given to the Hague delegations, the articles 3 and 4 caused of course a very strong reaction. During the extraordinary session of the Conference the English delegation stated that the objectives of the Hague convention were:

> *1.To achieve greater co-operation between the contracting parties concerning the recognition and enforcement of judgements, and*
> *2.In doing so, to avoid widening the field of operation of judgements that were based on improper jurisdiction.*

[32] Between 1960 and 1964 they met fourteen times. Some meeting were attended by observers from the Benelux Committee on the Unification of Law, from the Hague Conference on Private International Law, and by representatives from some of the EEC Commissions departments.
[33] In contrario to a simple Convention that does not provide rules on jurisdiction, but that only sums up the conditions under which a judgement given in the territory of the other state will be recognised and enforced.
[34] K.H. NADELMANN, "Jurisdictionally Improper Fora in Treaties on Recognition of Judgements: The Common Market Draft", *Columbia Law Review*, 1967, (995) p. 998.

Together with the American delegation, the U.K. delegation made two propositions:

> *1.That the countries which entered into an agreement with each other under the Hague convention would agree not to exercise any exorbitant jurisdiction that they had previously exercised against the residents of the other country.*
> *2. That these countries would also agree not to recognise the exorbitant jurisdiction of any third country in relation to the residents of their partners.*

Other delegates of non Common-market countries declared that these amendments merited adoption, as they were in the spirit of the present convention and of the Hague Conference itself.
Delegates of the EEC-countries on the contrary, with one exception,[35] objected that the Hague convention, being a simple recognition convention, could not deal with provisions regulating the jurisdiction of each State, and that they had no authority to negotiate on restrictions of the bases of internal jurisdiction.
In October 1966 a Protocol was elaborated by a special Committee. By ratifying this protocol States undertake the obligation not to "recognise"[36] a foreign judgement against a person domiciled in a State which has assumed the obligations imposed by the Hague Convention, if the foreign judgement was based only on an exorbitant rule of jurisdiction.[37]
The Hague Convention[38] never became effective, as only Cyprus, the Netherlands and Portugal are parties.[39]
Although the ideas of the Hague convention were a huge step in the good direction, the only consequence of the Conference was the insertion of article 59 in the Brussels Convention. This provision allows each member State to commit itself towards a third State, under the terms of the Convention, not to recognise a decision rendered in a Member State against a resident of that third State if jurisdiction could only be based on a ground envisaged by Article 3, second paragraph.
Nevertheless an important limitation to this principle is made in paragraph 2 of

[35] Namely from Mr. JENARD, the Belgian delegate and chairman of the Working group of the Common Market experts.
[36] Thus the Protocol only comply partially with the wishes of the UK and American delegations, as exorbitant jurisdiction can still be used, but not recognised.
[37] Article 4 specifies what is considered as improper jurisdiction, namely jurisdiction based upon (in short):
-presence of assets
-nationality of the plaintiff
-domicile, habitual residence of ordinary residence of the plaintiff
-doing business
-service of a writ upon the defendant during his temporary presence within the territory
-an unilateral specification of the forum by the plaintiff
[38] Of February 1st 1971.
[39] Information Concerning the Hague Conventions on Private International Law, 36, Netherlands International Law Review (1989), 185, No. 204, 205.

the Article. (see *infra*, Conclusion).

B. ARTICLE 3 AND 4

So as explained above, the Common market countries, being fully aware of the problem of exorbitant jurisdiction and its unreasonable consequences, decided to eliminate them in favour of -but only in favour of- the residents of the member States.

1. ARTICLE 3

Article 3 provides:
"Persons domiciled in a Contracting State may be sued in the courts of another Contracting State only by virtue of the rules set out in Sections 2 to 6 of this Title.
In particular the following provisions shall not be applicable as against them:
-In Belgium: Article 15 of the civil code and Article 638 of the Judicial code
-In Denmark: Article 248(2) of the law on civil procedure and Chapter 3, Article 3 of the Greenland law on civil procedure
-… "[40]

The list in the second paragraph is not exhaustive[41] but highlights the more exorbitant claims to international jurisdiction normally available under the various national laws, (or case law[42]) which are circumscribed by the Convention.[43]

a. Function

The function of article 3 is double.
The first function is a practical one. The first paragraph of the article reminds us that, when an international case falls under the scope of the Brussels convention, no national rules of jurisdiction can be applied, but only the exhaustive[44] list of jurisdictional bases given by the Convention (in section 2 to 6 of the first title).[45] More specific the Article confirms that a defendant

[40] The list continues by giving the most exorbitant rules of jurisdiction of the other member States.
[41] L.I. DE WINTER, *o.c.*, p. 715, H. Gaudemet-Tallon, *Les Conventions de Bruxelles et de Lugano*, *Compétence Internationale, reconnaissance et exécution des jugements en Europe*, Montchrestien, 1996, No. 76; M. CARPENTER, M. HAYMANN, T. HUNTER-TILNEY and P. VONKEN, *The Lugano and Sebastian Conventions, Current EC legal developmants,* Butterworths, London, 1990, p. 135.
[42] For example in the United Kingdom.
[43] A. DASHWOOD, R. HACON and R. WHITE, *A guide to the civil jurisdiction and judgements convention*, Kluwer law and taxation publishers, Antwerp, (1987) p. 87
[44] L.I. DE WINTER, *o.c.*, note 1, p. 710.; M. CARPENTER, M. HAYMANN, T. HUNTER-TILNEY and P. VOLKEN, "The Lugano and San Sebastian Conventions", *Current EC legal Developments*, Butterworths, London, 1990, p. 135.
[45] J. ZEKOLL, "The role and status of American Law in the Hague Judgement Convention Project", *Albany Law Review,* 1998, (1283), No. 1288.

