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THE EUROPEAN UNION'S NEW ROLE IN INTERNATIONAL PRIVATE LITIGATION

Ronald A. Brand[†]

I. Introduction

This article concerns what some would consider a very narrow topic: private litigation and how it is affected by changes in Europe. This discussion, however, has broader implications and is in that sense about foreign policy. In February 2005, President George W. Bush became the first U.S. President ever to visit the European Union's headquarters in Brussels.¹ In November 2004, the European Union took the lead in mediating a successful end to Ukraine's election, and negotiated a suspension of Iran's uranium-enrichment program.² In December 2004, the European Union took over the North Atlantic Treaty Organisation ("NATO") peacekeeping mission in Bosnia and Herzegovina.³ It was not long ago that many doubted European attempts to establish a major aircraft manufacturer or a common currency.⁴ Airbus now outsells Boeing, and the Euro is the world's second-largest reserve currency after the U.S. dollar—with many nations shifting further away from the dollar to the Euro.⁵ Europe's "soft power" approach to world affairs is further indicated by the fact that the European Union and its Member States now provide nearly \$50 billion in development aid throughout the world, compared to just over \$16 billion for the United States.⁶

While such political comparisons are interesting, the European Union also provides both an example and a laboratory for many aspects of legal development. It is trendy these days, with the proposed "*European Constitution*," to talk of "*European federalism*" and to debate whether a "*regional international economic organization*" has now become a member of the community of states, or at least something approaching an entity with real "*sovereign*" powers. The entire process, however, can easily be bogged down in semantics.

Lord Pearson once joined the debate on European semantics by telling what he referred to as the only two jokes he knew about the United Kingdom's EU mem-

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¹ See Marc Champion, *EU Tries Again on Foreign Policy; Reinvigorated Drive for United Action Draws Notice in Washington*, WALL ST. J., Jan. 26, 2005, at A. 14, available at http://ue.eu.int/ueDocs/cms_Data/docs/pressdata/EN/pressReview/83542.pdf.

² See *id.*

³ Gareth Harding, *Analysis: EU assumes peace role in Bosnia*, THE WASHINGTON TIMES, Dec. 2, 1999, at <http://washingtontimes.com/upi-breaking/20041202-105020-4526r.htm>.

⁴ See Champion, *supra* note 1.

⁵ David Gow, *First for Airbus as it outsells arch-rival Boeing*, THE GUARDIAN, Jan. 6, 2004, at <http://www.guardian.co.uk/airlines/story/0,1371,1116906,00.html>.

⁶ See Champion, *supra* note 1.

bership: "The first is that we shouldn't go on saying that we are 'giving' our Sovereignty away; we are actually paying Brussels tens of billions of pounds a year to take it. The second is that if the European Union applied to join itself, it wouldn't have a hope of being accepted, given its clear lack of democracy."⁷

One need not go far to find similar statements made about Washington by what in legal circles are now called "federalists" in the United States. The upside-down nature of politics and semantics is further demonstrated by the fact that those statements are often made by members of groups that now control much of the political life and decision-making process in Washington.

My background is not politics or semantics, so I need quickly to dig myself out of any possible hole in either of those areas. I want rather to consider issues from the perspective of a lawyer—and a lawyer's tools are words, so semantics are important. But I want, in particular, to look at the European Union in the context of one of the areas lawyers often consider; and that is civil litigation. I must admit that when I was in law school and wanting to think about important international matters, I did not think first about procedure in cross-border lawsuits, or about how we decide what law applies to a particular private dispute. *Peace and justice* are the work of international lawyers, and of course, peace and justice are issues for those who consider international law as it relates to concerns like genocide, or justifications for war, or the rules regarding detention of captured persons.

I've now had a bit more time to think about these things, and let me tell you some of the conclusions I have reached:

First, peace and justice are not matters to be left to world leaders, they are matters that should engage each of us; and they most definitely are matters that should engage every lawyer.

Second, peace and justice do not come in packages; they come in pieces. And those pieces most often are not found at a national or international governmental level, but rather in personal and commercial relationships. When we do business with people in other countries we form relationships that help us both understand and work with each other. When we develop a better understanding of others, we make tensions less likely. When we make tensions less likely, we make disputes less likely. And when we *have* disputes, if we resolve them peacefully, we make *escalation* of tensions less likely.

We all know that nations need to find peaceful methods of dispute resolution, but what are the methods that exist in today's world? We have the International Court of Justice ("ICJ"),⁸ and now the International Criminal Court ("ICC"),⁹ and several regional criminal courts. More importantly, I would argue—based on actual use and successful results—we have the World Trade Organization

⁷ Lord Pearson, *Better Off Out! What is the Point of the European Union?*, available at <http://www.brugesgroup.com/mediacentre/comment.live?article=249> (last visited Jan. 14, 2005).

⁸ International Court of Justice (ICJ), at <http://www.icj-cij.org/>.

