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Changes in the European Union's Regime of Recognizing and Enforcing Foreign Judgments and Transnational Litigation in the United States

SAMUEL P. BAUMGARTNER*

I. Introduction

When we speak about the law of transnational litigation in the United States, we usually refer to our own law as it applies to cross-border cases. After all, it is U.S. law, state or federal, that the courts of the United States apply in such cases.¹ In other words, what we think of as transnational in this type of litigation is not the source of authority of the law applied, but the factual connection to another country that tends to be present, such as when one of the parties is domiciled abroad, some of the evidence is in foreign hands, or part of the activity involved has occurred on the territory of another nation.

However, as practitioners of transnational litigation are aware, acting without knowledge of the relevant foreign laws and approaches in this area may result in unpleasant surprises. Litigation of this kind does not occur in a vacuum. U.S. judgments may need to be recognized or enforced abroad, or parallel litigation may take place in a foreign forum. Indeed, as recent empirical work suggests, the days when transnational litigation involving U.S. parties primarily or exclusively took place in U.S. courts – if they ever existed – may be about to come to an end.² Thus, U.S. litigants may increasingly find themselves participating in proceedings abroad as well as at home. More generally, even unrelated cases can affect one another through transnational activity. Indeed, the laws and judicial rulings in one jurisdiction may have unintended consequences, both at home and abroad, through the activities of transnational actors; the effects of jurisprudential preferences elsewhere; and the consequences, sometimes subtle,

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¹ I exclude here foreign law applied through the operation of U.S. choice of law rules, state or federal. Cf. GARY B. BORN & PETER P. RUTLEDGE, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* 613-750 (4th ed. 2007) (describing and analyzing U.S. choice of law rules).

² See Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, __ *SOUTHWESTERN J. INT'L L.* __ (forthcoming) (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).

of power politics.³ Thus, as I have suggested elsewhere, knowledge of the rules of transnational litigation of other countries as well as the litigation systems and ideational preferences underlying them is crucial for both litigants and law reformers to be successful with their work in this area.⁴

It is for this reason that I intend to shine a spotlight on both recent and upcoming developments in the recognition law of one of the biggest trading partners of the United States, the European Union. I shall focus here on the recognition law applicable to judgments from other EU states. I have elsewhere written on the way European nations treat judgments from the United States.⁵ As we shall see shortly, it is not too difficult for someone from the United States to sue or be sued in one of the member states of the European Union. 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 may occur in the United States.

The relevant law of the European Union has changed considerably during the last few years, and several proposals for reform are currently being considered.⁷ Among these

³ See, e.g., Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1312-84 (2004) [hereinafter Baumgartner, *Transnational Litigation*]; Shi-Ling Hsu & Austen Parrish, *Litigating Canada-U.S. Transboundary Harm: International Environmental Lawmaking and the Threat of Extraterritorial Reciprocity*, 48 VA. J. INT'L L. 1, 57-63 (2007); Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TULANE L. REV. 67, 96-114 (2009). That power politics can have subtle consequences may need particular emphasis in this country. Probably the most important such consequence is resentment, which can result – consciously or subconsciously – in changes or interpretations of the laws of transnational litigation in other nations against the interests of litigants from, and institutions or process values of, the country in which power is exercised. See, e.g., Baumgartner, *Transnational Litigation*, *supra*, at 1352-53; Samuel P. Baumgartner, *Human Rights and Civil Litigation in United States Courts: The Holocaust-Era Cases*, 80 WASH. U. L.Q. 835, 846-49 (2002).

⁴ See Baumgartner, *Transnational Litigation*, *supra* note 3, at 1385-90; Samuel P. Baumgartner, *Transnational Litigation in the United States: The Emergence of a New Field of Law*, 55 AM. J. COMP. L. 793, 802-05 (2007) (reviewing BORN & RUTLEDGE, *supra* note 1).

⁵ See Samuel P. Baumgartner, *How Do U.S. Judgments Fare in Europe?*, 40 GEO WASH. INT'L L. REV. 173 (2008) [hereinafter Baumgartner, *U.S. Judgments*]. See also Linda J. Silberman, *Some Judgments on Judgements: A View from America*, 19 KING'S L.J. 235 (2008).

⁶ See, e.g., Europa, Gateway to the European Union: Countries, available at: 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, available at 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

proposals, it is particularly those regarding the so-called Brussels I Regulation that I am interested in here.⁸ Before I move on to the proposed reforms and an analysis of their potential impact, however, it is useful to recall the current EU regime of recognizing and enforcing judgments in Part II. For a better understanding of the proposed reforms, it is also useful to recognize that there have recently been deeper structural and conceptual changes in the EU law relating to the recognition and enforcement of judgments and in the EU law on transnational litigation more generally. I explore these changes in Part III. Having laid that foundation, I examine the proposed amendments in Part IV and conclude with an analysis of the significance of both these proposals and the ongoing structural and conceptual changes of the EU law on transnational litigation to litigants and law reformers in the United States.

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

Presently, the main instrument controlling the recognition and enforcement of judgments in civil and commercial matters from other EU member states is Regulation 44/2001, usually referred to as the Brussels I Regulation.⁹ It 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

property regimes, COM(2011) 126/2, available at 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, available at 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, available at 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 *Id.*

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

¹¹ Article 220 of the Rome Treaty of 1957 did, however, urge member states to enter into negotiations “with a view to securing for the benefit of their nationals . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments.” This became the impetus for the

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, along with provisions on parallel litigation.¹² Another important step forward consisted in making the relatively new European Court of Justice (ECJ) the final arbiter in interpreting the Convention.¹³ The resulting treaty was generally considered a success – certainly among Continental Europeans. 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 2000.¹⁶ A new version of the Lugano Convention followed in 2007.¹⁷ Thus, the rules of

negotiations leading to the Brussels Convention. *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. On the continental European history of negotiating recognition treaties and treaties in matters of transnational litigation more generally see, for example, SAMUEL P. BAUMGARTNER, THE PROPOSED HAGUE CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS: TRANSATLANTIC LAWMAKING FOR TRANSNATIONAL LITIGATION 47-58 (2003).

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, a role the Court was able to expand extensively from the 1960s to the 1980s, 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, 290-93 (1997).

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 proposed amendments to 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* Brussels I Regulation, *supra* note 8.

¹⁷ *See* Convention on jurisdiction and the recognition of judgments in civil and commercial matters, 2007 O.J. (L 339) 3.

the Brussels I Regulation apply not only in the 27 member states of the European Union, but also in Iceland, Norway, and Switzerland.¹⁸

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.¹⁹ 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.²⁰ 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.²¹ 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.²² As the Court pointed out, the Regulation itself does not provide for forum non conveniens dismissals.²³ 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.²⁴

¹⁸ See *Traités internationaux pour lesquelles la Suisse assume les fonctions de dépositaire, Convention concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciales*, available at http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/intla/intrea/depch/misc/conlug2.Par.0007.File.tmp/mt_110302_lug2part_f.pdf. (listing the member states of the Lugano Convention of 2007).