living on the territory of a Contracting State, can only be sued before the courts of another Contracting State (and thus be withdrawn from his "natural judge"[46]) by application of section 2 to 6 of the first title.[47]
The second function is a symbolic one.
As explained earlier,[48] after the strong reaction (caused by articles 3 and 4[49]) of the delegations of non Common Market countries, article 59 was inserted.
The idea was to extend article 59 to all grounds of jurisdiction from which residents of Common Market States are exempted and to enable Common Market States to enter into the obligations of the supplementary Protocol to the Hague Convention.[50]
To weaken their "betrayal" to the spirit of the Hague Conference -in which they co-operated- article 3, second paragraph was meant to show the awareness of the existence of exorbitant jurisdiction and to open -trough article 59- the way for regulation of recognition and enforcement of judgement between the Common Market States and the Member States of the Hague Conference.
Furthermore, the paragraph also shows that not all the rules of jurisdiction, found in the national legislations of member States are exorbitant (as the exorbitant ones are enumerated).

b. Example

One of the articles listed, is Article 15 of our civil code. This article states that a Belgian citizen can be called before the Belgian courts for obligations incurred by him, in a foreign country, even towards an alien.
Why is this provision considered as being exorbitant?
Indeed, it is perfectly possible that by application of the Brussels Convention, one comes to the same result.
If for example a Belgian living in Belgium who agreed to deliver 200 Flemish cakes for a wedding in France (the agreement was contracted in France) does not deliver them two possibilities are given by the Brussels Convention.
The Frenchman can sue the Belgian either before the Belgian courts (by virtue of Article 2) -the same result thus as when Article 15 civil code would have been applied- or before the French courts (by virtue of Article 5.1).[51]
Nevertheless Article 15 Civil Code can be considered as exorbitant, because the Article assigns jurisdiction -solely based upon the nationality of the defendant- to the Belgian courts, always and without considering any facts of the case that perhaps could show a closer contact to other jurisdictions.

[46] Following the rule *actor sequitur forum rei*.
[47] This is not completely correct as in application of Article 57, International Conventions regulating specific topics, could make exceptions to this rule.
[48] See "II.A. Historical context".
[49] Inserted in the first Draft of the Brussels Convention (1964).
[50] Nevertheless, they never entered into those obligations.
[51] "Both articles are interchangeable, and, at least when the facts of the case permit this, one can choose between one or the other", J. ERAUW, "Niet uitsluitende bevoegdheidsgronden", (71) p. 71 in H. VAN HOUTTE and M.PERTEGAS SENDER, *Europese IPR-verdragen*, Acco, Leuven, 1990.

Moreover, the provision itself contains already a situation, in which it is very plausible that, because of the facts, it would be more reasonable and fair to assign other courts as competent.[52]
Other examples are the Article 14 of the French civil code (see supra), 23 of the German Civil Procedure Code (see supra) etc.

2. ARTICLE 4

Article 4 states that:
"If the defendant is not domiciled in a Contracting State, the jurisdiction of the courts of each Contracting State shall, subject to the provisions of Article 16, 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."

a. Further explanation

By virtue of this provision, national rules on jurisdiction, including the exorbitant ones, apply against persons (defendant) domiciled outside the Contracting States, except in cases provided for by Article 16.
Moreover, a person of any nationality domiciled in a Contracting State may "use" the national rules of jurisdiction of that State.[53]
This way, for example a Canadian national, who lives in France and who is in dispute with an Argentinean over a contract concluded in Argentina concerning property in Argentina, may nonetheless sue in France in application of Article 14 of the French Civil Code.

[52] See "…obligations incurred in a foreign country, even towards aliens."
[53] In order to avoid discrimination based on nationality, prohibited by the Rome Treaty among nationals of Member States, the Brussels Convention gives any domiciliary of the individual State, whatever its nationality, the right to use the local fora.

b. Function

The sole function of this article is to remember that when the defendant does not live in a Contracting State -and thus the provisions of the Brussels Convention are not applicable- the national law of the State where the plaintiff is domiciled, whatever his nationality may be, becomes into force.
The only[54] exception hereto is Article 16 that will keep its force, even if national rules provide for other solutions.
For example if an American living in Luxembourg (plaintiff), sues an in American living in America (defendant) for damages on a holiday-house in Italy, the Italian courts will have jurisdiction (Article 16 Brussels Convention), no matter what the outcome would have been by virtue of the Luxembourg legislation.