⁹ International Criminal Court (ICC), at <http://www.icc-cpi.int/php/showcpi.int/php/show.php?id=home&l-EN>.

("WTO"),¹⁰ which allows submission of disputes by nations for binding decisions. But if you look at any of the institutional dispute settlement mechanisms for nations, they all look a lot like the types of dispute settlement that lawyers work at everyday in courts, in arbitration, and in other forms of alternative dispute resolution.

The truth is that most settlement of disputes between persons of different countries takes place, not at the ICJ, or the ICC, or the WTO, but in private arbitration and in litigation before national courts. Peace (and justice) are promoted and kept on a regular basis through the process of reaching decisions in specific cases involving specific parties. And in all of this, lawyers play the central role—as advocates, as judges, as arbitrators. Lawyers are day-to-day peacemakers.

It is in this vein that I want to consider one part of the evolution of Europe that has been closest to my own work. That part is the developing competence of the European Union over matters of private law, private international law, and judicial cooperation. In other words, the role of the European Union (through the institutions of the European Community) in private litigation.

II. The Evolutionary Process

In order to understand this evolutionary process, it is necessary to begin with the broader process that led to the founding of the European institutions that now exist. At the end of World War II, the United States was firmly behind an economic relationship in Europe that would—we hoped—bring former warring nations together in a manner that would prevent future wars.¹¹ The foundation for this grand scheme was not in arms control treaties, or traditional peace treaties at the end of war, but rather in economic agreements: The European Economic Community,¹² the European Coal and Steel Community,¹³ and the European Atomic Energy Community ("Euratom").¹⁴ These three institutions, formed by treaties signed in the late 1950's by the six original Member States, have now evolved into the European Community institutions and the European Union—with twenty-five Member States encompassing nearly all of Western Europe and a significant part of Central and Eastern Europe.¹⁵ The European Union now has a population of nearly 460 million people; more than one-and-one-half times the population of the United States.¹⁶

¹⁰ World Trade Organization (WTO), at <http://www.wto.org/>.

¹¹ See e.g., Youri Devuyst, *The European Union Transformed: Community Method and Institutional Evolution from the Schuman Plan to the Constitution for Europe* 11 (4th ed. 2005).

¹² European Economic Community, at <http://www.infoplease.com/ce6/history/A0817889.html>.

¹³ European Coal and Steel Community, at http://en.wikipedia.org/wiki/European_Coal_and_Steel_Community.

¹⁴ European Atomic Energy Community at http://en.wikipedia.org/wiki/European_Atomic_Energy_Community.

¹⁵ Europa—Gateway to the European Union, at http://www.europa.eu.int/abc/maps/index_en.htm.

¹⁶ Internet World Statistics—Usage and Population Statistics, at <http://www.internetworldstats.com/europa.htm>.

The original European Economic Community was designed as a customs union, something specifically allowed by Article XXIV of the then-infant General Agreement on Tariffs and Trade.¹⁷ The plan was to relieve tensions among Germany, France, Italy, and the three Benelux nations by eliminating internal border restrictions on trade, and by creating a common external tariff.¹⁸ This would create the “four freedoms” of Europe: the free movement of goods, services, people, and capital. The idea was a simple one: the more economically intertwined past enemies became, the less likely they were to move toward a third global war in the same century. That part of the plan has been successful. For proof of success, one need only look to places like the former Yugoslavia where states desire to break apart from their neighbors while at the same time carefully designing their laws and policies to align with the requirements for admission to the European Union. The European Union has become the magnet that harmonizes laws, policies, and political statements throughout Central and Eastern Europe. In the face of dramatic regional tensions and fragmentation, there is consistent and sustained desire to become a part of a greater Europe.

III. The Free Movement of Legal Rights

This evolution obviously creates interesting comparisons with the United States. Today's Europe began, and has grown, in ways far different from the patterns of our own political history. But there are common factors. One can easily compare the provisions of the original European Economic Community Treaty—promoting free movement—with our own interstate commerce clause.¹⁹ We of course accomplished similar purpose with many fewer original words, but the effect is the same: commercial policy is centralized, and that centralized control of commerce has in both cases resulted in greater centralization of many other aspects of government. The Europeans, like Americans, have found that economic relations are core to cooperative existence, and that much of life is encompassed in, and affected by, economic activity.

This leads us to a further comparison between the fundamental documents creating the United States of America and the European Community and Union. In both the United States and the European Union, it was realized early on that if you are truly to have free movement of goods, services, people, and capital, you must also have free movement of the legal recognition of the interests represented in each of those factors. After all, isn't it one of the first things we learn in law school, that there are no legal “things,” only legal interests—those intangible “sticks” we try to bundle up in our first year property courses. Owning things, or money, or intellectual property rights, means something only so far as the legal system—through the courts—will recognize and protect individual interests in such property. The result is that in order to have the free movement of

¹⁷ Barry Eichengreen, *European Economic Community*, available at <http://www.econlib.org/library/Enc/EuropeanEconomicCommunity.html>.