¹⁹ See *Groupe Josi Reinsurance Co., SA v. Universal General Ins. Co.*, Case C-412-98, 2000 E.C.R. I-5925, paras. 33-61.

²⁰ See Brussels I Regulation, *supra* note 8, at art. 2(1).

²¹ *Owusu v. Jackson*, Case C-281-02, 2005 E.C.R. I-1383. To be precise, the ECJ in *Owusu* and many other cases cited here interpreted the Brussels Convention, not the Regulation. See *id.* at para. 1. However, none of the changes made to the Convention in the Regulation would suggest that the Court's interpretation of the Regulation would be any different today.

²² *Id.* at paras. 37-46.

²³ *Id.* at para. 37.

²⁴ 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 lis pendens stays in favor of litigation in the courts of a non-

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.²⁵ Thus, for instance, U.S. parties may find themselves sued in France simply because the plaintiff is French,²⁶ in the United Kingdom just because they were served with process there,²⁷ 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.²⁸

The Regulation's provisions on the recognition and enforcement of judgments, which I am primarily interested in here, apply whenever a judgment from one member state is to be recognized or enforced in another.²⁹ 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.³⁰ The judgment will not be recognized if (1) it manifestly violates

member state. Following *Owusu*, this means that such litigation is simply to be disregarded. On *lis pendens* stays in the United States, by comparison, see, for example, BORN & RUTLEDGE, *supra* note 1, at 522-40.

²⁵ 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), available at http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf

²⁶ See CODE CIVIL art. 14 (Fr.). Although the language of article 14 provides for jurisdiction over foreigners only for “the performance of obligations contracted [by them] ... with a French person,” the French courts have interpreted the provision to extend jurisdiction over virtually every cause of action brought by a French national against a foreigner. However, French litigants have rarely sought an application of the provision to the full potential of exorbitance that this interpretation suggests, mostly suing only if the defendant owns property in France or any other EU country. See, e.g., 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, [] (Société de Legislation Comparée 2005).

²⁷ See, e.g., RICHARD FENTIMAN, INTERNATIONAL COMMERCIAL LITIGATION 361-62 (2010).

²⁸ See JURISDIKTIONSNORM § 99(1) (Au.). Note that some of the exorbitant bases of jurisdiction previously in existence in some of the member states have either been abolished or significantly limited. Thus, for instance, The Netherlands abolished jurisdiction based on the Dutch domicile of the plaintiff in 2002. Similarly, both Germany and Austria used to permit plaintiffs to sue anyone who owned property within the country for any claim, including claims unrelated to that property. As indicated in the text, however, Austria has since limited this jurisdictional basis to claims that are not unreasonably larger than the value of the property; and the German Bundesgerichtshof now requires the claim to have a sufficient connection to Germany for application of section 23 of its Code of Civil Procedure. See 115 BGHZ 94 (1992).

²⁹ See Brussels I Regulation, *supra* note 8, at arts. 33(1) & 38(1).

³⁰ *Id.* at art. 33.

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 defence” (unless the defendant has since had the opportunity to challenge the judgment in the rendering state)³¹ 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.³² The jurisdiction to adjudicate of the rendering court, however, is not generally subject to reexamination by the recognition court.³³ Exceptions to this rule are largely in place to reinforce the provisions on exclusive jurisdiction and those protecting consumers, and holders of insurance policies.³⁴ Since the Brussels Regulation contains 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.³⁵ 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. U.S. observers have long since criticized this as unnecessary discrimination.³⁶

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

³¹ The exception in brackets was introduced by the Brussels I Regulation and did not exist in the Brussels Convention. *See* Brussels Convention, *supra* note 10, art. 27(2). It does not apply to judgments to be recognized in, or emanating from, Swiss courts because of a Swiss reservation to Article 34(2) of the Lugano Convention of 2007. *See* Notification aux Parties et Signataires de la Convention concernant la compétence judiciaire, la reconnaissance et l’exécution des décisions en matière civile et commerciale, faite à Lugano le 30 octobre 2007, available at: http://www.dfae.admin.ch/etc/medialib/downloads/edazen/topics/intla/intrea/depch/misc/conlug2.Par.0057.File.tmp/mt_101027_lugnotif101027_fr.pdf.

³² *Id.* at art. 34.

³³ *Id.* at art. 35(3).

³⁴ *Id.* at art. 35(1).

³⁵ *See, e.g.,* Turner v. Grovit, Case C-159-02, 2005 E.C.R. I-3565, paras. 24-26.

³⁶ *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 (Summer 1994); Friedrich K. Juenger, *Judicial Jurisdiction in the United States and in the European Communities: A Comparison*, 82 MICH. L. REV. 1195, 1211-12 (1984); Kurt H. Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 76 COLUM. L. REV. 1995 (1967);

jurisdiction).³⁷ The declaration of enforceability (also called *exequatur*) is granted *ex parte* and can be joined with *ex parte* preliminary measures of protection.³⁸ Unlike the Brussels Convention, 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.³⁹ After the decision on the declaration has been served on the judgment creditor, either party may appeal, in most member states to a court at the appellate level.⁴⁰ At this appeal, the judgment debtor is heard with the claim that the recognition requirements are not met.⁴¹ 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 about 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.⁴²

Any judgment that is enforceable in the rendering state will be declared enforceable in this fashion.⁴³ This particularly means that even preliminary and

³⁷ See Brussels I Regulation, *supra* note 8, at art. 38.

³⁸ *Id.* at arts. 41 & 47(2).

³⁹ *Id.* at art. 41.

⁴⁰ *Id.* at arts. 42-43.

⁴¹ See Brussels I Regulation, *supra* note 8, at art. 45. Professor Oberhammer usefully distinguishes the “title import function” from the “title inspection function” of the declaration of enforceability. The former officially renders the foreign judgment a domestic one, the latter primarily serves to examine the foreign judgment for potential defects. See Paul Oberhammer, *The Abolition of Exequatur*, 30 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [hereinafter IPRAX] 197, 197-199 (2010). From this perspective, the *ex parte* granting of the declaration of enforceability serves the “title import function,” which can be, and in a few countries is, exercised by a registrar without the involvement of a court. See, e.g., Burkhard Hess, Thomas Pfeiffer & Peter Schlosser, Report on the Application of Regulation Brussels I in the Member States 222, final version September 2007, available at http://ec.europa.eu/civiljustice/news/docs/study_application_brussels_1_en.pdf. An appeal against the granting of the declaration by the judgment debtor, when it occurs, usually serves the “title inspection function.”