This reminding guarantees the free circulation of judgements, by preventing that a court of one of the Contracting States would refuse recognition because based upon national -eventually exorbitant- jurisdiction. As Article 4 explicitly allows exorbitant jurisdiction in certain cases, judgements based upon these rules will have to be recognised. Without this Article, according to P. JENARD, assets of a debtor could escape execution by being transferred to another Member State.[55] What of course would impair the effectiveness of the system. In my opinion it is more likely to say that it is Article 28[56] who prevent this from happening. Nevertheless it is useful, in order to avoid confusion and disparate case law, to explicitly state that the application of national legislation, is some cases, is valid under the Convention. The reminding counts also for "lis pendence"[57] (Article 21). In order to regulate lis pendence, the two courts, before which a similar case is brought, have to be competent according to the Convention.[58] Because of Article 4, litispendence will also be regulated if a court has jurisdiction based upon national rules.

c. Remark

Article 4 reminds the "universal virtue" of Article16.
Indeed, even if a court bases his jurisdiction on his own national rules, that

[54] See “II.B.2.c. Remark”.
[55] Namely because that other State would not recognise a judgement rendered at an improper fora.
[56] Article 28 limits the grounds for non-recognition to a violation of the articles 7 to 17 and Article 59, and moreover clarifies that the public policy test of Article 27(1) may not be applied to the rules relating to jurisdiction.
[57] The article says that when a party brings proceedings in a second Member State court in relation to a matter already pending before the court of another Member State, the second must automatically declare its incompetence in favour of the first unless the jurisdiction of the first is challenged.
[58] Rapport P. JENARD, *o.c.*, p. 20; M. PERTEGAS SENDER, “Aanhangigheid, samenhang en voorlopige maatregelen”, p. 119, No. 4.10 in H. VAN HOUTTE en M. PERTEGAS SENDER, *o.c.*, note 53; E.C.J., The owners of the cargo lately laden on board of the ship “Tatry” a. The owners of the ship “Maciej Rataj” of 6 december 1994, C-406:92, Concl. of Advocate General M.G.Tesauro, n. 22.

court will have to take Article 16 into account and declare itself eventually incompetent, as Article 16 has to be respected no matter were the defendant and plaintiff are domiciled.[59]
A first remark on this issue concerns the "*effet reflexe*". According to some authors[60], the principle of Article 16 works also in the other direction.[61] Article 16 would contain an implicit rule, namely that if an Article 16-matter is anchored in a third country, that country would have exclusive jurisdiction.[62] If we accept this, Article 4 would give an important protection to defendants domiciled outside the Contracting States. For example a Californian living in California could then not be sued before a French court by a Frenchman living in France, over property in California.[63] National rules of jurisdiction, would namely not be applicable, as Article 4 states explicitly that concerning an Article 16-matter, Article 16 has to be applied.

A second remark concerns the limitation to Article 16, as exception of Article 4. Indeed the articles 17 and 18 and could also be considered to be exceptions[64] to the application of national rules of jurisdiction. Article 17 because if two parties, of whom at least one domiciled in a Contracting State (what the case is if Article 4 applies) agree[65] on bringing a case before a certain court, this court has exclusive jurisdiction unless it concerns an Article 16-matter.[66] This exclusivity also applies even if national (eventually imperative[67]) rules of jurisdiction would give an other result.[68] If we take for example a Frenchman living France (plaintiff) who sues an American living in America (defendant) before the French courts by virtue of Article 14 French Code civil[69]. If the two agreed on bringing the case before the Belgian courts, the American will be able to invoke the incompetence of the French court.[70] Article 18 because if a defendant appears before an incompetent court (with

[59] H. VAN HOUTTE, "Uitsluitende bevoegdheidsgronden" in H. VAN HOUTTE en M PERTEGAS SENDER, *o.c.*, note 53, p.43.
[60] In contradiction to the litteral words of the Article and the Rapport's Möller (nr.54) and Almeida (nr.15).
[61] G. DROZ, "La convention de San Sebastian alignant la Convention de Bruxelles sur la Convention de Lugano", *R.C.D.I.P.* 1990; H.GAUDEMET-TALLON, *Les Conventions de Bruxelles et de Lugano, Compétence Internationale, reconnaissance et exécution des jugements en Europe,* Monchrestien, 1996, No. 84.
[62] VAN HOUTTE, *o.c.*, note 53, p. 44, No. 2.1.
[63] Normally this would be possible by virtue of Article 14 of the French Code Civil.
[64] Proposition of the Commission for a new Convention regulating the recognition and enforcement of foreign judgements in civil and commercial matters, of 31/1/98 (98/C 33/05), COM (97) 609 def. -97/0339(CNS)
[65] In the forms required by Article 17.
[66] Then the court assigned by Article 16 is competent as Article 16 prevails on Article 17.
[67] *Infra* an example is given concerning an imperative rule of jurisdiction.
[68] Belgian Commercial court, December 10th 1987, *T.B.H.* 1987, 791; Belgian Commercial court, July 20th 1984, *T.B.H.* 1985, 415.
[69] In application of Article 4 of the Brussels Convention.
[70] If he does not appear, the French judge will have to check -by virtue of his office- his competence to the forum-clause but it does not deny the competence the French court, this court is competent in application of Article 18 Brussels Convention; E.C.J. June 6th 1981, *Elefanten Shuh v. Jacqmain*, C-150/80.

the exception of an Article 16-matter) without contesting[71] his competence, this court has jurisdiction. In other words it is considered that he tacitly consented. This can also happen if national rules of jurisdiction assign another court as competent and even if a forum-clause exists in favour of another court. If for example, coming back to my last example, there is no agreement between the two and the Frenchman sues the American before a German court. If the American appears there without contesting the jurisdiction, the German court is competent even if according to the French Code Civil the French courts are competent. Although judgements will have to be recognised[72] by the court that has competence according to national legislation even if the (not in a contracting state living) defender appeared before another court of the Member States in application of Article 17 or 18, in order to avoid confusion, it would be better to extend the exception of Article 4 to the two Articles.