¹⁸ *Id.*

¹⁹ U.S. CONST. art. I, § 9, cl. 6.

goods, services, people, and capital, you must also have the free movement of legal rights. In other words, you must have free movement of judgments.

Our Founding Fathers in the United States recognized this requirement in our Constitution through the Full Faith and Credit Clause of Article IV, which states that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."²⁰ The founders of the European Economic Community recognized similar needs, but—in their tradition—accomplished the goal in more words and a number of positive law developments. They did not provide for the free circulation of judgments directly, but rather mandated that the Member States come together to negotiate a treaty that would accomplish this goal. They were, in one sense however, a bit more foresighted than the U.S. Founding Fathers, by realizing that they needed free movement of arbitral awards as well as of court judgments. Article 220 of the original Treaty of Rome (now Article 293 of the consolidated European Community Treaty) provided that:

Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

. . . .
the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.²¹

The six original Member States carried out this dictate by negotiating the 1968 Brussels Convention,²² a treaty that was both narrower and broader than the objectives of Article 220. Because of the existence of the 1958 New York Convention covering arbitration,²³ the Brussels Convention was limited to court judgments, and did not need to cover arbitration. It also was limited to "civil and commercial" matters, thus avoiding a broader scope that would have been consistent with Article 220. On the other hand, the Brussels Convention was not limited to recognition and enforcement of judgments. Realizing the importance of jurisdiction to questions of judgments recognition, the original Member States negotiated a "double convention" that included rules of direct jurisdiction for the originating court as well as rules applicable in courts in which the resulting judgment is taken for purposes of recognition and enforcement.²⁴ The Brussels Con-

²⁰ U.S. CONST. art. IV, § 1, cl. 1.

²¹ Treaty Establishing the European Community, art. 293 (ex art. 220), O.J. Eur. Comm. C 325/33, 24 Dec. 2002 [hereinafter TEC].

²² European Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Brussels, 27 September 1968, 41 O.J. Eur. Comm C 27/1, 26 Jan. 1998 (consolidated and updated version of the 1968 Convention and the Protocol of 1971, following the 1996 accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden) [hereinafter Brussels Convention], at <http://curia.eu.int/common/recdoc/convention/en/c-textes/brux-idx.htm>.

²³ The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, entered into force 7 June 1959 [hereinafter New York Convention] available at <http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.html>.

²⁴ Single (sometimes referred to as "simple") conventions on the recognition of judgments deal only with indirect jurisdiction and apply only to the decision of the court asked to enforce a foreign judgment.

vention thus did much more than provide the equivalent of a "full faith and credit clause" for Europe; it harmonized jurisdictional rules and provided specific protection for defendants domiciled in other Member States from otherwise "exorbitant" jurisdictional bases.²⁵ In the latter respect, it added some of the effect of the U.S. Due Process clause as it has been applied to jurisdictional issues.²⁶

As new Member States joined the European Community, each of them acceded to the Brussels Convention as a part of its package of obligations.²⁷ This process changed, however, when the Treaty of Amsterdam entered into force on May 1, 1999, adding language to the European Community Treaty that moved competence from the Member States to the Community institutions.²⁸ One of the creations of the Amsterdam Treaty was a new "area of freedom, security and justice."²⁹ As part of this new area of competence, Article 61 of the European Community Treaty now provides that "the Council shall adopt . . . measures in the field of judicial cooperation in civil matters as provided for in Article 65."³⁰ Article 65 in turn describes the scope of such authority as follows:

Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:

(a) improving and simplifying: the system for cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.³¹

The recognizing court considers the jurisdiction of the court issuing a judgment in deciding whether to recognize the judgment of the originating court. Double conventions, like the Brussels and Lugano Conventions, not only deal with recognition, but also provide direct jurisdiction rules applicable in the court in which the case is first brought – thus addressing the matter from the outset and preempting the need for substantial indirect consideration of the issuing court's jurisdiction by the court asked to recognize the resulting judgment.

²⁵ See Brussels Convention, *supra* note 22, art. 3.

²⁶ For a discussion of the application of the Fifth and Fourteenth Amendment Due Process Clauses to issues of personal jurisdiction in U.S. courts, see Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661 (1999).

²⁷ Brussels Convention, *supra* note 22.

²⁸ Treaty of Amsterdam, at <http://europa.eu.int/abc/obj/amst/en/>.

²⁹ See Strengthening the European Union As An Area of Freedom, Security and Justice, available at http://europa.eu.int/comm/justice_home/fsj/intro/fsj_intro_en.htm.

³⁰ TEC, *supra* note 21, art. 61 (ex art. 73i).

³¹ *Id.* at art. 65 (ex art. 73m).