⁴² See Hess, Pfeiffer & Schlosser, *supra* note 41, at 221. These numbers must be treated with some caution, however. While they are based on extensive information obtained from particular courts within some of the member states, they are simply estimates “obtained from lawyers” in others; and there are seven countries from which no information is available on this issue. See *id.* at 221; Study JLS/C4/2005/03, Compilation of all National Reports, Questionnaire No. 1: Collection of Statistical Data, 26-29, available at http://ec.europa.eu/civiljustice/news/docs/study_bxl1_compilation_quest_1_en.pdf.

⁴³ See Brussels I Regulation, *supra* note 8, at arts. 32 & 38.

protective measures can be enforced in the other member states.⁴⁴ 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.⁴⁵ 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.⁴⁶ Ex parte measures are therefore not currently enforceable in the other EU states.

III. 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, thus distinguishing its provisions sharply from some of the member state laws applicable to judgments from outside the European Union.⁴⁷ However, the Brussels I Regulation is not the only EU instrument governing the recognition and enforcement of judgments. Much has happened since the Brussels Convention made up the sole piece of Community law in the area of transnational litigation. To begin, the scope of application of the Brussels I Regulation is limited, as was that of the Brussels Convention, to civil and commercial matters and further excludes litigation regarding status claims, matrimonial property regimes, wills and succession, bankruptcy, social security, and arbitration.⁴⁸ The drafters

⁴⁴ 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).

⁴⁵ 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.

⁴⁶ *Denilauer v. Couchet*, Case C-125-79, 1980 E.C.R. 1553.

⁴⁷ See, e.g., Hess, Pfeiffer & Schlosser, *supra* note 41, 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."); Baumgartner, *supra* note 5, at 183-98 (discussing the limitations on the recognizability of judgments from non-EU-member states that exist in some of the EU nations).

⁴⁸ See Brussels I Regulation, *supra* note 8, at art. 1. On the long-standing European civil law tradition of limiting recognition to judgments in civil and commercial matters see, for instance, Gerhard Walter & Samuel P. Baumgartner, *The Recognition and Enforcement of Judgments Outside the Scope of the Brussels and Lugano Conventions*, in RECOGNITION AND ENFORCEMENT OF JUDGMENTS OUTSIDE THE

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 generally in 1997, thus 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) and the Regulation on cross-border insolvency proceedings in 2000 and the Regulation on jurisdiction, applicable law, and recognition and enforcement of judgments relating to maintenance obligations in 2009.⁴⁹ Moreover, 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 partnerships or civil unions in U.S. parlance).⁵⁰

But even within the Brussels I Regulation's scope of application, new instruments have been adopted that preempt application of the Regulation. Thus, 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.⁵¹ Further instruments

SCOPE OF THE BRUSSELS AND LUGANO CONVENTIONS 1, 12-15 (Gerhard Walter & Samuel P. Baumgartner eds., 2000).

⁴⁹ 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].

⁵⁰ See Proposed Regulation on Matrimonial Property, *supra* note 7; Proposed Regulation on Registered Partnerships, *supra* note 7.

⁵¹ 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]. Uncontested claims for purposes of the latter regulation roughly are monetary claims to which the debtor can be deemed to have agreed and that thus end in a consent judgment, judicially approved settlement, or an "authentic instrument" admitting to the debt or which have been prosecuted in a civil proceeding in a member state in which the debtor has failed to appear to contest the claim and that thus end in a default judgment. See Uncontested Claims Regulation, *supra*, art. 3. The order of payment procedure, on the other hand, permits a creditor who believes to have an uncontested cross-border claim for the payment of a sum of money to obtain an enforceable judgment in no more than

of this sort are being considered, 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.⁵²

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.⁵³ It is on the basis of this argument that the negotiators of the Amsterdam Treaty adopted a Community competence to legislate in matters of transnational litigation “in so far as necessary for the proper functioning of the

three months. The creditor simply fills out a form identifying the debtor, sum of money owed, and a brief description of the cause of action and the evidence supporting the claim, thus obviating the need for filing a complaint in a regular civil action. The court then orders the defendant either to pay the sum claimed or to file an objection. In the latter case, the plaintiff can overcome the objection only by beginning an ordinary civil proceeding. But if the defendant neither pays nor objects within 30 days, the court declares the order an enforceable judgment. *See* Order of Payment Regulation, *supra*, arts. 7-18. The resulting judgment in the latter case, and the consent judgment, judicially approved settlement, or “authentic instrument” in the uncontested claims procedure are then enforceable within the other member states. *See id.*, art. 19; Uncontested Claims Regulation, *supra*, art. 5.

⁵² *See* Proposal for an Account Preservation Order, *supra* note 7.

⁵³ *See, e.g.,* Manfred Wolf, *Abbau prozessualer Schranken im europäischen Binnenmarkt, in* WEGE ZU EINEM EUROPÄISCHEN ZIVILPROZESSRECHT 35 (Wolfgang Grunsky et al., eds., 1992). The ECJ, with the help of referring German courts, was the first European institution to apply the EC Treaty's trade requirements to domestic rules on transnational litigation. In a series of decisions throughout the 1990s, the Court declared a number of national provisions treating litigants from other member states differently from domestic litigants to be in violation of the EC Treaty's non-discrimination rules. *See* Hayes v. Kronenberger GmbH, Case C-323-95, 1997 E.C.R. I-1711 (German provision requiring foreign plaintiffs to post a bond); Data Delecta Aktiebolag v. MSL Dynamics Ltd., Case C-43-95, 1996 E.C.R. I-4661 (Swedish provision requiring same); Mund & Fester v. Hatrex Int'l Transport, Case C-398-92, 1994 E.C.R. I-467 (German provision permitting pre-judgment attachment of personal property against foreign defendant who is likely to be judgment proof in Germany); Hubbard v. Hamburger, Case C-20-92, 1993 E.C.R. I-3777 (German provision requiring foreign plaintiffs to post a bond). *But see* E.D. Srl. v. Fenocchio, Case C-412/97, 1999 E.C.R. I-3845 (upholding as conforming with the EC Treaty the limitation of the Italian order of payment procedure to claims against defendants who can be served with process in Italy, reasoning that “the possibility that nationals would therefore hesitate to sell goods to purchasers established in other Member states is too uncertain and indirect for that national provision to be regarded as liable to hinder trade between Member States”).

internal market” in 1997.⁵⁴ 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.⁵⁵ 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.⁵⁶ Not surprisingly, the ECJ has interpreted the provisions of the Brussels I Regulation in light of these policies as well as in the context of EU legislation implementing other policies to the extent they touch on matters of jurisdiction and the recognition of judgments.⁵⁷ The result is an integrated system and an integrated

⁵⁴ Consolidated Version of the Treaty Establishing the European Community [hereinafter TEC], art. 65, 2006 O.J. (C 321) 37. This Community competence has since been somewhat expanded in the Treaty of Lisbon, primarily by lengthening the list of specific powers of the Union and by replacing the language “*in so far as necessary* for the proper functioning of the internal market” with “*particularly when necessary* for the proper functioning of the internal market.” See Consolidated Version of the Treaty on the Functioning of the European Union [hereinafter TFEU], art. 81, 2010 O.J. (C 83) 47 (emphasis supplied). The term used in both treaties is “judicial cooperation in civil matters having cross-border implications.” See art. 65 TEC, *supra*, and art. 81 TFEU, *supra*. A reading of both the text of these articles and their history as described in the text, however, indicates that this narrow term really encompasses most or all of inter-member state transnational litigation.

