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Recent Reforms in EU Law: Recognition and Enforcement of Judgments

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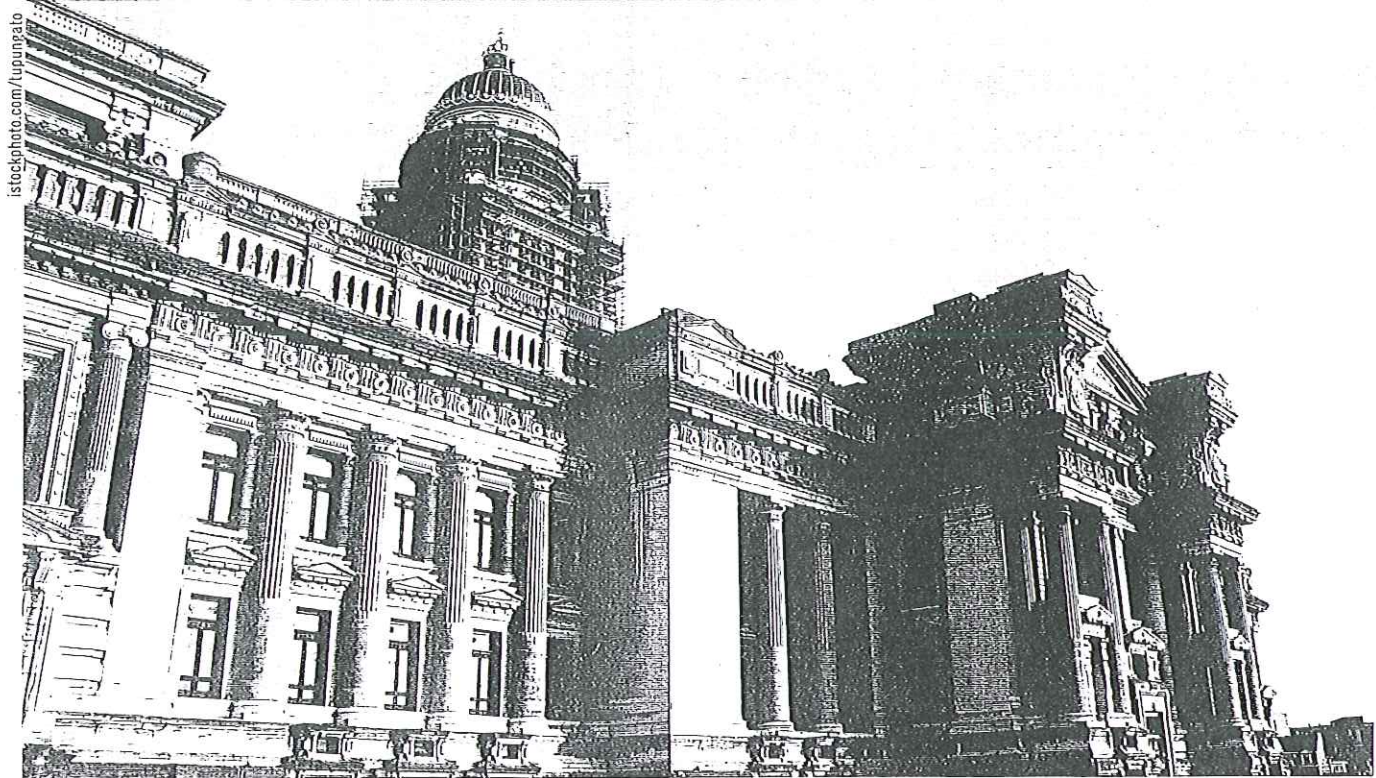
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RECENT REFORMS IN EU LAW

Recognition and Enforcement of Foreign Judgments

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The European Union has just adopted a set of amendments to the Brussels I Regulation, which governs jurisdiction to adjudicate, parallel proceedings, and the recognition and enforcement of foreign judgments. This article discusses the Regulation and the adopted amendments regarding recognition and argues that these amendments are part of a deeper set of structural and conceptual changes in the law of transnational litigation in the European Union over the last two decades.

by SAMUEL P. BAUMGARTNER

Transnational litigation—litigation involving foreign parties, foreign evidence, or some other connection to another country—appears to be increasingly important in U.S. courts. At the same time, however, recent empirical work suggests that the days when transnational litigation involving U.S. parties primarily took place in U.S. courts are about to come to an end.¹ Thus, U.S. litigants may find themselves participating more often in proceedings abroad. Moreover, judgments may need to be enforced abroad, and foreign courts may need to be petitioned to force

non-parties to provide evidence in U.S. proceedings. Hence, counsel representing U.S. litigants increasingly will need to know about foreign approaches to transnational litigation; similarly, U.S. law reformers may need to pay closer attention to foreign approaches in this area to ensure their own chosen approaches are likely to work as intended.²

Given this increasing importance of knowledge about foreign approaches to transnational litigation, I intend to shine a spotlight on both recent and upcoming developments in the law of one of the biggest trading partners

of the United States, the European Union. My focus here is on the recognition and enforcement of judgments of one EU state in another. It is not too difficult for someone from the United

This is an updated version of a longer article published in 18 *SOUTHWESTERN J. INT'L L.* 567 (2012).

1. See Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 *SOUTHWESTERN J. INT'L L.* 31, 32-39 (2012) (finding overall decline in alienage cases in all federal courts as well as overall increase of foreign judgments recognition cases and cases referencing Federal Rule 44.1 on the application of foreign law in the Southern District of New York).