3. CONCRETE

a. Introduction

First it is necessary to remind that not all national rules of jurisdiction are exorbitant.
A distinction thus can be made between:

- The closed[73] list of grounds of jurisdiction given buy the Brussels Convention.
- The open list of exorbitant rules of jurisdiction, found in the national legislation of contracting States.
- The open list of not exorbitant rules of jurisdiction,[74] found in the national legislation of Contracting States.

To give a clear view of the situation, I refer to "EEX-person", for any person, no matter what his nationality is, who lives on the territory of a Contracting State, and to "3rd-person", for any person, no matter what his nationality[75] is, who doesn't live there.

b. Diagram

DEFENDANT	PLAINTIFF	What rules determine the competence of the

[71] Eventually together with a defense, see Elefanten Shuh v. Jacqmain, *o.c.*
[72] As article 28 limits the ground for non-recognition to violations of Article 7 to 17 (17 not included).
[73] Namely the exhaustive list of admitted grounds of jurisdiction enumerated in the Articles 2 to 24.
[74] For example the Belgian Article 635.2 (Judicial Code), that says that foreigners can be sued before Belgian courts if they are domiciled in Belgium.
[75] See *infra*.

		EEX-judge[76]
1. EEX-person	EEX-person	Articles 2 to 24 of the Brussels Convention, thus no exorbitant rules, except in the case of Article 24.
2. EEX-person	3rd-person	Articles 2 to 24 of the Brussels Convention, not the legislation of that 3rd country.
3. 3rd-person	EEX-person	National rules of jurisdiction of the State, in which the EEX-person lives, with the exception of Articles 16, 17 and 18.
4. 3rd-person	3rd-person	No court of the Contracting States is competent, with the exception of Articles 16, 17 and 18.

c. Examples[77]

1. An in Belgium living American concession-holder, will not be able to sue an in France living American concession-giver before the Belgian courts in application of Article 4 of the Belgian statute on sole selling[78] (except for provisional and protective measures).
That in Belgium living American, will have to sue before the court that is competent according to the Brussels Convention. This can be the Belgian court (*forum executionis contractus,*[79] Article 5.1), but also the French court (Article 2).
In this specific case, it is reasonable to consider that the in Belgium living American will sue before the Belgian court so that the result, although based upon another rule of jurisdiction, remains the same.[80] Nevertheless, the plaintiff may still choose to bring action where the defender is domiciled, thus before the French courts.[81]

2. An in New York living American (plaintiff) will be able to sue an in Belgium living Belgian (defender) before, the courts of New York, by virtue of the "long-arm statutes" of the New York Civil Practice Law and Rules. The Brussels Convention can not prevent this from happening. But, as according to the Brussels Convention, in this case the Brussels Convention has to be applied[82], no Contracting State will recognise or execute the judgement as it does not come from a Contracting State.

3. An in France living Chinese will be able to sue an in America living

[76] By "EEX judge" I mean the court of a Contracting State
[77] The numbers given in the diagram correspond with the examples given
[78] Of 27 July 1961 (B.S. 5/10/61) concerning the unilateral termination of the for undefined time given concessions of sole selling; Article 4 contains an imperative rule of jurisdiction.
[79] Article 5.1 constitutes a base of jurisdiction alternative to article 2.
[80] E.C.J., *De Bloos S.P.R.L. a. Soc. Bouyer*, 6/10/76, C 14/76; *R.C.D.I.P.* 1977, 756, note.
[81] DASHWOOD, *o.c.*, 88.
[82] And thus a court of the Contracting States would be competent, for example the Belgian courts by virtue of Article 2 (*actor sequitur forum rei*).

American before the French courts (or other court appointed by the French rules of jurisdiction) unless we have to do with an Article 16-matter[83] or unless there is a forum-clause or tacit acceptation in favour of the courts of another Contracting State (Article 17 and 18). This also when the cause of action is wholly unrelated to France.
Concerning the two last exceptions it has to be reminded that even if there was a forum-clause, but later on, the defender accept another court of the Contracting States as competent, this last court will be competent.[84]

4. If an in India living Indian sues an in Nigeria living Nigerian before the Indian courts by virtue of Indian legislation, the Brussels Convention does not object to that unless, according to Articles 16 and 17 a Contracting State is competent[85].
If Article 16 or Article 17 are applicable, the judgement, rendered by the Indian court will not be recognised nor executed by the Contracting States.
If the Indian sues the Nigerian before a German court without having to do with a Article 16-matter but eventually having a forum-clause in favour of the German courts, and the Nigerian does not contest the jurisdiction,[86] the German court is competent according to Article 18 and the judgement rendered by this German court will be recognised and executed by the Contracting States.
If in this last case the Nigerian contest the jurisdiction of the German court, the German court will not be competent anymore because there is no other ground on which he can base his jurisdiction.

[83] Then the court were the matter is anchored is exclusively competent.
[84] *Elefanten Shuh t. Jacqmain*, *o.c.*
[85] Article 16 and 17 apply, regardless whether the parties are domiciled in- or outside a Contracting State.
[86] Thus he tacitly excepts the jurisdiction of the German court.

d. Remark

A first remark concerns the recognition and enforcement by the courts of third countries of judgements rendered by courts of the Contracting States.
The Brussels convention regulates on one hand the jurisdiction of the Contracting States, and on the other hand, the recognition and execution of foreign judgements, by the Contracting States.
Nevertheless, the Convention can not force a third Country to recognise or execute judgements, just because the fact that the judgement is based upon rules of jurisdiction provided for by the Convention.
Thus, even if the Brussels Convention allows national and thus also exorbitant rules as a ground of jurisdiction when the defendant is not domiciled in a Contracting State, it can not force the third States to recognise such a judgement, as these third States have their own conditions to recognise and execute foreign judgements.[87]
For example, in the case *Seidler v. Jacobson,*[88] the courts of New York refused to recognise the judgement based upon the Austrian rules of jurisdiction, rendered by default. According to the New York law, there was no sufficient connection between the defenders (Mr. and M. Jacobson) and the court that rendered the judgement.[89]
Although Austria was at that time no part of the Brussels Convention, this refusal of recognition shows that even if a State has jurisdiction based upon national rules, it is not certain that third States will recognise and execute the judgement.