IV. The Internal Effect of Article 65

Article 65 of the EC Treaty has importance both within and without the European Union. Internally, the language is clear. The Community institutions, and not the Member States, now have competence to create new legal instruments governing cross-border service of process, cross-border taking of evidence, and recognition and enforcement of civil and commercial judgments.³² Community institutions now have competence for "promoting compatibility" on issues of applicable law, and rules of civil procedure.³³ The Community institutions have not hesitated to exercise this new authority. Five new regulations have been promulgated. Three are in the area of jurisdiction and the recognition and enforcement of judgments:

- 1) Regulation 1346/2000 on insolvency proceedings;³⁴
- 2) Regulation 1347/2000 on jurisdiction and the recognition and enforcement of judgments in family law matters,³⁵ known as "Brussels II;" and
- 3) Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters,³⁶ known as "Brussels I." This Regulation replaces the Brussels Convention (except for Denmark).

Two other new Regulations are in the area of judicial cooperation:

- 1) Regulation 1348/2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters;³⁷ and
- 2) Regulation 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters.³⁸

The Council has also adopted a decision and two directives under Article 65. The Decision establishing a European Judicial Network in civil and commercial

³² *Id.*

³³ *Id.* at art. 65(b) (ex art. 73m(b)).

³⁴ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, O.J. Eur. Comm. L 160/1, 30 June 2000.

³⁵ Council Regulation (EC) No 1347/2000 of 29 May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses, O.J. Eur. Comm. L 160/19, 30 June 2000 [hereinafter Brussels II].

³⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. Eur. Comm. L 012/1, 16 Jan. 2001 [hereinafter Brussels I]. The Brussels Convention remains in force for relations between Denmark and the other Member States.

³⁷ Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, O.J. Eur. Comm. L 160/37, 30 June 2000.

³⁸ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, O.J. Eur. Comm. L 174/1, 27 June 2001.

matters was adopted in May of 2001.³⁹ Under this instrument, each Member State designates a "contact point" for purposes of facilitating resolution of issues that may arise in cross-border litigation within the European Union.⁴⁰ The Commission also has adopted a directive on legal aid for cross-border litigants⁴¹ and a directive relating to compensation to crime victims.⁴²

Proposals for further instruments continue to be considered.⁴³ These include a Green Paper on alternative dispute resolution,⁴⁴ a proposal for a Council Regulation concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility,⁴⁵ a proposal for a Council Regulation creating procedures for uncontested claims,⁴⁶ a Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations ("Rome I") into a Community instrument,⁴⁷ a proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"),⁴⁸ a Green Paper on small claims litigation,⁴⁹ and a Green Paper on maintenance obligations.⁵⁰

The realm of instruments affecting litigation internal to the Community continues to include treaties that either do not clearly fall under the scope of Article 65 or include contracting parties from outside the European Union. These treaties include:

³⁹ Council Decision 2001/470/EC of 28 May 2001 establishing a European Judicial Network in civil and commercial matters, O. J. Eur. Comm. L 174/25, 27 June 2001, available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2001/l_174/l_17420010627en00250031.pdf; See http://europa.eu.int/comm/justice_home/ejn/index_en.htm.

⁴⁰ *Id.* at art. 2(2).

⁴¹ Council Directive 2002/8/EC of 27 Jan. 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, O.J. Eur. Comm. L 26/41, 31 Jan. 2003.

⁴² Council Directive 2004/80/EC of 29 Apr. 2004 relating to compensation to crime victims, O.J. Eur. Union L 261/15, 6 Aug. 2004.

⁴³ Further information on the agenda under Article 65 available at http://europa.eu.int/comm/justice_home/fsj/civil/fsj_civil_intro_en.htm (last visited Jan. 17, 2005).

⁴⁴ Green Paper on alternative dispute resolution in civil and commercial law, COM/2002/0196 final, 19 Apr. 2002, Celex No. 502DC0196.

⁴⁵ This Regulation would repeal Brussels II and amend Brussels I in matters relating to maintenance, COM/2002/0222 final, O.J. Eur. Comm. C 203E/155, 27 Aug. 2002.

⁴⁶ Amended proposal for a Regulation of the European Parliament and of the Council creating a European enforcement order for uncontested claims (presented by the Commission pursuant to Article 250 (2) of the EC Treaty), COM/2003/0341 final, 12 June 2003.

⁴⁷ COM/2002/0654 final, Celex No. 502DC0654, 14 Jan. 2003. Whether the area of applicable law is clearly covered by Article 65 of the European Community Treaty is a matter of debate. See Paul Beaumont, *Private International Law of the European Union: Competence Questions Arising from the Proposed Rome II Regulation on Choice of Law in Non-contractual Obligations*, in 2 CILE STUDIES, PRIVATE LAW, PRIVATE INTERNATIONAL LAW AND JUDICIAL COOPERATION IN THE EU-US RELATIONSHIP, 123 (Ronald A. Brand, ed. 2005). This may be settled if the current text of the Treaty on a European Constitution ultimately is adopted. See *supra* note 43.

⁴⁸ COM(2003)0427 final, Celex No. 503PC0427, 22 July 2003.