⁵⁵ 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 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.

⁵⁶ 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, available at http://www.europarl.europa.eu/summits/tam_en.htm.

⁵⁷ See, e.g., *Hypoteční Banca v. Lindner*, Case C-327-10, paras. 44-54 (Nov. 11, 2011), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62010CJ0327:EN:HTML> (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

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. As the Commission stated in its Hague Programme of 2004, “[a] European area of justice is more than an area where judgements obtained in one Member State are recognised and enforced in other Member States, but rather an area where effective access to justice is guaranteed in order to obtain and enforce judicial decisions.”⁵⁸ 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.⁵⁹ Thus, for instance, the Brussels I Convention establishes the conditions and procedures under which foreign judgments must be recognized and accepted for enforcement, but remains silent on, and thus leaves to member state law, questions such as what preclusive effects a recognized judgment has or how a money judgment is to be enforced once declared enforceable.⁶⁰ 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. Thus, for instance, a German who claims to be owed €10,000 by an Italian merchant can either litigate the claim in Germany under German

(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). On the interpretation of various pieces of EU legislation on inter-Community transnational litigation by the ECJ see, for example, Burkhard Hess, *Methoden der Rechtsfindung im Europäischen Zivilprozessrecht*, 26 IPRAX 348 (2006).

⁵⁸ Hague Programme, *supra* note 56, at 2.3(9).

⁵⁹ This included both instruments unifying more traditional aspects of transnational litigation – such as judicial jurisdiction, service of process, gathering of evidence and the recognition of judgments – and the harmonization of aspects of transnational litigation that touch on issues of cross-border trade and access to justice. For the latter, *see, e.g.*, Directive 2000/35/EC of the European Parliament and of the Council of 29 June 2000 on combating late payment in commercial transactions, art. 5, 2000 O.J. (L 200) 35 (requiring member states to “ensure that an enforceable title can be obtained, irrespective of the amount of debt, normally within 90 calendar days of the lodging of the creditor’s action” if “the debt or aspects of the procedure are not disputed”); Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests, 1998 O.J. (L 166) 51 (mandating that consumer groups organized under the laws of one member state be given standing to sue in another member state); Council Directive 97/5/EC of the European Parliament and of the Council of January 27 1997 on cross-border credit transfers, art. 10, 1997 O.J. (L 43) 25 (requiring member states to “ensure that there are adequate and effective procedures for the settlement of disputes” in cross-border credit transfers).

⁶⁰ This overlap has created some thorny questions on how best to integrate the European procedures into the very different domestic procedural and enforcement systems of the member states. *See, e.g.*, Oberhammer, *supra* note 41, at 198-199.

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).⁶¹ 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.⁶²

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, for instance, incorporate portions of the Brussels I Regulation. Thus, the Order of Payment Regulation simply provides that jurisdiction to adjudicate to issue a European order of payment “shall be determined in accordance with the relevant Community Law, in particular Regulation (EC) No 44/2001.”⁶³ More extensively, the

⁶¹ See Order of Payment Regulation, *supra* note 51, arts. 19-28 and *supra* note 51. I use this example partly to showcase yet another complication. For it is not at all clear that the claimant is better off using the European order of payment procedure in this case. Germany has long had its own version of such a procedure, the so-called *Mahnverfahren*, which deviates from the new European one in a number of respects. It is thus possible that, at least in the short term, the claimant would be better off using the German *Mahnverfahren*, with which the German courts are familiar, than the European order of payment procedure, with which they are not. See, e.g., Gerhard Wagner, *Harmonization of Civil Procedure – Policy Perspectives*, in CIVIL LITIGATION IN A GLOBALISING WORLD 93, 99 (X.E. Kramer & R.C. vanRhee eds., 2012). Recognizing this problem, the German legislature has designated a single court in Berlin to have jurisdiction to issue European orders of payment. See § 1087 ZPO (Ger.). As a result, that court should gain the necessary experience effectively to deal with the new procedure in the not-too-distant future. See, e.g., Xandra E. Kramer, *Enhancing Enforcement in the European Union: The European Order for Payment Procedure and Its Implementation in the Member States, Particularly in Germany, the Netherlands, and England*, in ENFORCEMENT AND ENFORCEABILITY: TRADITION AND REFORM 17, 30 (C.H. vanRhee & Alan Uzelac eds., 2010).

⁶² See Proposal for an Account Preservation Order, *supra* note 7, arts. 5-45. There is an exception to the immediate enforceability of the Order in other member states: Orders that are not granted by a court “in the member state where proceedings on the substance of the matter have to be brought in accordance with the applicable rules on jurisdiction” are enforceable only in the state of issuance. See *id.* arts. 6(2), 14(1) & 23.

⁶³ Order of Payment Regulation, *supra* note 51, art. 6(1). This means, for instance, that the order of payment procedure can be used against U.S. defendants if the rendering court has jurisdiction under domestic member-state law. See *supra* text accompanying notes 25-28.

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,⁶⁴ even though that Regulation would not otherwise govern judgments of this sort.⁶⁵ Moreover, the newer Community instruments in transnational litigation increasingly use particular terms of the Brussels I Regulation as reference points, both explicitly and impliedly. Thus, for instance, the Small Claims Regulation, the Order of Payment Regulation, and the proposed Account Preservation Order Regulation refer to the definition of “domicile” in Articles 59 and 60 of the Brussels I Regulation for various purposes.⁶⁶ Similarly, 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.⁶⁷ 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.”⁶⁸

The sum of these developments has been a seismic shift over the last half century from treating matters of transnational litigation as virtually irrelevant to 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, though admittedly still far in the future, is likely to be the

⁶⁴ Insolvency Regulation, *supra* note 49, art. 25(1).

⁶⁵ See *supra* text accompanying note 48.

⁶⁶ See Small Claims Regulation, *supra* note 51, arts. 3(2); Order of Payment Regulation, *supra* note 51, arts. 3(2) & 6(2); Proposal for an Account Preservation Order, *supra* note 7, art. 4(15). For further examples see Hess, Pfeiffer & Schlosser, *supra* note 41, at 29-30.