States to sue or be sued in one of the member states of the European Union and thus to become subject to the EU recognition regime. Imagine, for instance, a U.S. buyer who purchases a piece of machinery from a German seller. This buyer may be subject to the jurisdiction of the German courts regarding his contractual obligation to pay for the machinery in Germany, even if he never set foot on German territory.³ Similarly, a California resident who is involved in an accident with a French tourist on Interstate 5 in California can be sued by the French tourist in French courts because of the plaintiff's French nationality.⁴ The resulting judgments in both of these cases are enforceable in the courts of all other EU countries, say in England, where our buyer operates a distribution center, or in Greece, where our California resident owns a vacation home.⁵ With the European Union now at 27 members and potentially

growing,⁶ it may be just as important for lawyers and law reformers in the United States to know when and where within the Union a resulting judgment can be enforced and how as it is to know whether recognition and enforcement of that judgment may occur in the United States.

In recent years, the relevant law of the European Union has changed considerably. During the last two years alone, the European Commission—which is tasked with drafting EU legislation—has submitted several reform proposals for consideration.⁷ Chief among them is a recast of Regulation 44/2001 on jurisdiction and on the recognition and enforcement of judgments, usually referred to as the Brussels I Regulation.⁸ The final version of this recast was adopted by the European Council—the chief EU lawmaking body—on December 6, 2012, and will go into effect in 2015.⁹ Close analysis reveals struc-

tural and conceptual changes in the EU law relating to the recognition and enforcement of judgments and in the law applicable to transnational litigation more generally, that go much deeper than the 2012 recast of the Brussels I Regulation. Below, I begin by recalling the EU regime of recognizing and enforcing judgments under the current version of the Brussels I Regulation and follow with an analysis of the mentioned structural and conceptual changes. Having laid that foundation, I address the adopted reforms to the Brussels I Regulation and conclude by considering the significance of both these reforms and the ongoing changes of EU law on transnational litigation to litigants and law reformers in the United States.

The Current Law on Recognizing and Enforcing the Judgments of Other EU Member States

The Brussels I Regulation is currently—and will remain under the recast—the main instrument controlling the circumstances under which a judgment in civil and commercial matters from one EU member state must be recognized—that is, given *res judicata* effect—and enforced in another. The Brussels I Regulation is itself a revised and updated version of the Brussels Convention of 1968,¹⁰ a treaty negotiated at a time the European Community lacked the power to legislate in matters relating to cross-border litigation and civil procedure more generally.¹¹ The drafters of the Brussels Convention took a big step forward in the long history of negotiating recognition treaties in Europe by combining provisions on the recognition and enforcement of judgments with rules on the jurisdiction to adjudicate of member-state courts in transnational cases, as well as with provisions on parallel litigation—that is, litigation involving the same claims between the same parties.¹² Another important step forward consisted of making the relatively new European Court of Justice (ECJ) the final arbiter in interpreting the Convention.¹³ The resulting treaty

2. Accordingly, Congress has developed an interest in the subject matter. See *Recognition and Enforcement of Foreign Judgments: Hearing before the H. Comm. on the Judiciary, Subcommittee on Courts*, 112th Cong. (2011), http://judiciary.house.gov/hearings/hear_11152011_2.html (considering the adoption of a federal statute on the recognition and enforcement of foreign judgments). A year earlier, Congress entered the area for the narrow purpose of "prohibit[ing] recognition and enforcement of foreign defamation judgments and certain foreign judgments against the providers of interactive computer services" in U.S. courts unless certain minimum requirements are met. See *Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act*, Pub. L. No. 111-223, 124 Stat. 2380 (2010).

3. See, e.g., Max Vollkommer, § 29, in ZÖLLER ZIVILPROZESSORDNUNG 127, 134 (26th ed., Reinhold Geimer et al. eds., 2007) (discussing place of performance under CISG).

4. See *infra* note 23 and accompanying text.

5. See *infra* text accompanying notes 27-32.

6. See, e.g., Europa, *Countries*, http://europa.eu/about-eu/countries/index_en.htm (listing 27 member states as well as five "candidate countries" under consideration for future EU membership).

7. See Proposal for a Regulation of the European Parliament and of the Council Creating a European Account Preservation Order to facilitate cross-border debt recovery in civil and commercial matters, COM (2011) 445, http://ec.europa.eu/justice/civil/files/comm-2011-445_en.pdf [hereinafter Proposal for an Account Preservation Order]; Proposal for a Council Regulation on Jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes, COM (2011) 126/2, http://ec.europa.eu/justice/policies/civil/docs/com_2011_126_en.pdf [hereinafter Proposed Regulation on Matrimonial Property]; Proposal for a Council Regulation on Jurisdiction, applicable law and the recognition

and enforcement of decisions regarding the property consequences of registered partnerships, COM (2011) 127/2, http://ec.europa.eu/justice/policies/civil/docs/com_2011_127_en.pdf [hereinafter Proposed Regulation on Registered Partnership]; and Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), COM (2010) 748 final, http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf [hereinafter Proposed Brussels I Amendments].

8. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters, 2000 O.J. (L 012) 1 [hereinafter Brussels I Regulation].

9. See Regulation (EU) No. 1215/2012 of the European Parliament and the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast), 2012 O.J. (L 351) 1, art. 81 [hereinafter Brussels I Regulation Recast].

10. Convention on jurisdiction and enforcement of judgments in civil and commercial matters, 1968 O.J. (L 299) 32 [hereinafter Brussels Convention].