⁴⁹ Green Paper on a European order for payment procedure and on measures to simplify and speed up small claims litigation, COM(02)0746 final, Celex No. 502DC0746, 20 Dec. 2002.

⁵⁰ Green Paper - Maintenance obligations, COM(04)0254 final, Celex No. 504DC0254, 15 Apr. 2004.

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- 1) The "Rome I" Convention on the law applicable to contractual obligations;⁵¹ and
- 2) The Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.⁵²

V. The External Effect of Article 65

The Community institutions obviously have been busy exercising their authority under Article 65. The result is a number of instruments, both those in effect now and those currently being prepared, that change and consolidate rules applicable to private law, private international law, and judicial cooperation in the courts of the Member States of the European Union. For the most part, these rules on their face are limited to litigation that is internal to the Union. The cases to which they apply will be in EU Member State courts, and usually will involve parties from EU Member States. However, some of the rules apply to situations involving non-EU parties. For example, the rules of the Brussels Regulation focus on litigation in Member State courts when the defendant is from a Member State. Thus, they would – at least for now – apply to a case brought by a U.S. national against a French domiciliary in a French court. They would not, however, apply in courts outside the European Union. All of the instruments reflect the exercise of competence for matters relating, as required by Article 65, to “the proper functioning of the internal market.”⁵³

This leaves open the question of authority for the adoption of such rules for purposes of external relations. This issue has surfaced in several ways. One is at the Hague Conference on Private International Law, where since 1992 the Hague Member States have considered the possibility of a multilateral convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.⁵⁴ Those negotiations began in the early 1990s, before the Treaty of Amsterdam and the current language of Article 65.⁵⁵ At that time, each delegation representing an EU Member State was fully engaged in the negotiations. Because negotiations were not completed prior to the effective date of the Treaty of Amsterdam, however, Article 65 had a rather important impact on the process at The Hague. What had been full participation by EU Member States in the negotiations, moved to full coordination of a Community position represented in

⁵¹ 1980 Rome Convention on the law applicable to contractual obligations (consolidated version). O.J. Eur. Comm. C 27/34, 26 Jan. 1998 [hereinafter Rome I]. On July 22, 2003, the European Commission submitted its Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations, COM (03) 427(01) [hereinafter Rome II]. This would effectively extend the rules of Rome II to non-contractual obligations, thus giving the package of applicable law rules coverage more consistent with the scope of the jurisdictional rules of the Brussels I Regulation.

⁵² European Communities-European Free Trade Association: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, done at Lugano, September 16, 1988, O.J. Eur. Comm. L 319/9, 25 Nov. 1988 [hereinafter Lugano Convention].

⁵³ TEC, *supra* note 21, at art. 65.

⁵⁴ Information on the Hague Conference project available at http://hcch.e-vision.nl/index_en.php?act=progress.listing&cat=4.

⁵⁵ *Id.*

The Hague by the Commission on behalf of the Community. This affected dynamics both within the group of EU Member States and in the larger set of delegations at The Hague. While the positions of the EU Member States are now well-coordinated at the negotiations, through participation by the Commission and Council representatives, there remains no clear explanation of whether competence for negotiating and signing a treaty at The Hague rests (1) with the EU Member States, (2) with the Community institutions, or (3) in a mixed form with Member States and Community institutions each having competence for some, but not all, issues.

The Hague Conference is not the only institution in which matters that may fall under Article 65 are considered in a multilateral setting. Other organizations that deal with the unification and harmonization of international private law and private international law issues include the United Nations Commission on International Trade Law ("UNCITRAL") in Vienna,⁵⁶ and the International Institute for the Unification of Private Law ("UNIDROIT") in Rome.⁵⁷ While the instruments considered to date in each of those institutions have not brought the direct confrontation with Article 65 issues that has resulted with the jurisdiction and judgments negotiations in The Hague, it likely is only a matter of time until this issue arises in each of these bodies.⁵⁸

The question of external competence for matters of private international law and judicial cooperation is being more directly addressed in another setting. While the Brussels Convention was being amended and then adopted as an internal regulation, the Community Member States were also renegotiating the Lugano Convention on jurisdiction and judgments with the European Free Trade Association ("EFTA") Member States.⁵⁹ Uncertainty over who should sign the newly amended Lugano Convention—the EU Member States, the Council on behalf of the Community, or both—ultimately led to a Council request to the European Court of Justice for an opinion, under Article 300(6) of the European Community Treaty,⁶⁰ on whether the Community "has exclusive, or shared, competence to conclude the new Lugano Convention."⁶¹

Citing the 1971 *ERTA* decision of the European Court of Justice,⁶² the Council's Legal Service rendered an opinion on February 5, 1999, stating that "once the Community has exercised its internal competences adopting positions by

⁵⁶ See <http://www.uncitral.org/>.

⁵⁷ See <http://www.unidroit.org/>.