⁶⁷ See, e.g., Pippa Rogerson, *Article 1*, in EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW, *supra* note 44, 45, 51-56. On the limitation of the applicability of the Brussels I Convention to civil and commercial matters see *supra* text accompanying note 48.

⁶⁸ Proposed Brussels I Amendments, *supra* note 7, at 3. As indicated *supra* note 54, the term used in Brussels is “civil judicial cooperation” rather than “transnational litigation.” See Proposed Brussels I Amendments, *supra* note 7, at 3.

displacement of all member state law applicable to transnational cases, no matter what the type of proceeding.⁶⁹

IV. The Proposed Amendments to the Brussels I Regulation

It is against this backdrop that the Commission has proposed a number of changes to the Brussels I Regulation. The most important proposed changes relating to recognition and enforcement of judgments are (1) the abolition of the declaration of enforceability; (2) the limitation of the public policy defense to matters of procedure; (3) the abolition of the defense of improper notice, requiring the defendant to raise the defense with the rendering court; (4) the abolition of the remaining cases in which a jurisdictional defense is available; (5) changes in the scope of recognizability and enforceability of provisional and protective measures; (6) and the extension of the Regulation's jurisdictional regime to defendants from non-member countries.⁷⁰ In short, the proposal intends to further implement the policies of integration and free movement of judgments, thus bringing the treatment of judgments from other member states closer

⁶⁹ Thus far, attempts to extend procedural harmonization and unification efforts to purely domestic cases have been strongly resisted. In 1993, a group of European civil procedure scholars proposed the harmonization of various parts of domestic European civil procedure by way of an EC directive. *See* MARCEL STORME, APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION (1994). But the proposal was greeted with anything but enthusiasm and was never acted upon by the Commission. Similarly, the initial attempt of the Commission to expand the scope of application of the Order of Payment and Small Claims regulations, *supra* note 51, to domestic as well as cross-border cases was strongly resisted as beyond the constitutional powers of the Union and thus was ultimately dropped. *See, e.g.,* Wagner, *supra* note 61, at 97-98. The Commission has, however, been successful in gaining passage of Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, 2004 O.J. (L 195) 16, which harmonizes member state procedural law in both transnational and domestic intellectual property cases in certain respects. The Commission was able to do so by casting the directive as a legal instrument regulating substantive intellectual property law along with procedural enforcement mechanisms. *See* Wagner, *supra*, at 102. I suspect it did not hurt that the Directive had a precursor in the minimum requirements for domestic procedural rules established by the WTO's TRIPS Agreement. *See* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments – Results of the Uruguay Round; arts. 41-50, vol 31, 33. I.L.M. 81 (1994).

⁷⁰ Further important proposed changes include provisions to improve the enforcement of forum selection and arbitration clauses, the introduction of a *lis pendens* provision in favor of litigation pending in a non-member state; and various provisions mandating a certain level of cooperation between the courts of different member states involved in the same matter. *See* Proposed Brussels I Amendments, *supra* note 7, at 3-9.

to that of domestic ones.⁷¹ The first five changes are also explicitly based on the policy of trusting the law, procedure, and practice in the other member states.⁷²

The first of these, the abolition of the declaration of enforceability sounds like a bolder move than it really is.⁷³ 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.⁷⁴ Recall further that, from what we know, very few judgment debtors actually bother to do so.⁷⁵ The Commission thus appears to conclude that most judgment creditors have to waste the time and resources to obtain a judicial document that certifies something few debtors contest.⁷⁶ These resources include the cost of the declaration itself,⁷⁷ costs of translating the relevant documents,⁷⁸ and costs for retaining local counsel.⁷⁹ Even though

⁷¹ See Proposed Brussels I Amendments, *supra* note 7, at 4.

⁷² However, the Commission does not consider that trust to exist in matters of defamation and group litigation and thus currently excludes these two areas from the proposed elimination of *exequatur* and the defenses of improper notice and substantive public policy violations. See Proposed Brussels I Amendments, *supra* note 7, at 6-7.

⁷³ Much of the opposition against this proposal is really directed against the concomitant proposal to abolish several of the currently existing grounds for refusing recognition. See *infra* text accompanying notes 81-92. However, nothing prevents the European Union from abolishing the declaration of enforceability while retaining the ability of the judgment debtor to challenge the recognition of the judgment on all currently available grounds against recognition through some other procedure. See, e.g., Xandra E. Kramer, *Abolition of Exequatur under the Brussels I Regulation: effecting and protecting rights in the European judicial area*, 2011 NEDERLANDS INTERNATIONAAL PRIVAATRECHT 633, 641 (2011); Oberhammer, *supra* note 41, at 199-200.

⁷⁴ See *supra* text accompanying notes 37-41.

⁷⁵ See *supra* text accompanying note 42.

⁷⁶ See Proposed Brussels I Amendments, *supra* note 7, at 3 (positing that the declaration of enforceability “remains an obstacle to the free circulation of judgments which entails unnecessary costs and delays for the parties involved and deters companies and citizens from making full use of the internal market”). See also Hess, Pfeiffer & Schlosser, *supra* note 41, 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”).

⁷⁷ Fees for the declaration of enforceability differ considerably from member state to member state. See Hess, Pfeiffer & Schlosser, *supra* note 41, at 227-28.

⁷⁸ According to Article 55(2) of the Brussels I Regulation, a translation must be produced only “[i]f the court or competent authority so requires.” The purpose of this provision was to limit the need for translations to those occasions in which the court would otherwise be unable sufficiently to understand the relevant documents to determine whether or not there is an enforceable judgment. However, in practice, the courts of many member states, it turns out, routinely require the translation not only of the judgment itself, but of the opinion as well. Moreover, attorneys unsure of whether or not a translation will be required simply produce it so as to avoid wasting time with an appeal. See Hess, Pfeiffer & Schlosser, *supra* note 41, at 226-27.

one may quibble with this reasoning, the proposal effectively gets rid only of the requirement for a declaration of enforceability, not, however, the availability of a review of the judgment by court in the recognition state. Under the proposal, the judgment creditor retains the ability at any time to prevent enforcement by applying for an order to refuse enforcement on one of the remaining grounds against recognition, generally by the same court that currently adjudicates the appeal against the declaration of enforceability.⁸⁰

The second proposed change, the limitation of the public policy defense to procedural irregularities, has been more controversial. It is based on a common separation of the public policy defense on the European Continent into substantive and procedural grounds for objection.⁸¹ The latter refers to serious violations of the recognition state's standards of procedural fairness, the former to public policy violations resulting from the substantive law as applied. To the extent we know, there are few if any cases in the member states where substantive public policy was found to block the recognition or enforcement of a member-state judgment.⁸² From this, the Commission has concluded that substantive public policy no longer serves a useful purpose at a time of increasing reciprocal trust of the member states of their respective legal systems, but instead has the potential of generating unnecessary costs for judgment creditors.⁸³ The proposal to abolish the public policy defense altogether has been around for a number of years, of course, and so has the debate over whether the member states are really ready to let go of this safety valve against judgments with which they disagree deeply.⁸⁴ If judgment debtors are hardly ever successful with a claim of violation of substantive public policy, this does not necessarily mean that the exception serves no useful purpose. Instead, it

⁷⁹ No member state requires representation by counsel to obtain the declaration of enforceability. However, Article 40(2) of the Brussels I Regulation mandates that the judgment creditor "give an address for service of process within the area of jurisdiction of the court applied to." It appears that judgment creditors frequently appoint local counsel for this purpose. Moreover, it is useful to retain local counsel with knowledge of local practice, which can differ significantly from country to country. However, in some of the member states, the costs of local counsel are borne by the judgment debtor if the application for a declaration of enforceability is granted. On all this see Hess, Pfeiffer & Schlosser, *supra* note 41, at 228-29; Oberhammer, *supra* note 41, at 198.