11. See Treaty Establishing the European Economic Community, art. 220, Mar. 25, 1957, 298 U.N.T.S. 11.

12. See Brussels Convention, *supra* note 10, arts. 2-49.

13. See Protocol of 3 June 1971 on the interpretation by the Court of Justice of the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, 1978 O.J. (L 304) 50. On the role played by the ECJ in the implementation of European Union law in the member states, see, for example, KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW, 1-32 (2001); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 290-293 (1997).

generally was considered a success. Accordingly, the regime of the Brussels Convention was later extended to the members of the European Free Trade Association through the parallel Convention of Lugano of 1988.¹⁴ In 1997, the Treaty of Amsterdam gave the European Community the power to legislate in the area of judicial cooperation, including the recognition of judgments,¹⁵ prompting the Community to recast the Brussels Convention, with some revisions, into Community law in the form of the Brussels I Regulation of 2000. An adapted version of the Lugano Convention followed in 2007.¹⁶ Thus, the rules of the Brussels I Regulation apply not only in the 27 member states of the European Union but also in Iceland, Norway, and Switzerland.

As with the Brussels Convention, the Brussels I Regulation contains rules on jurisdiction to adjudicate, parallel proceedings, and the recognition and enforcement of foreign judgments. The Regulation's jurisdictional rules exclusively govern the jurisdiction to adjudicate of the courts of the member states in those transnational cases in which the defendant is domiciled in one of the member states. The domicile of the plaintiff, on the other hand, is for the most part irrelevant.¹⁷ Thus, for instance, in a suit by a U.S. plaintiff against a defendant from the European Union, the Regulation controls, and only the courts of the member state in which the defendant is domiciled have jurisdiction.¹⁸ Indeed, according to the ECJ's controversial *Owusu* decision, the Regulation may control even when both plaintiff and defendant are domiciled in the same member state as long as the litigation has "certain connections" to another state.¹⁹ In *Owusu*, a case brought by one U.K. domiciliary against another involving an accident in Jamaica, this meant that the U.K. courts had jurisdiction under article 2(1) of the Regulation and thus had to refrain from applying the English forum non conveniens doctrine in favor of litigation between the same parties in Jamaica.²⁰ As the Court pointed out, the Regulation itself does not

provide for forum non conveniens dismissals. Instead, it deals with parallel litigation exclusively by means of a *lis pendens* rule and then only when the parallel suit is pending in another member state.²¹

On the other hand, the Brussels I Regulation does not control, and, hence, the member states can apply their own rules on the jurisdiction to adjudicate when the defendant is not a domiciliary of one of the EU member states. These domestic rules on jurisdiction include various exorbitant jurisdictional bases that may not be used against defendants from other member states.²² Thus, for instance, U.S. parties may find themselves sued in France simply because the plaintiff is French,²³ in the United Kingdom just because they were served with process there,²⁴ and in Austria only because they own property that is currently present in that country, as long as the amount in controversy is not unreasonably larger than the value of the property.²⁵

The Regulation's provisions on the recognition and enforcement of judgments apply whenever a judgment from one member state is to be recognized or enforced in another.²⁶

Recognition occurs automatically upon entry of judgment in the originating state, although non-recognizability can always be raised as an incidental objection where relevant or in a separate application for a declaratory judgment.²⁷ The judgment will not be recognized if (1) it manifestly violates the public policy of the recognition state; (2) in case of a default judgment, the defendant was not served with process "in sufficient time and in such a way as to enable him to arrange for his defense, unless the defendant failed to commence proceedings to challenge the judgment [in the rendering state] when it was possible for him to do so"; or (3) if the judgment is inconsistent with a prior judgment between the same parties either in the recognition state or in another EU member state.²⁸ The jurisdiction to adjudicate of the rendering court, however, is not generally subject to reexamination by the recognition court.²⁹ Exceptions to this rule are largely in place to reinforce the provisions on exclusive jurisdiction and those protecting consumers and holders of insurance policies.³⁰ Since the Brussels Regulation con-

14. Convention on jurisdiction and the recognition of judgments in civil and commercial matters, 1988 O.J. (L 319) 40.

15. Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, art. 73m, 1997 O.J. (L 340) 1. The Treaty of Amsterdam also introduced new complexities. According to additional protocols, this new power in the area of transnational litigation does not extend to Denmark, and the United Kingdom has a right to opt into or opt out of proposed new community legislation in this area. The United Kingdom has chosen to opt into most of the measures here discussed, including the recast of the Brussels I Regulation. Denmark entered into a treaty with the European Union agreeing to the extension of the Brussels I Regulation to Danish territory. See Agreement between the European Union and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2005 O.J. (L 299) 62 (in force since July 1, 2007).

16. See Convention on jurisdiction and the recognition of judgments in civil and commercial matters, 2007 O.J. (L 339) 3.

17. See *Groupe Josi Reinsurance Co., SA v. Universal General Ins. Co.*, Case C-412-98, 2000 E.C.R. I-5925, paras. 33-61.

18. See Brussels I Regulation, *supra* note 8, at art. 2(1).

19. *Owusu v. Jackson*, Case C-281-02, 2005 E.C.R. I-1383.

20. *Id.* at paras. 37-46.

21. The *lis pendens* stay works as follows: If the same cause of action between the same parties is pending in the court of another member state, the court later seized must stay the proceedings before it and then dismiss them as soon as the court first seized has decided that it has jurisdiction. If the case pending before another member state is merely related, stay and dismissal are optional. See Brussels I Regulation, *supra* note 8, at arts. 27-28. However, the Regulation does not provide for any such *lis pendens* stays in favor of litigation in the courts of a non-member state. Following *Owusu*, this means that such litigation is simply to be disregarded.

22. See Brussels I Regulation, *supra* note 8, at art. 3(2). For a general discussion of these rules and their use in practice, see Arnaud Nuyts, *Study on Residual Jurisdiction, General Report*, 58-63 (2007), http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf.