A second remark concerns the nationals of contracting States not domiciled in a contracting State.
What if a German living in Germany (plaintiff) sues a Frenchman living in America (defendant) before the German courts, in application of Article 23 of the German Civil Procedure court, admitted by Article 4 of the Brussels Convention.
Will the French courts have to recognise such a judgement, or will they be able to invoke their Article 15 that assigns exclusive jurisdiction, as a ground for non-recognition.
The answer is no as Article 28 of the Brussels Convention does not provide such a ground for non-recognition.

C. NEGATIVE CONSEQUENCES OF ARTICLE 3 AND 4

[87] For example, in the United States, the judgement has to be rendered respecting the "due-process"-clause, inserted in the American Constitution, consisting (in short) in a competent court, a fair defence and a reasonable judgement.
[88] Facts: an American couple living in New York bought an antique statute during there trip in Austria. Once back in New York, they found out that the Statute wasn't worth the price, so they refused to pay. The Austrian seller sued them before the Austrian courts.
[89] *Sedler v Jacobson*, 383, N.Y.S. 2d.833, Supreme court 1976.

Firstly the two Articles worsen the situation persons not domiciled in the EU, and more specific allow and even force Contracting States to discriminate.
Not only far more people can invoke exorbitant rules of jurisdiction against them,[90] but, furthermore the judgements rendered on the basis of such a rule will automatically be recognised by all the contracting States (Article 28.3).[91] This even if the recognising Contracting State has far less exorbitant rules than those on which bases the judgement was rendered. For example Italy, who has very anti-xenophobic and non-discriminatory rules of jurisdiction[92], will have to recognise a judgement based upon Article 14 of the French Civil Code. Not surprisingly, some authors say that the Convention establishes discrimination as a European principle that has to be respected by all member States.[93]

Secondly, the insertion of the Articles does not encourage the Contracting States to reform their exorbitant rules of jurisdiction. Before the existence of the Brussels Convention, the Member States, aware of the negative consequences of those rules concluded Treaties one with another, that prohibited the use of exorbitant grounds of jurisdiction are the recognition of judgements based on exorbitant grounds.[94] Nevertheless, not every Member State had concluded a treaty with every other member State. If the Brussels Convention would not have existed, citizens (who would not have been protected) would certainly have argued the existence of those rules before the European Court, if the States itself, being more and more aware of the unfairness of those rules if they would not yet, voluntarily have abandon.[95]
Because of the Brussels Convention though this abandon is not necessary anymore as the whole community is protected against them and as judgement based upon them are recognised.

Also a fundamental review of the articles itself in the Convention, is not likely to happen.
The Brussels Convention is an intra-community[96] Convention that is not within the legal framework of the EC. Because it is a separate instrument under International Law, special procedures are necessary for the adhesion of States seeking EC membership. Parallel accession conventions must be negotiated. Nevertheless, Article 63 declares that every accessing State has to

[90] Before the convention only nationals could do so, now all the persons domiciled in the Contracting State.
[91] F.K. JUENGER, "La Convention de Bruxelles du 27 septembre 1968 et la courtoisie internationale, Réflexions d'un Américain", *R.C.D.I.P.* 1983,(37) p. 42.
[92] Italy for example abolished both the forum of the plaintiffs and defendants nationality when reforming its Private International Law.
[93] J. FITZPATRICK, "The Lugano Convention and Western European Integration: a comparative analysis of jurisdiction and judgements in Europe and the United States", *Connecticut Journal Of International Law*, 695, Spring 1993, (695) No. 724; F.K. JUENGER, *o.c.*, note 97, p. 42.
[94] For example the Convention between France and Belgium of August 8th 1899.
[95] Like for example Belgium dropped its Article 14 Civil Code.
[96] Concluded for the purpose of full-filling the obligation stated in Article 220 of the Treaty of Rome.

accept the fundamental principles of the Convention as a base of negotiation.[97] Also this worsens the situation of non-domiciled, as even if new States have friendlier rules, becoming a member State, these rules will not be taken over by the Convention. For example the common law doctrine of "*forum non conveniens*"[98] has definitively been rejected during the negotiations due to the accession of the United Kingdom, Ireland and Denmark.[99]

III. EXORBITANT RULES WITHIN THE BRUSSELS CONVENTION

A. INTRODUCTION TO THE PROBLEM

According to Articles 3 and 4 exorbitant rules of jurisdiction can not be used against persons domiciled in the Contracting States. Nevertheless, the question arises whether those two Articles are sufficient to exclude this use. In other words isn't it possible to use some regulations of the Brussels Convention in such way, that the outcome would be a disguised exorbitant jurisdiction? And that thus a State's court would be competent there where the competence actually belongs to another State's court.