⁵⁸ For commentary from a conference addressing this issue, see 2 CILE STUDIES, PRIVATE LAW, PRIVATE INTERNATIONAL LAW, AND JUDICIAL COOPERATION IN THE EU-US RELATIONSHIP (Ronald A. Brand ed., 2005), *supra* note 47.

⁵⁹ Lugano Convention, *supra* note 52.

⁶⁰ TEC, *supra* note 21, art. 300(6):

The European Parliament, the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 48 of the Treaty on European Union.

⁶¹ Opinion 01/03.

⁶² Case 22/70, *Commission v. Council*, [1971] E.C.R. 263 (*ERTA*).

which common rules are fixed [pursuant to Article 65], the Community competence becomes exclusive, in the sense that the Member States lose the right to contract, individually and even collectively, obligations with third countries which affect the said rules.”⁶³ This doctrine already has led to Community representation of Member State positions in the WTO and other international economic law bodies. Now that competence for private international law and judicial cooperation issues lies with the Community for internal market purposes, and now that such competence has been exercised through promulgation of the Brussels I Regulation in the area of jurisdiction and the recognition and enforcement of judgments, the question is whether such exercise of internal competence brings with it external competence because the possession of one naturally requires consistent exercise of the other.

To answer this question, we must look further at the evolution of the jurisprudence of the European Court of Justice on this issue. The 1971 *ERTA* doctrine was further developed by the Court in its *Open Skies* judgments of 2002,⁶⁴ when it stated:

81. It must next be determined under what circumstances the scope of the common rules may be affected or distorted by the international commitments at issue and, therefore, under what circumstances the Community acquires an external competence by reason of the exercise of its internal competence.

82. According to the Court's case-law, that is the case where the international commitments fall within the scope of the common rules (*ERTA* judgment, paragraph 30), or in any event within an area which is already largely covered by such rules (Opinion 2/91, paragraph 25). In the latter case, the Court has held that Member States may not enter into international commitments outside the framework of the Community institutions, even if there is no contradiction between those commitments and the common rules (Opinion 2/91, paragraphs 25 and 26).

83. Thus it is that, whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external

⁶³ See Alegria Borrás, *The Effect of the Adoption of Brussels I and Rome I on the External Competences of the EC and the Member States* 2 (copy on file with the author). The Legal Service was paraphrasing the *ERTA* judgment at ¶¶ 17 and 18, which stated:

17. In particular, each time the Community, with a view to implementing a common policy envisaged by the Treaty, adopts provisions laying down common rules, whatever form these may take, the Member States no longer have the right acting individually or even collectively, to undertake obligations with third countries which affect those rules.

18. As and when such common rules come into being, the Community alone is in a position to assume and carry out contractual obligations towards third countries affecting the whole sphere of application of the Community legal system.

⁶⁴ Case C-467/98, *Commission v. Denmark*, [2002] E.C.R. I-9519; Case C-468/98, *Commission v. Sweden*, [2002] E.C.R. I-9575; Case C-469/98, *Commission v. Finland*, [2002] E.C.R. I-9627; Case C-471/98, *Commission v. Belgium*, [2002] E.C.R. I-9681; Case 472/98, *Commission v. Luxembourg*, [2002] E.C.R. I-9741; Case C-475/98, *Commission v. Austria*, [2002] E.C.R. I-9797; and Case C-476/98, *Commission v. Germany*, [2002] E.C.R. I-9855.

competence in the spheres covered by those acts (Opinion 1/94, paragraph 95; Opinion 2/92, paragraph 33).

84. The same applies, even in the absence of any express provision authorising its institutions to negotiate with non-member countries, where the Community has achieved complete harmonisation in a given area, because the common rules thus adopted could be affected within the meaning of the *ERTA* judgment if the Member States retained freedom to negotiate with non-member countries (Opinion 1/94, paragraph 96; Opinion 2/92, paragraph 33).

Commentators have argued that these decisions do not indicate clear exclusive Community competence in areas of private international law and judicial cooperation because a doctrine laid down in "purely economic areas such as external trade," may not apply evenly to private international law.⁶⁵

From the U.S. side of the Atlantic, the *ERTA* line of cases is particularly interesting. The idea that powers emanating from constitutional documents—in this case the treaties creating the European Community—that grant specific authority for internal matters, without granting specific authority for external matters, can be exercised internally and thus result in the capture of external authority is an intriguing one. This clearly is seen as both fundamental and necessary to the evolution of the law of the European Community. At the same time, this concept demonstrates the tension between the Member States and the Community institutions as the deepening of the Community moves forward. In the *Lugano* case, it also demonstrates the capture of authority by international trade lawyers within the Community institutions in the realm of private international law; something on which the private international law experts apparently never were consulted when the Treaty of Amsterdam was concluded and competence was moved to the Community institutions.