23. See CODE CIVIL art. 14 (Fr.). On this provision, see, for example, Kevin M. Clermont & John R.B. Palmer, *French Article 14 Jurisdiction*, Viewed From the United States, in DE TOUS HORIZONS: MÉLANGES XAVIER BLANC-JOUVAN 473, 479-93 (Société de Législation Comparée 2005).

24. See, e.g., Richard Fentiman, INTERNATIONAL COMMERCIAL LITIGATION 361-362 (2010).

25. See JURISDIKTIONSFORM § 99(1) (Au.).

26. See Brussels I Regulation, *supra* note 8, at arts. 33(1) & 38(1).

27. *Id.* at art. 33.

28. *Id.* at art. 34.

29. *Id.* at art. 35(3).

30. *Id.* at art. 35(1).

tains jurisdictional rules as well as rules on the recognition and enforcement of judgments, and since the member states generally trust one another in the application of those rules, the reasoning goes, no review of the application of those rules by the rendering court is needed at the time of recognition.³¹ Notice what this means for defendants from non-member countries such as the United States: Not only can the courts of the EU member states take jurisdiction over such defendants on the basis of exorbitant jurisdictional rules that are outlawed in the inter-Community context, but the emanating judgments must be recognized and enforced in all of the other member states without further examination of the originating court's jurisdiction. Observers in the United States have long criticized this as unnecessary discrimination.³²

While the recognition of a judgment from another member state is automatic, enforcement of such a judgment requires a declaration of enforceability (in the United Kingdom, the registration of the judgment for purposes of enforcement in the relevant jurisdiction).³³ The declaration of enforceability (also called *exequatur*) is granted *ex parte* and can be joined with *ex parte* preliminary measures

of protection.³⁴ Unlike the Brussels Convention,³⁴ the Regulation no longer requires or even permits the consideration of the recognizability of the judgment for purposes of issuing the declaration of enforceability. Instead, the declaration must be issued whenever the applicant submits both a copy of the judgment and a certification of enforceability of the judgment given by the court of origin.³⁵ After the decision on the declaration has been served on the judgment debtor, either party may appeal, in most member states to a court at the appellate level.³⁶ At this appeal, the judgment debtor is heard with the claim that the recognition requirements are not met.³⁷ Thus, recognizability is considered only in those cases in which the judgment debtor appeals the declaration of enforceability. According to a recent study, this occurs in only one to five percent of all cases, suggesting that the declaration of enforceability is usually granted as a matter of course and without lengthy proceedings.³⁸

Any judgment that is enforceable in the rendering state will be declared enforceable in this fashion.³⁹ Particularly, this means that even preliminary and protective measures can be enforced in the other member states.⁴⁰ Moreover, this includes preliminary and protective measures granted

by a court that bases its jurisdiction solely on Article 31 of the Brussels I Regulation, which permits any court of a member state to grant such measures under domestic law even where the courts of that state do not have jurisdiction over the substance of the matter pursuant to the Regulation's jurisdictional provisions.⁴¹ On the other hand, however, the ECJ held in *Denilauer v. Couchet*, interpreting the Brussels Convention, that the recognition requirement of proper notice in what is now article 34(2) of the Regulation prevents the enforcement of measures issued without hearing the defendant.⁴² *Ex parte* measures are therefore not currently enforceable in the other EU states.

Recent Structural and Conceptual Changes

Overall, the Brussels I Regulation leads to the recognition and enforcement of judgments from other member states in an effective and quite efficient manner.⁴³ However, the Brussels I Regulation is no longer the only EU instrument governing the recognition and enforcement of judgments. To begin, the scope of application of the Brussels I Regulation, as was that of the Brussels Convention, is limited to civil and commercial matters and further excludes litigation regarding status claims, matrimonial property regimes, wills and succession, bankruptcy, social security, and arbitration.⁴⁴ The drafters of the Brussels Convention had hoped that separate conventions could be negotiated in some of these areas at a later date, when the differences among member-state laws would be easier to overcome. However, it was not until the Community received legislative power in the area of civil justice in 1997, thereby giving it the power to legislate by majority vote, that discussion of these instruments began in earnest. Thus, the Community adopted the Brussels II Regulation on jurisdiction and recognition in matters of divorce, legal separation, and parental responsibility (amended in 2003); the Regulation on cross-border insolvency proceedings in 2000; and the Regulation on juris-

31. See, e.g., *Turner v. Grovit*, Case C-159-02, 2005 E.C.R. I-3565, paras. 24-26.

32. See, e.g., Arthur T. von Mehren, *Recognition and Enforcement of Foreign Judgments: A New Approach for the Hague Conference?*, 57 LAW & CONTEMP. PROBS. 271, 278 (1994); Friedrich K. Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1211-1112 (1984); Kurt H. Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 76 COLUM. L. REV. 1995 (1967).

33. See Brussels I Regulation, *supra* note 8, at art. 38. The recognition of a judgment results in extending its effects, including its *res judicata* effects, to the territory of the recognizing jurisdiction. Enforcement requires the further expedient of a declaration of enforceability to ensure that the judgment is in fact enforceable where rendered and is recognizable in the recognition state. The declaration of enforceability therefore presupposes a recognizable judgment. See *infra* notes 37 & 39 and accompanying text.

34. *Id.* at arts. 41 & 47(2).

35. *Id.* at art. 41.

36. *Id.* at arts. 42-43.

37. See Brussels I Regulation, *supra* note 8, at art. 45.

38. See Burkhard Hess, Thomas Pfeiffer

& Peter Schlosser, *Report on the Application of Regulation Brussels I in the Member States*, final version September 2007, 221, http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf.

39. See Brussels I Regulation, *supra* note 8, at arts. 32 & 38.

40. See, e.g., Patrick Wautelet, *Article 32, in EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW: BRUSSELS I REGULATION 535*, 541 (Ulrich Magnus & Peter Mankowski eds., 2007).