B. THROUGHOUT THE CONVENTION

1. THE CONCEPT OF DOMICILE

The concept of domicile is a basic notion in the Convention. According to Article 2 the courts of the State where the defendant is domiciled are, in general competent (*actor sequitur forum rei*). On the other hand, Article 4 states that national rules of jurisdiction can be used against a person not domiciled in a Contracting State. It is the national law of the Contracting States that defines whether or not a person is domiciled within his territory (Article 52 Brussels Convention). If the State would have national rules that on one hand, regarding nationals[100] of the European Union establish the domicile in France through very few requirements, and on the other hand, regarding to non-European Nationals, through very difficult requirements, it would this way enlarge his jurisdiction.
Let's take for example France. If a French law would state, and I exaggerate, that every EU-national that stayed within the territory of France for more than a month, is considered domiciled in France. In that case the French courts

[97] The rapport of P. JENARD , *o.c.*, p. 62.
[98] This doctrine allows a judge, normally competent, to refuse jurisdiction, if another court is "more convenient", if a better court exists.
[99] On the 9th of October 1978.
[100] Although the Brussels Convention does not "work" with the concept of nationality, just to make this hypothesis I will use this notion because most of the EU-nationals live within the territory of the European Union.

would be normally[101] competent for all the EU-defendants, that do not live in a contracting State and that stayed in France for more than a month (*actor sequitur forum rei*). Moreover concerning the EU-nationals living within a Contracting State, the French courts could be considered as the courts of the Contracting State where that EU-national is domiciled,[102] unless the case would be brought before the court of the Contracting State where the EU-national is also domiciled.[103] If now a French law would state that every non-EU-national has to stay more than 10 years in France to be considered as domiciled in France, the French courts could base their competence on national -even exorbitant- rules of jurisdiction towards those persons as they would be considered as non-domiciliaries.

2. SEATS OF COMPANIES AND CORPORATIONS

Same remark.

3. THE NOTION OF "PLACE OF PERFORMANCE OF THE CONTRACT"

If the parties did not specify the place of execution, the law of the court before which the case is brought will define this place.[104] If a State defines this notion, very widely in it's national law, the courts of that State can be competent according to Article 5.1. If for example, Belgium would define that place as "the place where the most efforts were done", all the contracts over goods manufactured in Belgium (if they would not specify the place of execution) would be considered as executed in Belgium and the Belgian courts could be competent according to Article 5.1. alternatively with Article 2.

[101] Of course with the exceptions given in the convention.
[102] To determine the domicile of a person in another Contracting State, the court will apply the laws of the other Contracting State (in this case France) (Article 52,2).
[103] In that case the court of the Contracting State will apply his own laws and see that the person is domiciled there.
[104] ECJ, 6 October 1976, *Tessali v. Dunlop*, case nr. 12/76, 1976, 1473; Belgian Commercial court: Luik 12 February 1987, *J.L.* 1987, 932 note D. PIRE; Brussels, 30 April 1987, A*nn. Dr. Liège*. 1988, note G. VAN HECKE.

4. REMARK

These mentioned possibilities for a State to win jurisdiction are not realistic. Because of on the one hand the competence of the European Court of Justice[105] to interpret the Brussels Convention and on the other hand the "co-operation spirit" between the Member States the possibilities given will stay inefficient and useless.
Nevertheless there is one possibility where a State can use exorbitant jurisdiction, admitted by the Convention, even towards persons domiciled in the Contracting States.

C. ARTICLE 24

This Article allows the courts of a Contracting State to take provisional and protective measures, although the courts of another Contracting State are competent to decide about the substance of the case. This even if that other court is exclusively competent, or if there was a forum-clause in favour of another State.

Two questions can be asked:

1. Can a State take any measures allowed in its own national rules?
The Article literally says that the measures "provided in the national laws of a Contracting State" can be asked before the court of that contracting State. At first sight a State in order to "win" jurisdiction, that actually belongs to another court could thus perfectly pronounce very far going, almost definitive measures, basing itself upon his own national rules. This way, a State could decide about a case that according to the Brussels Convention-for reasons of reasonableness and logic- belongs to the jurisdiction of another State.
Nevertheless in order to avoid this, the European Court of Justice decided[106] that not all measures allowed under national legislation can be taken but only "those measures which, in matters within the scope of the Convention, are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is otherwise sought from the court having jurisdiction as to the substance of the case."

[105] That will certainly not allow these practices.
[106] ECJ*, Reichert-Kocker v. Dresdner Bank*, (ReichertII), 26 March 1992, C-261/90, 1992, I-3697; ECJ, *Van Uden Maritime BV v. Kommanditgesellschaft in Firma Deco-Line* a.o., 17 November 1998, C-391/95.

2. Can the court that takes the measures be competent on the ground of exorbitant rules of jurisdiction?
The answer is yes[107] but there has to be a "real connecting link" between the State (where the measures are asked) and the object of the measures. This may be surprising, as normally exorbitant rules of jurisdiction can not be used against persons domiciled in the Contracting States. Nevertheless it has to be remembered that, as the measures has to be really temporary and not definitive, the case itself will be judged by a court, competent according to the Convention.

D. CONCLUSION

Thus even if the Brussels Convention prohibits the use of exorbitant jurisdiction against domiciliaries, a few possibilities (some more realistic than others) are given by the Convention to do so.