⁸⁰ See Proposed Brussels I Amendments, *supra* note 7, arts. 43 & 46.

⁸¹ See, e.g., Stéphanie Francq, *Art. 34*, in EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW, *supra* note 44, 556, 568-78; Walter & Baumgartner, *supra* note 48, at 27.

⁸² See Hess, Pfeiffer & Schlosser, *supra* note 41, at 249-50.

⁸³ See Proposed Brussels I Amendments, *supra* note 7, at 6.

⁸⁴ See Commission Communication to the Council and the European Parliament – Towards greater efficiency in obtaining and enforcing judgments in the European Union, COM(1997) 609 final, 1998 O.J. (C 33) 20, para. 20.

may simply demonstrate that the courts of the member states understand that this is a safety valve rarely to be applied.⁸⁵

No less controversial is the proposal to abolish the defense of improper service of process against default judgments. It is in this area, the relevant studies have found, that most of the challenges to the recognition and enforcement of judgments still occur.⁸⁶ Apparently, however, the Commission has concluded that where problems with proper notice exist, it is better to have them remedied by the rendering court.⁸⁷ Thus, in exchange for the abolition of the defense of improper service at the recognition stage, the proposal introduces, as a matter of EU law, the ability of the judgment debtor to reopen a default judgment in the rendering court for improper service under narrow circumstances.⁸⁸ This is certainly in line with the significant narrowing of the defense from one that could be interpreted as being open against any irregular notice in the Brussels Convention⁸⁹ to one that can be directed only against service of process that actually resulted in the defendant being unable to prepare a defense in adequate time in the Brussels I Regulation.⁹⁰ The idea is clear: Although irregularities with proper service do appear to occur with some frequency, the courts of the rendering state are in a much better position than their counterparts in the recognition state to judge whether there really was a problem and, if so, to rectify it. Moreover, holding up enforcement proceedings in the recognition state with this task is unnecessary because we can trust the courts of the rendering state with it. The question, of course, is whether the litigating bar

⁸⁵ The ECJ made this abundantly clear in *Régie nationale des usines Renault v. Maxicar SpA*, 2000 E.C.R. I-2973, paras. 30-33.

⁸⁶ See, e.g., *Hess, Pfeiffer & Schlosser*, *supra* note 41, at 239.

⁸⁷ See Proposed Brussels I Amendments, *supra* note 7, art. 45.

⁸⁸ Article 45(1) of the Proposed Brussels I Amendments, *supra* note 7, provides:

A defendant who did not enter an appearance in the Member State of origin shall have the right to apply for a review of the judgment before the competent court of that Member State where:

(a) he was not served with the document instituting the proceedings or an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence; or

(b) he was prevented from contesting the claim by reason of force majeure or due to extraordinary circumstances without any fault on his part;

Unless he failed to challenge the judgment when it was possible for him to do so.

⁸⁹ See Brussels Convention, *supra* note 10, art. 27(2) (proscribing recognition “if the defendant was not duly served ... in sufficient time to enable him to arrange for his defense”).

⁹⁰ See *supra* text accompanying note 32 (primarily eliminating the word “duly”).

and public agrees with the proposition that the courts of the other member states can be trusted in this fashion.

The abolition of the remaining cases in which the jurisdiction to adjudicate of the rendering court may be challenged is not surprising, given the attempt of the proposed changes to improve the free circulation of judgments. There have long been questions about why consumers and insurance policy owners should be able to get a second bite at the apple and why rendering courts from other member states cannot be trusted with a jurisdictional determination in those areas, while they can be in all others.⁹¹ However, these are also particularly vulnerable groups, and one may wonder whether requiring them to travel abroad to raise a jurisdictional defense against a claim brought by a foreign corporation is justified.⁹² Purely a matter of trust (and not one involving the protection of vulnerable groups) is the proposal to abolish the remaining jurisdictional defense where jurisdiction is exclusive according to Article 22 of the Brussels I Regulation.

With regard to preliminary and protective measures, by contrast, the Commission is proposing not only an expansion but also a limitation of recognizable and enforceable measures. Seeking to overrule a long-standing interpretation of the Brussels Convention and the Brussels I Regulation by the ECJ,⁹³ on the one hand, the Commission proposes to mandate that preliminary measures granted *ex parte* be recognized and enforced.⁹⁴ The apparent reason is that, in practice, the current system forces plaintiffs in large-scale 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.⁹⁵ There is

⁹¹ See, e.g., GERHARD WALTER, *INTERNATIONALES ZIVILPROZESSRECHT DER SCHWEIZ* 442-43 (4th ed. 2007); Hess, Pfeiffer & Schlosser, *supra* note 41, at 283. On the extent to which a jurisdictional defense is available under the current version of the Brussels I Regulation see *supra* text accompanying note 33-35. Note that, unlike in U.S. interstate practice (see, e.g., *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 524-27 (1931)), a challenge to the rendering court's jurisdiction to adjudicate in those cases is currently possible according to Article 35 of the Brussels I Regulation whether or not the defendant challenged and litigated the jurisdictional question in the rendering court, although the rendering court's factual determinations on jurisdiction are binding on the recognition court.

⁹² See, e.g., Andrew Dickinson, *The 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) ("Brussels Ibis Regulation")* 10, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930712. Note, however, that, under the current regime, the rendering court must establish its jurisdiction *sua sponte* where the defendant is domiciled in an EU member state but is sued in another member state and fails to appear. See Brussels I Regulation, *supra* note 8, at art. 26(1).

⁹³ See *supra* text accompanying note 46.

⁹⁴ See Proposed Brussels I Amendments, *supra* note 7, at 9.