41. The ECJ has, however, had to put limits on the kinds of measures that can still be called "preliminary and protective" in order to be recognizable. See *St. Paul Dairy Ind. NV v. Unibel Excser BVBA*, Case C-104-03, 2005 E.C.R. I-3481; *Mietz v. Intership Yachting*, Case C-99-96, 1999 E.C.R. I-2277; *Van Uden Maritime BV v. Deco-Line*, Case C-391-95, 1998 E.C.R. I-7091.

42. *Denilauer v. Couchet*, Case C-125-79, 1980 E.C.R. 1553.

43. See, e.g., Hess, Pfeiffer & Schlosser, *supra* note 38, at 22 ("Overall, the national reports show a considerable efficiency of the proceedings: Getting a decision on *exequatur* is a matter of a few weeks, in some Member States, the decision is granted in a few days.").

44. See Brussels I Regulation, *supra* note 8, at art. 1.

diction, applicable law, and recognition and enforcement of judgments relating to maintenance obligations in 2009.⁴⁵ Furthermore, after lengthy consideration, the Commission has recently released proposals for regulations on the jurisdiction, applicable law, and recognition and enforcement of judgments regarding both matrimonial property regimes and registered partnerships (civil unions in U.S. parlance).⁴⁶

But even within the Brussels I Regulation's scope of application, new instruments have been adopted that preempt its application. Regulations each on uncontested claims, small claims, and order of payment proceedings permitting creditors quickly to obtain a judgment in cases in which the defendant does not object lead to judgments that are directly enforceable in the other member states.⁴⁷ Further instruments of this sort—for instance, the creation of a European Account Preservation Order to attach debtors' bank accounts to secure enforcement of an anticipated or existing judgment in cross-border litigation—are being considered.⁴⁸

These recent changes and the proposals currently pending, however, are merely manifestations of a larger conceptual reorientation with regard to the Brussels I Regulation, and transnational litigation more generally. First, the EU institutions no longer view the Brussels I Regulation simply as the Brussels Convention in the guise of EU legislation—if they ever really did—but rather as part of the larger enterprise of European integration. In the early 1990s, scholars began to argue that procedural rules can hinder inter-Community trade as much as non-tariff barriers arising from economic legislation and thus that transnational litigation required harmonization beyond that achieved through the Brussels Convention.⁴⁹ It is on the basis of this argument that the negotiators of the Amsterdam Treaty adopted in 1997 a Community competence to legislate in matters of transnational litigation “in so far as necessary for the proper functioning of the inter-

nal market.”⁵⁰ Armed with this new power, the Community proceeded to adopt not only the Brussels I and Brussels II Regulations and the Regulation on Insolvency Proceedings but also regulations on the cross-border service of process and taking of evidence as well as directives on legal aid and mediation in transnational cases.⁵¹ Moreover, the European Council and the Commission have since articulated more specific policies for civil justice flowing from the goal of economic integration. These policies include the free movement of judgments; equal access to justice in cases crossing member-state boundaries; and mutual trust of the laws and proceedings of other member states.⁵² Not surprisingly, the ECJ has interpreted the provisions of the Brussels I Regulation in light of these policies as well as in the

45. See Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, 2009 O.J. (L 7) 1; Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and matters of parental responsibility, repealing Regulation (EC) No 1347/2000, 2003 O.J. (L 338) 1; Council Regulation (EC) No 1346/2000 of May 29 2000 on insolvency proceedings, 2000 O.J. (L 160) 1 [hereinafter *Insolvency Regulation*].

46. See Proposed Regulation on Matrimonial Property, *supra* note 7; Proposed Regulation on Registered Partnerships, *supra* note 7.

47. Regulation (EC) No. 861/2007 of the European Parliament and the Council of 11 July 2007 establishing a European Small Claims Procedure, 2007 O.J. (L 199) 1 [hereinafter *Small Claims Regulation*]; Regulation (EC) No. 1896/2006 of the European Parliament and the Council of December 12, 2006, creating a European order for payment procedure, 2006 O.J. (L 399) 1 [hereinafter *Order of Payment Regulation*]; Regulation (EC) No. 805/2004 of the European Parliament and of the Council of April 2004 creating a European Enforcement Order for uncontested claims, 2004 O.J. (L 143) 15 [hereinafter *Uncontested Claims Regulation*].

48. See Proposal for an Account Preservation Order, *supra* note 7.

49. See, e.g., Manfred Wolf, *Abbau prozessualer Schranken im europäischen Binnenmarkt, in WEGE ZU EINEM EUROPÄISCHEN ZIVILPROZESSRECHT* 35 (Wolfgang Grunsky et al. eds., 1992).

50. Consolidated Version of the Treaty Establishing the European Community [hereinafter *TEC*], art. 65, 2006 O.J. (C 321) 37. Today, the relevant powers are determined by the Consolidated Version of the Treaty on the Functioning of the European Union [hereinafter *TFEU*], art. 81, 2010 O.J. (C 83) 47.