The *Lugano* case is interesting for reasons beyond the specific question the Court must address. The case was argued before the European Court of Justice on October 19, 2004, as its first *en banc* hearing since the 2004 enlargement of the Community to twenty-five Member States.⁶⁶ This means that judges from all twenty-five of the Member States will be involved in the ruling. While the case, on its face, deals only with a single treaty, it has far broader implications, and is likely to influence the development of private law, private international law, and judicial cooperation on a Community level for years to come. In addition to determining who should sign the amended Lugano Convention, the decision is likely to suggest as well who properly speaks for the Community and its Member States in negotiations at the Hague Conference on Private International Law and in other multilateral bodies. Whether the European Court of Justice finds any important distinction between prior cases in the international economic law realm and these matters in the field of private international law will say a lot about the development of the European Community from a simple common market to the

⁶⁵ See Borrás, *supra* note 63, at 2.

⁶⁶ Opinion 1/03 of the European Court of Justice, *pending decision*.

more complex type of law-making framework that makes it look more-and-more like a traditional federal system.

VI. What Impact?

We need not wait for the *Lugano* decision to realize the impact of the changes brought about in Article 65 of the European Community Treaty. Some of those changes are already evident, and some are certain enough for the future to require that lawyers be aware of their effect even now. The list of issues for consideration include:

- A) the effect of evolution of European competence on negotiations in multilateral institutions;
- B) the importance of language distinctions within Article 65 to the likelihood of future European instruments;
- C) the importance of Article 65 developments to the future evolution of U.S. law on issues covered in its provisions;
- D) the need for considering Article 65 issues when planning for and carrying out cross-border litigation; and
- E) the need for considering Article 65 issues when drafting agreements for cross-border commercial transactions.

I would like to offer brief comments on each of these five issues.

A. Evolving EU Competence and Multilateral Institutions

Given the language of Article 65 of the European Community Treaty, and the *ERTA* and *Open Skies* jurisprudence of the European Court of Justice⁶⁷, it is hard to imagine that the Court's coming decision in the *Lugano Convention* case will not include recognition of Community competence for external relations in matters covered in Article 65 and implemented internally through Regulations and other Community instruments. The only real question is the extent to which the Member States will be recognized as retaining competence. In other words, the issue is whether this will be a matter for exclusive Community competence or for mixed competence. Either way, the European Union, through the Community institutions, will have a role in determining rules of private law, private international law, and judicial cooperation in multilateral institutions.

This already has had a significant impact at the Hague Conference on Private International Law, and is likely to have impact elsewhere. This is particularly true in the negotiation of a Convention on Exclusive Choice of Court Agreements, which is scheduled for completion in a Diplomatic Conference in June 2005.⁶⁸ If this process is successful, there will finally be a treaty that could do for litigation what the 1958 New York Convention⁶⁹ did for arbitration by mak-

⁶⁷ See *supra* note 64 and accompanying text.

⁶⁸ Information on the Choice of Court Convention available at http://hcch.e-vision.nl/index_en.php?act=progress.listing&cat=4.

⁶⁹ New York Convention, *supra* note 23.

ing both the agreement to submit to a specific forum and the resulting decision enforceable in all contracting states. That Convention will not be concluded without the active and coordinated participation of the European Community institutions, even though the Community is not yet an official Member of the Hague Conference and has status there only through its Member States.⁷⁰ No treaties directly affected by Article 65 are currently before other institutions, such as UNCITRAL and UNIDROIT, but it seems only a matter of time before that is the case.

B. Distinctions in the Language of Article 65

The second issue is that of distinctions in the language of Article 65. The type of competence within Article 65 is divided in a manner that is not necessarily clear to the casual observer. Thus, in Article 65(a)—covering cross-border service, taking of evidence, and the recognition and enforcement of judgments—the language is the strongest: the Council is authorized to take measures aimed at “improving and simplifying” these aspects of the law.⁷¹ This clearly encompasses Regulations imposing rules on the Member States. In paragraph (b), dealing with conflict of laws and jurisdiction issues, the language only authorizes the Council to take measures “promoting the compatibility” of rules.⁷² This leaves open the argument that in these areas Community competence is more limited. The same is true in paragraph (c), dealing with rules of civil procedure, where the Council is authorized to take measures “eliminating obstacles to the good functioning of civil proceedings.”⁷³

Commentators have debated the differing language and its impact on Community competence.⁷⁴ This debate may become moot if the Constitutional Treaty is ratified. That document, in Article III-269, would drop the Article 65 distinctions in language, replacing it with the following text:

1. The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.
2. To this end, European law or framework law shall lay down measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
 - (a) the mutual recognition and enforcement between Member States of judgments and decisions in extrajudicial cases;
 - (b) the cross border service of judicial and extrajudicial documents;

⁷⁰ Statute of the Hague Conference on Private International Law, entered into force 15 July 1955, available at http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=29.

⁷¹ TEC, *supra* note 21, at art. 65(a) (ex art. 73m(a)).

⁷² *Id.* at art. 65(b) (ex art. 73m(b)).

⁷³ *Id.* at art. 65(c) (ex art. 73m(c)).

⁷⁴ See, e.g., Beaumont, *supra* note 47.