⁹⁵ See, e.g., WALTER, *supra* note 91, at 431.

some potential for fraudulent activity here, but the Commission appears to assume, as it does with regard to improper service of process, that such problems can easily be addressed by the court of origin, once the defendant is given the opportunity – required by the proposed amendment – to challenge the measure there and that the court of origin should be trusted with remedying the situation. On the other hand, the proposal 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.”⁹⁶ The Commission thus attempts 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.⁹⁷ Following through with the principles of trust and increased mobility, the Commission assumes 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 the jurisdiction granting such measures – the same way we can expect defendants to challenge allegedly defective judgments in the (foreign) rendering state rather than wait for recognition or enforcement proceedings at home.⁹⁸

Considerably more surprising, finally, is the Commission’s proposal to subject defendants from non-member states essentially to the same jurisdictional regime as defendants who are domiciled within a member state. Currently, the Brussels I Regulation proceeds from the assumption, as did the Brussels Convention, that only defendants having their domicile within a member state of the European Union are to be protected from litigation pending in jurisdictions other than the defendant’s domicile that have few if any relevant connections to the claim.⁹⁹ Its jurisdictional rules are thus limited to cases in which the defendant is domiciled in a member state.¹⁰⁰ Yes, this approach does discriminate against defendants from non-member states, such as the United States, particularly when combined with the rule that judgments against such

⁹⁶ See Proposed Brussels I Amendments, *supra* note 7, art. 2(a).

⁹⁷ See Proposed Brussels I Amendments, *supra* note 7, at 9 and *supra* text accompanying note 45.

⁹⁸ The proposal further requires that “if proceedings on the substance are pending in one court and another one is asked to issue a provisional measure, [] the two courts cooperate in order to ensure that all circumstances of the case are taken into account when a provisional measure is granted.” Proposed Brussels I Amendments, *supra* note 7, at 9.

⁹⁹ Unlike the jurisprudence of the U.S. Supreme Court under the Due Process Clause, the jurisdictional rules of the Brussels I Regulation and the ECJ case law interpreting them has focused not on the relationship between the forum and the defendant but between the forum and the claim for purposes of establishing specific jurisdiction outside of general jurisdiction (in the case of the Brussels I Regulation) at the domicile of the defendant. See, e.g., BAUMGARTNER, *supra* note 12, at 168.

¹⁰⁰ See *supra* text accompanying notes 19-28.

defendants based on an exorbitant jurisdictional rule from one member state generally must be recognized and enforced in the others.¹⁰¹ But such is the privilege of those who fashion the rules for a particular jurisdiction – in this case the Common Market – and it can be neutralized with the equally existing privilege of non-member states to negotiate a jurisdiction and judgments treaty with the European Union.¹⁰² That there is a privilege to fashion the rules of transnational litigation the way a jurisdiction sees fit, of course, does not mean that it is smart to exercise that privilege without considering the potential transnational consequences.¹⁰³

However, the Commission has decided that the focus on protecting European defendants and the concomitant incentive for other nations (especially the United States) to come to the negotiating table are no longer the only policies behind the Brussels I Regulation in cases involving litigants from non-member states. Instead, the Commission points out that the current system leads to unequal access for *plaintiffs* from the European Union to member state courts in cases against defendants from non-member states.¹⁰⁴ This is not only because the exorbitant jurisdictional bases available in the member states differ in reach, but also because the domestic jurisdictional law of some member states provides for jurisdictional bases that are similar or equal to those in the Brussels I Regulation while those of other states are considerably more limited.¹⁰⁵ The Commission thus proposes both to make the jurisdictional bases of the Brussels I Regulation available against defendants from non-member states and to prohibit the use of the exorbitant bases of jurisdiction currently available against such defendants.¹⁰⁶ However, unlike the rules applicable to defendants from member states, the proposal suggests adopting two additional bases of jurisdiction against defendants from non-member states. First is jurisdiction based on the ownership of property within the relevant member state, thus providing for a limited form of exorbitant jurisdiction that is equally available in all

¹⁰¹ See *supra* note 36 and accompanying text.

¹⁰² See, e.g., Clermont & Palmer, *supra* note 26, at [6-7]; Kathryn A. Russel, *Exorbitant Jurisdiction and Enforcement of Judgments: The Brussels System as an Impetus for United States Action*, 19 SYRACUSE J. INT'L L. & COM. 57, 59-60 (1993). The claim by the drafters of the Restatement (Third) of the Foreign Relations Law of the United States that there may be limitations on exorbitant bases of jurisdiction deriving from customary international law has remained with little support. Cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 421, cmt. e (positing that “jurisdiction based on service of process on a person only transitorily in the territory of the state is not generally acceptable under international law”).

¹⁰³ See *supra* text accompanying notes 3-4.

¹⁰⁴ See Proposed Brussels I Amendments, *supra* note 7, at 3.

¹⁰⁵ See, e.g., Nuyts, *supra* note 25, at 19-21 (2007).

¹⁰⁶ See Proposed Brussels I Amendments, *supra* note 7, at 8.

jurisdictions.¹⁰⁷ The second is a *forum necessitatis*, permitting plaintiffs from EU member states to sue defendants from non-member states in any member state that has a sufficient connection with the dispute if no forum is reasonably available elsewhere in the world.¹⁰⁸ Depending on the country, this proposal thus either limits or expands the types of cases in which U.S. defendants may be sued in that jurisdiction, whose judgment must then be recognized and enforced by the other member 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. Even with regard specifically to the recognition and enforcement of judgments from other member states, the Brussels I Regulation is no longer the only piece of EU legislation, although it probably remains the most important one. Indeed, the development seems to move into 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.¹⁰⁹ 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. From this perspective, the Commission's proposal to subject defendants from non-member states (mostly) to the same bases of jurisdiction to adjudicate as defendants from member states would bring some relief. Jurisdiction over defendants from non-member states would then be determined by EU law rather than by the internal law of the member states, as is currently the case.¹¹⁰ At first blush, this seems to be good news for defendants from the United

¹⁰⁷ *Id.* at art. 25. Permitting citizens or domiciliaries to bring suit against foreigners who own property within the forum state, which can then be used to enforce a resulting judgment, is likely to be the primary reason behind the existence of most exorbitant bases of jurisdiction. *See, e.g.,* Clermont & Palmer, *supra* note 26, at [16-18].

¹⁰⁸ *Id.* at art. 26. In the United States, the Supreme Court has twice refused to consider adoption of a forum of necessity on the facts before it when the minimum contacts required by the due process clause were otherwise missing. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 419 n.13 (1984); *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977).

¹⁰⁹ On all this see *supra* text accompanying notes 48-68.

¹¹⁰ *See supra* text accompanying notes 99-108.