51. See Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters; Regulation (EC) No. 1393/2007

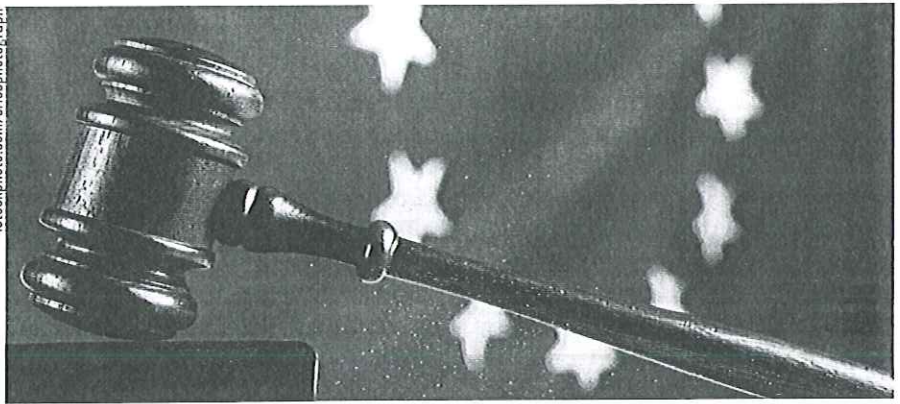
of EU legislation implementing other EU policies to the extent they touch on matters of jurisdiction and the recognition of judgments.⁵³ The result is an integrated system and an integrated interpretation that can be increasingly difficult for outsiders to understand in all of its ramifications.

The second conceptual change has been the move from addressing specific aspects of transnational litigation to viewing cross-border litigation in its entirety as a proper area for EU legislation. Earlier instruments under the new EU competence in the area of transnational litigation were limited to harmonizing or unifying domestic proceedings to the extent they touched directly on cross-border cases. For instance, the Brussels I Convention establishes the conditions and

of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, and repealing Council Regulation (EC) No. 1348/2000, 2007 O.J. (L 324) 97 (replacing a version of the Regulation from 2000) [hereinafter *Service Regulation*]; Council Directive 2002/8/EC of 27 January 2003 to improve access to justice in cross-border disputes by establishing minimum common rules relating to legal aid for such disputes, 2003 O.J. (L 26) 41; Council Regulation (EC) No. 1206/2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, 2001 O.J. (L 174) 1.

52. See European Council: The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, 2010 O.J. (C 115) 1, 13-16 [hereinafter *Stockholm Programme*]; Communication from the Commission to the Council and the European Parliament – The Hague Programme: Ten priorities for the next five years. The partnership for European renewal in the field of Freedom, Security, and Justice, COM (2005) 0184 final [hereinafter *Hague Programme*]; Tampere European Council 15 and 16 October 1999, Presidency Conclusions, paras. 33-34, http://www.europarl.europa.eu/summits/tam_en.htm.

53. See, e.g., *Hypoteční Banka v. Lindner*, Case C-327-10, 2011 E.C.R. 11542, paras 44-54 (interpreting the domicile provision of Article 59 so as to “strengthen[] the legal protection of persons established in the European Union” and thus to grant them an effective right to sue); *Turner v. Grovit*, Case C-159-02, 2005 E.C.R. I-3565, paras. 24-26 (interpreting the jurisdictional provisions of the Brussels Convention on the basis of the “trust which the Contracting States accord to one another’s legal systems and judicial institutions”); *Gemeente Steenbergen v. Baten*, Case C-271-00, 2002 E.C.R. I-10489, paras. 41-49 (interpreting the social security exception in Article 1 of the Brussels Convention with help of the definition of the term “social security” in Council Regulation No 1408/71 on the application of social security schemes to employed persons).



procedures under which foreign judgments must be recognized and accepted for enforcement, but remains silent on, and thus leaves to member-state law, such questions as what preclusive effects a recognized judgment has or how a money judgment is to be enforced once declared enforceable. The more recent regulations on uncontested claims and order of payment proceedings, on the other hand, create European procedural instruments from start to finish, displacing member-state law and practice where they apply. Hence, a German who claims to be owed €10,000 by an Italian merchant can litigate the claim in Germany under German law (if German courts have jurisdiction under the Brussels I Regulation), have the resulting German judgment declared enforceable in Italy under the Brussels I Regulation, and then have the judgment enforced under Italian enforcement rules. Alternatively, the German claimant can request a European order of payment in German court, which, if not paid or objected to by the Italian defendant within the relevant time period, becomes immediately enforceable in Italy in the same fashion as an Italian judgment (with a few minimum requirements set by EU law).⁵⁴ Similarly, under the proposed Regulation on Account Preservation Orders, the claimant can choose to proceed with a European Account Preservation Order that not only supplants domestic member-state law on attachment and garnishment but is also immediately enforceable in all member states and has the effects set out by the proposed Regulation.⁵⁵

54. See Order of Payment Regulation, *supra* note 47, arts. 19-28.

55. See Proposal for an Account Preservation Order, *supra* note 7, arts. 5-45.

56. Insolvency Regulation, *supra* note 45, art. 25(1).

57. See *supra* text accompanying note 44.

58. See, e.g., Pippa Rogerson, Article 1, in EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW, *supra* note 40, 45, 51-56.

59. Proposed Brussels I Amendments, *supra* note 7, at 3.

60. See Brussels I Regulation Recast, *supra* note 9, at arts. 36-51.

Obviously, these new European instruments supplant not only domestic member-state law but also the provisions of the Brussels I Regulation. Thus, the scope of application of the Regulation has shrunk and is likely to diminish further in the future. In other ways, however, the Regulation has become more important. Some of the new instruments incorporate portions of the Brussels I Regulation; for instance, the Insolvency Regulation provides that certain judgments rendered during transnational insolvency proceedings, including “preservation measures taken after the opening of insolvency proceedings,” be “enforced [in other member states] in accordance with” the relevant provisions of the Brussels I Regulation,⁵⁶ even though that Regulation would not otherwise govern judgments of this sort.⁵⁷ Moreover, the newer Community instruments in transnational litigation increasingly use particular terms of the Brussels I Regulation as reference points, both explicitly and impliedly. For instance, many of the new instruments are limited in their scope to “civil and commercial matters,” a term that has no precise analog in common law jurisdictions, but which has developed a particular meaning through the ECJ’s rich case law interpreting the same term in the Brussels Convention and Brussels I Regulation.⁵⁸ In short, the Brussels I Regulation has become, according to a recent statement by the Commission, “the matrix of [transnational litigation] in the European Union.”⁵⁹

The sum of these developments over the last half century has been a seismic shift from treating matters

of transnational litigation as virtually irrelevant in the enterprise of European integration to making them one of its focal points; from considering only the recognition and enforcement of judgments worthy of possible uniform treatment to opening all of transnational litigation for potential EU regulation; and, more recently, from unifying only the most immediate aspects of transnational litigation to creating uniform legislation for the entirety of certain transnational proceedings. The logical endpoint of this development is likely to be the displacement of all member-state law applicable to transnational cases, no matter what the type of proceeding.