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- (c) the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction;
- (d) cooperation in the taking of evidence;
- (e) a high level of access to justice;
- (f) the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States;
- (g) the development of alternative methods of dispute settlement;
- (h) support for the training of the judiciary and judicial staff.⁷⁵

Paragraph (2) of this Article appears to go beyond the scope of Article 65 of the European Community Treaty by authorizing the Council to take measures in all listed areas, "particularly when necessary for the proper functioning of the internal market."⁷⁶ Thus, all such measures are specifically authorized, without the appearance of different levels of Community involvement.

C. Article 65 and the Future of U.S. Law

The third issue deals with how Article 65 measures mesh with the future of U.S. law. This can best be considered in the context of the negotiations at The Hague for a Convention on Exclusive Choice of Court Agreements.⁷⁷ While the United States may have nationalized some aspects of judgments recognition through the Full Faith and Credit Clause,⁷⁸ and some aspects of jurisdictional analysis through the Due Process Clauses,⁷⁹ the European Union seems to have gone beyond the United States in its extent of potential centralization under Article 65. In the United States, conflict of laws rules traditionally have been the province of the states, mostly developed in the courts. This is one area in which Justice Brandeis' exhortation to the states to serve as laboratories is perhaps most evident.⁸⁰ Thus, a European approach to questions of applicable law that is as centralized as seems possible under Article 65 (and even more so under Article III-269 of the Treaty Establishing a Constitution for Europe) would go far beyond any efforts at unification or centralization in the United States.

One other area indicating potential tensions for U.S. legal development already eclipsed in the European Union, is in the area of enforcement of foreign judgments. While the Community institutions may now have captured exclusive authority in this area with the promulgation of the Brussels I Regulation⁸¹, in the

⁷⁵ Treaty Establishing a Constitution for Europe, art. III-269, O.J. Eur. Union, C 310/1, 16 Dec. 2004.

⁷⁶ *Id.*

⁷⁷ *Supra* note 29 and accompanying text.

⁷⁸ U.S. Const. art. VI, § 1.

⁷⁹ U.S. Const. amend. V & XIV.

⁸⁰ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

⁸¹ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. Eur. Comm. L 012/1, 16 Jan. 2001.

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United States, initiatives in this area currently move forward on three separate (and possibly conflicting) levels. The National Conference of Commissioners on Uniform State Laws has begun an effort to amend and update its Uniform Foreign Money-Judgments Recognition Act, which is now in effect in the majority of states.⁸² At the same time, the American Law Institute this May is likely to approve a project that would put forward a draft federal statute on recognition and enforcement of foreign judgments.⁸³ Finally, in June, it is likely that a U.S. delegation to the Hague Conference will participate in the completion of a Convention on Exclusive Choice of Court Agreements, setting rules of jurisdiction when such agreements exist and rules of recognition and enforcement when the application of those agreements result in judicial decisions.⁸⁴ On this issue, the federalism nature of the U.S. body politic is alive and well.

D. Planning for Cross-border Litigation After Article 65

The fourth issue raised by Article 65 is one for the transactions lawyer. What does it mean for drafting contracts for cross-border transactions? In this regard, lawyers preparing such contracts must be aware of the impact of Community Regulations and other instruments that result from the Article 65 process. Those rules may limit, as well as authorize, the use of provisions affecting choice of forum, applicable law, service of process, taking of evidence, and the recognition and enforcement of judgments (among others).

E. Negotiating and Drafting Cross-border Contracts After Article 65

The lesson for the litigator is similar: an understanding of Community legislation will be necessary when preparing and submitting cases dealing with cross-border transactions, particularly when a party from an EU Member State is involved or the dispute may for other reasons be lodged in the courts of an EU Member State.

VII. Conclusion

A final conclusion is perhaps more general, and perhaps more telling in terms of the big picture. The evolution of Community competence for issues of private litigation demonstrates in one small area the rapid and effective evolution of what we now refer to as the European Union. One need only look at the events of late 2004 and early 2005 in Ukraine, and the extent to which that nation's presidential election was infused with comments on relationships with "Europe," and with the expressed desire to join the European Union, to understand how the post-World War II vision of Europe has naturally affected a larger-and-larger geographic region. The "widening" of Europe through the addition of new Member States,

⁸² Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 263 (1986).

⁸³ American Law Institute, recognition and enforcement of foreign Judgments: Analysis and Proposed Federal Statute (Proposed Final Draft, April 11, 2005).

⁸⁴ See Convention on Choice of Court Agreements, June 30, 2005, available at http://www.hcch.net/index_en.php?act=conventions.text&cid=98.

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and the growing list of nations charting a course towards EU membership, when accompanied by the deepening of Europe through consistently expanding areas of competence, will continue to increase the influence of the European Union on the development of a wide range of states. Whether this will occur in all events without a corresponding diminution of the influence of other major players is yet to be determined, thus setting up another discussion about peace and justice of which we all should be aware.