IV. FUTURE PERSPECTIVES

A. NEW CONVENTIONS AND PROPOSITIONS

1. PROPOSITION OF THE COMMISSION OF JANUARY 31ST 1998 FOR A REVIEW OF THE BRUSSELS CONVENTION[108]

In the proposed version, Articles 3 and 4 did not change a lot. The notion of domicile was changed by "habitual residence"[109]. As a result, the Convention would become more "friendly". The group of domiciled people is namely smaller than the group "habitual residents". More people would thus be protected against exorbitant jurisdiction. But on the other hand, more people will be able to invoke exorbitant rules of jurisdiction. Furthermore the Articles 17 and 18 are joined by the Article 16 as an exception to the application of national rules of jurisdiction. Also this is positive for non domiciled persons, as they now explicitly[110] have the possibility to escape from national rules of jurisdiction by agreeing on a certain court.

2. A NEW HAGUE CONVENTION

Although the first initiative came to a naught, a special commission is working right now on the question of jurisdiction, recognition and enforcement of foreign judgements in civil and commercial matters.
Concerning exorbitant fora, a list[111] of fora was established which use might

[107] ECJ, *Van Uden v. Deco-Line*, *o.c.*; Conclusions of General Advocate LÉGER.
[108] 98/C 33/05
[109] Also in the other Articles of the proposal, this notion was changed.
[110] As explained above, they already implicitly had that possibility.
[111] See *supra*, p. 6 for the list.

be prohibited under the new Convention.[112]
Nevertheless, the list was first discussed with regard to the nature of the Convention.
If the new convention is going to be a double one (giving a closed list of authorised fora), a list of prohibited ground of jurisdiction is not necessary from the standpoint of the creation of rules (but facilitates the task of the judge).
If the negotiations rather lead to a mixed convention, the list is essential because important consequences will occur with respect to the effects of the judgements.

Secondly the discussion clarified that the exorbitant fora are only prohibited where their objective is to define a general jurisdiction with respect to the defendant. As regard to specific jurisdiction some of them may be acceptable.
However, at this stage, no precise conclusion can be drawn concerning how the new Convention will deal with exorbitant fora.

3. THE CONVENTION ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGEMENTS IN MATRIMONIAL MATTERS

The jurisdiction in this convention is regulated differently than in the Brussels Convention.
In the Articles 2 to 6 the Convention states the ground of jurisdiction of Member States, based upon the residence or either applicant or respondent or upon the nationality of both spouses or domicile of both spouses. (Article 2)
A spouse who is habitually resident in the territory of a Member State or is a national of a Member State or who has his or her domicile in the territory of a Member State may be sued in another Member State only by virtue of those articles (Article 7).
If no court of a Member State has jurisdiction pursuant these articles jurisdiction shall be determinated in each Member State by the laws of that Member State.
Against a respondent who is not habitually resident and is not either a national or does not have his domicile within the territory of a Member State, any national of a Member State who is habitually resident within the territory of another Member State may, like the nationals of that State, avail himself of the rules of jurisdiction applicable in that State(Article 8).
Although jurisdiction here is based in general upon habitual residence, persons who are not nationals, habitual residents or persons domiciled within the territory of a Member State, are still discriminated compared to nationals, residents or persons domiciled within the territory. It seems difficult for the European Union to give jurisdiction to non-Member States States, even if this would be more reasonable.

[112] Annex VI of the report of the special commission of june 1997 on international jurisdiction and the effects of foreign judgements in civil and commercial matters.

B. CONCLUSION

JUENGER stated in 1984[113](about the importance of exorbitant jurisdiction) that "there was no indication in reported decisions to suggest that the Brussels Convention's jurisdiction discrimination had posed much of a practical problem".
Nevertheless things could change in the future as the scope of the Brussels system is growing. In 1992, the states of the European Economic Community and those of the European Free Trade Association signed a Treaty, creating the European Economic Area. This area, consisting of 18 States creates a market of over 350 million people. All those States are party either to the Brussels convention, or to the Lugano convention. Taken together the Conventions allow the use of exorbitant jurisdictions against persons not domiciled in one of the Member States of the 2 Conventions. Furthermore, states of Eastern Europe show interest in joining the European Union, and other States as Cyprus, Malta and Turkey already applied for membership. If those States ever become member of the European Union, they will also become member of the Brussels Convention. As the scope of the Brussels Convention thus will grow, it is likely that exorbitant jurisdiction will begin to pose a substantial practical problem.

On the other hand, although local subsidiaries are usually domiciliaries of the country in which they are located, local branches are not. Any company thus with an office that can not establish domiciliary status in a Member State may become a victim to exorbitant jurisdiction.
The non-domiciliary defendant will be sued before a court in a foreign country and he will be compelled either to take the risk of letting the case go by default or to take all the trouble and to meet the considerable expense of defending the action and contesting it on the merits at a court in a foreign country.
In addition to this, other reasons may seriously impede litigation in a foreign court: the parties belong to different communities, the difference of language may create great difficulties, there may even be mistrust of the impartiality of the other party's court, it may be very difficult for a plaintiff to prove his action in a foreign court (f.e. if the witnesses are living in his country).
Furthermore, one has to remember that it is perfectly possible that a person will have to meet all this trouble (and thus go to a foreign court) to defend himself against a claim which may be entirely without foundation.

What are then the possibilities to escape from this situation?

The Conventions itself give two solutions:

[113] F. JUENGER, "Judicial Jurisdiction in the United States and in the European Communities: a comparison", *o.c.*, No. 1212.