The 2012 Recast

In line with these developments, the European Commission released proposed amendments to the Brussels I Regulation in December of 2010 that attempted to achieve further integration by treating judgments from other member states more like domestic judgments than like judgments from other countries. However, only two of the major proposed amendments in this area survived the legislative process: the abolition of the declaration of enforceability and changes in the scope of recognizability and enforceability of provisional and protective measures.⁶⁰ This is not the first time that the member states have slowed the speed of the train of European integration adopted by the Commission. Yet, as we have seen above, integration has continued nonetheless.

The abolition of the declaration of enforceability sounds like a bolder move than it really is. Recall that

this declaration is currently granted ex parte and that grounds for non-recognition are considered by a court in the recognition state only when the judgment debtor appeals the declaration after having been notified.⁶¹ Recall further that, from what we know, very few judgment debtors actually bother to do so.⁶² The EU lawmakers concluded that most judgment creditors have to waste time and resources to obtain a judicial document that certifies something few debtors contest.⁶³ These resources include the cost of the declaration itself,⁶⁴ costs of translating the relevant documents,⁶⁵ and costs for retaining local counsel.⁶⁶ However, the amended Regulation only gets rid of the requirement for a declaration of enforceability, not the availability of a review of the judgment's enforceability by a court in the recognition state. According to Article 46 of the recast Regulation, the judgment creditor retains the ability at any time to seek a court order against enforcement on the grounds that one of the recognition requirements of new Article 45 is not met.

With regard to preliminary and protective measures, the adopted changes not only expand but also limit recognition and enforcement compared to current law. Seeking to overrule a long-standing interpretation of the Brussels Convention and the Brussels I Regulation by the ECJ,⁶⁷ the Commission proposed to mandate that preliminary measures granted ex parte be recognized and enforced in the other member states.⁶⁸ The apparent reason is that, in practice, the current system forces plaintiffs in large cases, especially in matters of intellectual property, to seek ex parte injunctions in each one of the member states in which immediate enforcement action is needed.⁶⁹ The European Parliament and Council, however, significantly watered down the proposal by requiring that the defendant be notified of the measure before enforcement in the recognition state can occur.⁷⁰ On the other hand, amended Article 2(a) limits

recognizability to those preliminary measures that emanate from a court "which by virtue of this Regulation has jurisdiction as to the substance of the matter." EU lawmakers thus attempt to eliminate the problems that have arisen with forum shopping for the expansive "preliminary" enforcement measures that are available in some member states with otherwise little connection to the litigated dispute.⁷¹ Following through with the principles of trust and increased mobility, EU lawmakers assume that it is desirable to require plaintiffs to travel to the forum with jurisdiction in the main proceedings to obtain preliminary measures that are enforceable outside of that jurisdiction.

Looking beyond recognition and enforcement, the Parliament and Council did adopt at least one notable amendment that was not in the Commission proposal. This particular amendment seeks to overturn at least partly the *Owusu* decision discussed above.⁷² According to amended Article 33, the court of a member state may, under certain circumstances, stay proceedings in favor of an action between the same parties and involving the same cause of action that was first pending in a non-member state, such as the United States.

Conclusion

When it comes to transnational litigation, the European Union has been on a roll. The Brussels regime on jurisdiction and recognition of judgments, once the only source of European law on transnational litigation and one that was relegated to a treaty outside the Community legal framework, has become one of many EU legal instruments in this area. Indeed, the development seems to move in the direction of adopting European law for all of transnational litigation, from the filing of the complaint to the modalities of enforcing judgments in cross-border cases.⁷³ For the time being, however, litigants from countries outside of the Union, such as the United States, face a growing overlap of domestic law, EU regulations, and ECJ case law when

trying to figure out if and where they can sue and be sued within the Community and whether a judgment for or against them will be recognized and enforced in the other member states.

The purpose of the Brussels Convention of 1968 was primarily to harmonize and to some extent to liberalize the recognition of judgments from other member states. Since 1999, however, the goal has been to achieve the free movement of judgments, whereby judgments from other member states are treated no differently than judgments from courts within the same member state, that is, without any need for recognition or a declaration of enforceability.⁷⁴ The abolition of the declaration of enforceability and the changes to the recognition and enforcement of preliminary and protective measures in the amended Brussels I Regulation represent a further step toward achieving this goal. The Commission's proposals—not adopted this time—to eliminate the defenses of improper notice, (substantive) public policy, and lack of jurisdiction to adjudicate (in the few cases that remain in the current version of the Brussels I Regulation) are likely to resurface in future reforms of the Brussels I Regulation.⁷⁵ This is good news for

61. See *supra* text accompanying notes 33-37.

62. See *supra* text accompanying note 38.

63. See Proposed Brussels I Amendments, *supra* note 7, at 3. See also Hess, Pfeiffer & Schlosser, *supra* note 38, at 232 (concluding that "creditors seeking the cross-border enforcement of small amounts of money are discouraged from a cross-border collection of their claims").