States for the additional reason that the effect of this proposal would be to outlaw the use of exorbitant bases of jurisdiction under domestic member state law that are currently available against such defendants. However, it is less than clear that this would lead to an overall limitation of jurisdiction against U.S. defendants in all member states since the proposal also includes both a new assets jurisdiction and a new necessity jurisdiction specifically against non-Community defendants, and since the Brussels I Regulation's jurisdictional bases themselves reach farther than some of the jurisdictional rules of the member states.¹¹¹

The European Union has particularly been on a roll in the area of judgments recognition. 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.¹¹² 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.¹¹³ The proposed changes to the Brussels I Regulation go a long way toward achieving this goal. This is particularly true of the proposed elimination of 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).¹¹⁴ This is good news for judgment creditors from the United States, less so for our judgment debtors. For it will be even less advisable than it already is to default on a claim brought in a member state court in the hope that the resulting judgment can be collaterally attacked later. For the most part, collateral attacks will no longer be available in the other member states. Moreover, the number of countries where the 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.¹¹⁵ And the Lugano Convention extends the current regime of the Brussels I Regulation to three additional states,¹¹⁶ with the EU assessing the possibility of getting other important trading partners, including from outside of Europe, to sign on to the Lugano Convention.¹¹⁷ However, it is questionable whether the proposed changes and

¹¹¹ See Proposed Brussels I Amendments, *supra* note 7, at 8 and *supra* text accompanying note 105.

¹¹² See, e.g., BAUMGARTNER, *supra* note 12, at 62-63.

¹¹³ See *supra* note 56 and accompanying text.

¹¹⁴ See *supra* text accompanying notes 86-90.

¹¹⁵ See *supra* note 6.

¹¹⁶ See *supra* text accompanying 17-18.

¹¹⁷ See Stockholm Programme, *supra* note 56, at 17.

certainly further future changes to the Brussels I Regulation are likely to make it into new versions of the Lugano Convention since those changes are increasingly intertwined with Community law in other areas as well as with important (constitutional) Community obligations, such the freedoms of movement for goods, services, persons, and capital and the duty to cooperate.¹¹⁸

Overall, then, attorneys representing litigants from the United States are well advised to study both the current and the proposed set of rules on recognition and enforcement in the European Union carefully 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 and thus is 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.¹¹⁹ In case the United States considers the further negotiation of treaties in this area, 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.¹²⁰ 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.¹²¹ Given the long history of U.S. impatience in this area – impatience with foreign solutions, impatience with foreign countries resisting the

¹¹⁸ See, e.g., BURKHARD HESS, *EUROPÄISCHES ZIVIPROZESSRECHT* 198-99 (2010). *But see* Alexander Markus, *Probleme der EuGVVO-Revision: Begriff der Entscheidung und Abschaffung des Exequaturverfahrens*, in *INNOVATIVES RECHT: Festschrift für Ivo Schwander* 747, 748 (Franco Lorandi & Daniel Stähelin eds., 2011) (expressing hope that the European authorities will be open to renegotiations of the Lugano Convention for this purpose so as to meet a strong interest of (Swiss) practitioners in the field).

¹¹⁹ See AMERICAN LAW INSTITUTE, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE* (2006) [hereinafter ALI PROPOSAL]; U.S. House of Representatives, Subcommittee on Courts, Commercial and Administrative Law, Hearing on Recognition and Enforcement of Foreign Judgments, Nov. 15, 2011, available at http://judiciary.house.gov/hearings/hear_11152011_2.html.

¹²⁰ See Case C-1-03, 2006 E.C.R. I-1145.

¹²¹ It would also make it considerably more difficult for the Europeans simply to outvote the United States where they view their interests as counter to those of the United States, as happened in the negotiations of the proposed Hague Judgments and Jurisdiction convention. See, e.g., Arthur T. von Mehren, *Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference Project Succeed?*, 49 AM. J. COMP. L. 191, 202 (2001).

preferred U.S. approach, and impatience with the time and effort necessary for successful treaty negotiation – this is likely to be a considerable benefit.¹²²

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 EU 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, in some jurisdictions, remained at the stage of circa 1900.¹²³ 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 sub-standard legal regimes and many of them provide numerous opportunities to block recognition of U.S. judgments.¹²⁴ Yes, 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.¹²⁵ However, not only is this approach likely to create all kinds of problems,¹²⁶ including the potential of hurting litigants from the United States as litigation abroad, including litigation by U.S. plaintiffs, becomes more frequent.¹²⁷ 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 unpleasant results.¹²⁸ Perhaps, then, it is time for the United States to warm up to the idea of negotiating treaties in this area and to do so with patience and, preferably (at least initially), one country (or supranational organization) at a time.¹²⁹ The problem with negotiating with the European Union, of course, will be that the longer the Europeans focus on lawmaking for intra-

¹²² See, e.g., BAUMGARTNER, *supra* note 12, at 69-70; Stephen B. Burbank, *The Reluctant Partner: Making Procedural Law for International Civil Litigation*, 57 LAW & CONTEMP. PROBS. 103, 139-41 (Summer 1994).

¹²³ See, e.g., Baumgartner, *U.S. Judgments*, *supra* note 5, at 180.

¹²⁴ See *id.* at 181-82.

¹²⁵ See ALI PROPOSAL, *supra* note 119, §7.

¹²⁶ One need only study the long list of complexities created by the reciprocity requirement in a country, such as Germany, that has had such a requirement on the books for decades. See, e.g., DIETER MARTINY, III/1 HANDBUCH DES INTERNATIONALEN ZIVILVERFAHRENSRECHTS 523-80 (1984).

¹²⁷ See *supra* note 2 and accompanying text.

¹²⁸ For an account of this approach, see, for example, BAUMGARTNER, *supra* note 12, at 21-45.

¹²⁹ See, e.g., Kevin M. Clermont, *A Global Law of Jurisdiction and Judgments: Views from the United States and Japan*, 37 CORNELL INT'L L.J. 1, 24-26 (2004).

Community litigation and the more they think uniformly about external relations, the more single-minded, powerful, and perhaps unpalatable their proposed solutions may become from a U.S. perspective. The proposed changes to the Brussels I Regulation's jurisdictional regime, for example, are not meant to benefit defendants from non-member states, but rather to improve access to justice for EU plaintiffs.¹³⁰ And the relatively recent decision to point non-EU trading partners to the Lugano Convention,¹³¹ potentially more and more to the exclusion of other negotiable options,¹³² may not be a palatable or even feasible way forward from a U.S. point of view.¹³³ Thus, the sooner such negotiations take place, the better.

¹³⁰ See *supra* text accompanying notes 104-108.

¹³¹ See *supra* text accompanying note 117.

¹³² For the time being, the European Council does believe that “the option of bilateral agreements should be explored, on a case-by-case basis;” but only “where no legal framework is in place for relations between the Union and partner countries, and where the development of new multilateral cooperation is not possible from the Union’s standpoint.” Stockholm Programme, *supra* note 56, at 17. Of course, the Lugano Convention may be viewed as just such a framework.

¹³³ See, e.g., von Mehren, *supra* note 36, at 280-81.