A first solution for a foreign country is becoming part of the Lugano Convention. Article 60c of this Convention allows Contracting States to invite other States to accede to the Convention. The conditions for accession are laid out in Article 62 of the Convention namely that all Contracting States must unanimously agree to admit this new member. Theoretically, all foreign States thus could become member. Nevertheless, for some countries a practical problem prevents accession. The Lugano Convention, that is a replica of the Brussels Convention, was made by civil law countries. The application of the convention by common law countries would cause difficulties (although for example the United Kingdom, a common law country is member of the Brussels Convention). If the United States for example, would become member, it would be difficult for American judges to interpret and apply the Convention's unfamiliar rules of jurisdiction, the same way as they are applied in the Member States. Furthermore, the law of jurisdiction of the applying country would completely have to be restructured in Convention cases, unless substantial changes were made to the convention.[114]

The second solution is the negotiation of a Treaty, allowed by Article 59 of the Brussels Convention. This Article allows a Contracting State to oblige itself towards a third State not to recognise judgements of other Contracting States based upon exorbitant ground of jurisdiction. Nevertheless an important limitation to this principle is made in paragraph 2 of the Article. The Article prohibits that Contracting State to refuse to recognise a judgement pronounced in another Contracting State when the basis of jurisdiction for that judgement is the presence or seizure of property belonging to the defendant in that State, and the cause of action is primarily concerned with that property or the property constitutes the security for a debt which is the subject-matter of the action. Although, Article 59 gives a good solution,[115] any treaty thus would have to allow this basis of jurisdiction.

What other solution could be given by changing the Brussels Convention?

Firstly the Convention could extend the non-use of exorbitant grounds of jurisdictions to non-domiciliaries. The Convention could prohibit the Contracting States use its exorbitant ground, regarding to everyone, domiciliaries and non-domiciliaries. Although then in gaps would occur in the legal systems of the some Contracting States (exorbitant grounds are often filling the gap when no non-exorbitant ground applies[116]), these States would just have to accept that sometime it is more reasonable to let the court of

[114] What probably not will happen, as it would only be in the interest of the applying State.
[115] Although effort of a Treaty between the United Kingdom and the United States did not succeed, there exist some Treaties for example between the United Kingdom and Canada (of April 24, 1984) and between the United Kingdom and Australia (August 23, 1990).
[116] For example our Article 638, that says that if no ground given in the Articles 635, 636 and 637 establishes the competence of the Belgian courts towards an alien, the plaintiff can bring the cases before the Belgian courts.

another State judge about a case.

A second possibility could be to limit the application of exorbitant rules of jurisdiction to those cases were indeed a "real connecting link" would exist between the case and the competent court. In the *Van Uden* case, the European Court of Justice stated that this link was necessary even if provisional and protective measures could be asked before a court whose competence is based upon exorbitant jurisdiction. By applying this criteria not only to provisional and protective measures, but to all the cases that fall under the Convention, the biggest part of the problem would been solved. To correct the unreasonable outcomes of exorbitant jurisdiction, mechanisms could be inserted in the Convention. If for example the forum non conveniens-clause (as known in the United States and part of the United Kingdom)[117] would be inserted, a court that has jurisdiction over a dispute could decline to hear it because a better forum exists. The judge would "have to refer the case to the court with which the action has the most real and substantial link".[118] This way, judges, who -in civilised countries-are supposed to be reasonable and fair, could refuse themselves to judge and refer the case to another court, if there would be not a sufficient close link between the court and the case, or if at least, there would be obviously a closer link the case and another court. Another possibility would be to insert a "due process"-clause. This way, a judgement rendered without the minimum requirements of a due process would not be recognised in the other Contracting State. Nevertheless these solutions could, as they would depend on the judge's opinion lead to disparate case law[119], and much uncertainty…

[117] The insertion of the principle was refused during the negotiations, of the accession of England, Ireland and Denmark.
[118] House of Lords*, Spiliada Maritime Corp. v. Consulex Ltd*., (1986), 3, All.E.R., 843.
[119] As for example in the United States (where these mechanisms exist), where even judges of the Supreme court are confused about what they have to decide.

A third possibility would be to recognise the "effet reflexe" of Article 16. This way, at least in those cases -in which the Brussels Convention considered that there is such a close link between the action and the competent court that only one court has exclusive jurisdiction- if the Article 16-matter would be anchored in a third country, that country's court would have jurisdiction.

Nevertheless, in my opinion, as exorbitant jurisdiction is not only a European problem but rather a worldwide problem,[120] it would be better to work out a new convention.[121]
This convention could, for example provide for one general jurisdiction based on the relationship between the forum and the person(s) whose legal rights are affected. This could be the habitual residence of the defendant. In most cases the assets of the defendant will be found there, and this way, if someone wants to sue someone else without foundation, at least the defendant will not have to meet all the difficulties of defending himself in a foreign country.
But, as also the rights of the plaintiff have to be considered, the Convention should also contain, as an alternative, specific jurisdiction, based on the close relationship between the forum and the underlying dispute (the cause of action). Specific jurisdiction could be based upon several grounds, for example, the fact that the property over which the dispute exists lies in the country. Also other bases mentioned in the Article 5 to 25 of the Brussels Convention, could form, eventually adapted, reasonable bases of specific jurisdiction.
To elaborate such a Convention will certainly demand a huge amount of time, energy and efforts, but it is probably the only way to come to rules of jurisdiction based, as Professor GRAVESON says, on the principle of doing justice to all men.

[120] For example, in the United States, some States base personal jurisdiction upon the temporary presence in the State, or upon “doing business”.
[121] At this moment a commission is working on a new Hague Convention on the recognition and enforcement of foreign judgements.