64. See, e.g., Hess, Pfeiffer & Schlosser, *supra* note 38, at 227-228.

65. *Id.* at 226-227.

66. *Id.* at 198.

67. See *supra* text accompanying note 42.

68. See Proposed Brussels I Amendments, *supra* note 7, at 9.

69. See, e.g., Gerhard Walter, *INTERNATIONALES ZIVILPROZESSRECHT DER SCHWEIZ* 431 (4th ed. 2007).

70. See Brussels I Regulation Recast, *supra* note 9, at art. 2(a).

71. See Proposed Brussels I Amendments, *supra* note 7, at 9 and *supra* text accompanying note 41.

72. See *supra* text accompanying notes 19-21.

73. See *supra* text accompanying notes 44-59.

74. See *supra* note 52 and accompanying text.

75. See Proposed Brussels I Amendments, *supra* note 7, at 5-8.

judgment creditors from the United States, less so for our judgment debtors. The number of countries where a judgment can be recognized and enforced in this fashion is constantly growing. Already, there are five more countries that are on the list of candidates for membership in the European Union.⁷⁶ And the Lugano Convention extends the current regime of the Brussels I Regulation to three additional states,⁷⁷ with the EU assessing the possibility of getting other important trading partners, including from outside of Europe, to sign on to the Lugano Convention.⁷⁸

Overall, then, attorneys representing litigants from the United States are well advised to study carefully both the current and the proposed set of rules on recognition and enforcement in the European Union or retain competent local counsel well ahead of time. For U.S. law reformers, on the other hand, there is both good news and bad here. The good news is that, despite the complex overlay of EU law, national law, and ECJ jurisprudence, the law of transnational litigation in the European Union is increasingly uniform, becoming easier to study for purposes of predicting the transnational effects of potential U.S. reforms, such as the proposed federal legislation on the recognition and enforcement of foreign judgments.⁷⁹ Since the United States is considering further negotiation of treaties in this area,⁸⁰ there is the additional benefit that the European Union now possesses exclusive power to negotiate to the extent

those negotiations would in any way affect the Brussels regime.⁸¹ That is, the United States would face one partner in that part of the world rather than 27, each with partly disparate goals, as was the case during the negotiations for a Hague Convention on Jurisdiction and Judgments in the 1990s. Given the long history of U.S. impatience in this area—impatience with foreign solutions, impatience with foreign countries resisting the preferred U.S. approach, and impatience with the time and effort necessary for successful treaty negotiation—this is likely to be a considerable benefit.⁸²

The bad news is that the focus of all the activity at the EU level has been on inter-Community transnational litigation with little attention paid to litigation involving connections to non-member states. Thus, while the European Union is getting increasingly close in the area of recognition of judgments from other member states to the goal of the free movement of such judgments, the member-state law applicable to the recognition of judgments from the United States has remained, in some jurisdictions, at the stage of circa 1900.⁸³ Since the member states have entered into (mostly bilateral) treaties with their most important non-EU trading partners (except the United States), these laws are primarily designed to deal with judgments from substandard legal regimes, and many of them provide numerous opportunities to block recognition of U.S. judgments.⁸⁴ The United States can try to deal with this problem in the tried and true

fashion of applying unilateral pressure, in this case by (re-)introducing a reciprocity defense into its recognition law as has been suggested by the American Law Institute.⁸⁵ However, this approach is likely to create a plethora of problems, including the potential of hurting litigants from the United States who, in a more global environment, win a judgment abroad.⁸⁶ In addition, the sorry state of the European member-state recognition law applicable to U.S. judgments should be compelling evidence that the U.S. approach of applying unilateral pressure while staying out of international entanglements may yield less-than-optimal results. The sorry state of the European member-state recognition law applicable to U.S. judgments should be compelling evidence that the U.S. approach of applying unilateral pressure while staying out of international commitments may yield less than optimal results. Perhaps, then, it is time for the United States to warm up to the idea of negotiating treaties in this area and of doing so with patience. The problem with negotiating with the European Union, of course, will be that the longer the Europeans focus on lawmaking for intra-Community litigation and the more they think uniformly about external relations, the more single minded and perhaps unpalatable their proposed solutions may become from a U.S. perspective. For example, the relatively recent decision to point non-EU trading partners to the Lugano Convention,⁸⁷ potentially to the exclusion of other negotiable options,⁸⁸ is not an attractive or even a feasible way forward from a U.S. point of view.⁸⁹ Thus, the sooner such negotiations begin the better. ★

76. See *supra* note 6.

77. See *supra* text accompanying note 16.

78. See Stockholm Programme, *supra* note 52, at 17.

79. See American Law Institute, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006) [hereinafter ALI PROPOSAL] & *supra* note 1.

80. The State Department has been considering whether to participate in renewed negotiations over a worldwide convention on the recognition and enforcement of foreign judgments at the Hague Conference. See Hague Conference of Private International Law, Council on General Affairs and Policy of the Conference (17-20 April 2012), Conclusions and Recommendations Adopted by

the Council 3, http://www.hcch.net/index_en.php?act=progress.listing&cat=5.

81. See Case C-1-03, 2006 E.C.R. I-1145.

82. See, e.g., Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 139-141 (Summer 1994).

83. See, e.g., Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 180 (2008).

84. See *id.* at 181-182.

85. See ALI PROPOSAL, *supra* note 79, §7.

86. See *supra* note 1 and accompanying text.

87. See *supra* text accompanying note 78.

88. See Stockholm Programme, *supra* note 52, at 17.

89. See, e.g., von Mehren, *supra* note 32, at 280-281.

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