

# THE EUROPEAN MAGNET AND THE U.S. CENTRIFUGE: TEN SELECTED PRIVATE INTERNATIONAL LAW DEVELOPMENTS OF 2008

*Ronald A. Brand\**

I.	INTRODUCTION .....	367
II.	DEFINITIONS AND GENERAL SCOPE OF 2008 DEVELOPMENTS ..	368
III.	THE TEN DEVELOPMENTS .....	370
	A. <i>The Rome II Regulation</i> .....	370
	B. <i>The Rome I Regulation</i> .....	371
	C. <i>The West Tankers Opinion of Advocate General Kokott</i> .	373
	D. <i>Goshawk Dedicated Ltd &amp; Ors v. Life Receivables Ireland Ltd.</i> .....	377
	E. <i>Japan Accedes to the U.N. Sales Convention</i> .....	379
	F. <i>Medellín v. Texas</i> .....	381
	G. <i>Hall Street Associates, L.L.C. v. Mattel, Inc.</i> .....	384
	H. <i>Alpine Atlantic Asset Management AG v. Comstock</i> ....	386
	I. <i>U.S. and European Statements and Positions on the Hague Convention on Choice of Court Agreements</i> ..	388
IV.	LEGAL SYSTEM MAGNETS AND CENTRIFUGES .....	390
V.	CONCLUSION .....	391

## I. INTRODUCTION

This article began as a short presentation for the 2008 International Law Weekend in New York City. As I reviewed the ten private international law developments I had chosen for that presentation, it became clear that most of them reflected a much more important cumulative process that has developed over the past decade. The continuing evolution of that process in 2008 provides contrast between the centralization of private international law competence in the European Union (E.U.) and the apparent parallel dispersal of law making authority (particularly in regard to treaty implementation) in the United States. As a federal system has developed in the E.U., European Community institutions have replaced the Member States as the primary sources of rules of

---

\* © 2009 Ronald A. Brand. Professor of Law and Director, Center for International Legal Education, University of Pittsburgh School of Law. Thanks to Paul Herrup, Wes Rist, and Louise Ellen Teitz for comments on earlier drafts. Any errors are my own.

private international law, both internally and externally.<sup>1</sup> At the same time, some have claimed for the states of the United States an enhanced role in the development of external private international law rules for the United States, arguably assisted by decisions of the United States Supreme Court. This reversal of functions on both sides of the Atlantic has the potential to diminish the role of the United States and enhance the role of the European Community as global players in the development of private international law.

## II. DEFINITIONS AND GENERAL SCOPE OF 2008 DEVELOPMENTS

The term "private international law" has a number of meanings. In the traditional continental civil law system, as well as in the common law system in the United Kingdom (U.K.), it generally is taken to cover three areas important to cross-border litigation: jurisdiction, the determination of applicable law, and the recognition and enforcement of judgments.<sup>2</sup> In the United States, this combination of issues is addressed under the rubric of conflict of laws, often limiting consideration to internal cross-border matters.<sup>3</sup> At the same time, in the United States we tend to define the term private international law more broadly by reference to the work of the Office of Private International Law within the Office of Legal Adviser at the Department of

---

1. Currently, the European Union has no institutional framework. The European Community, under the Treaty Establishing the European Community, is the source of institutions that create legal instruments and participate in external relations. Under the Treaty of Lisbon, the "European Union" would replace the "European Community," and the Treaty establishing the European Community would be renamed the Treaty on the functioning of the Union. *See* Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, December 3, 2007, 2008 O.J. (C306) 1, *available at* <http://consilium.europa.eu/uedocs/cmsUpload/cg00014.en07.pdf> (last visited Feb. 21, 2009). The negative vote on the Irish referendum on June 12, 2008 has left implementation of the Treaty of Lisbon uncertain.

2. *See, e.g.*, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 3-4 (P.M. North & J.J. Fawcett, eds., 13th ed, 1999):

Private international law is that part of English law which comes into operation whenever the court is faced with a claim that contains a foreign element. It is only when this element is present that private international law has a function to perform. It has three main objects.

First, to prescribe the conditions under which the court is competent to entertain such a claim.

Secondly, to determine for each class of case the particular municipal system of law by reference to which the rights of the parties must be ascertained.

Thirdly, to specify the circumstances in which (a) a foreign judgment can be recognised as decisive of the question in dispute; and (b) the right vested in the judgment creditor by a foreign judgment can be enforced by action in England.

*Id.*

3. *See, e.g.*, RESTATEMENT (SECOND) CONFLICT OF LAWS (1971).

State.<sup>4</sup> Within the American Society of International Law, the Interest Group on Private International Law similarly has taken a broad approach to defining the term.<sup>5</sup>

However we define the term, the most significant development in private international law over the past decade has been the entry of institutions of the European Community into the field. The Member States of the E.U. have been major participants in the process of defining the rules of private international law through treaties such as the Brussels, Lugano, and Rome Conventions, as well as through their national rules on jurisdiction, applicable law, and the recognition and enforcement of foreign judgments. The amendments to the European Community Treaty brought about by the Treaty of Amsterdam gave Community institutions direct authority for developments in the areas of jurisdiction, recognition and enforcement of judgments, and applicable law.<sup>6</sup> This has made the development of private international law largely a matter internal to the Community institutions, and most particularly within the Directorate General for Justice, Freedom and Security of the European Commission.<sup>7</sup> Since the effective date of the Amsterdam Treaty amendments on May 1, 1999, there has been no lack of effort to centralize Community rules on private international law through Community Regulations.<sup>8</sup>

---

4. This scope of coverage is reflected on the website of the United States Department of State, Office of the Legal Adviser, Private International Law, available at <http://www.state.gov/s/l/c3452.htm> (last visited Feb. 21, 2009). "PIL" in the Legal Adviser's office represents the United States in negotiations at the Hague Conference on Private International Law, available at [www.hcch.net](http://www.hcch.net) (last visited Feb. 21, 2009), UNCITRAL, available at [www.uncitral.org](http://www.uncitral.org) (last visited Feb. 21, 2009), UNIDROIT available at [www.unidroit.org](http://www.unidroit.org) (last visited Feb. 21, 2009), and the OAS, available at [http://www.oas.org/DIL/private\\_international\\_law.htm](http://www.oas.org/DIL/private_international_law.htm) (last visited Feb. 21, 2009).

5. See, e.g., Louise Tsang, *Private International Law*, at VI, ASIL ELECTRONIC RESOURCE GUIDE, PRIVATE INTERNATIONAL LAW IN THE UNITED STATES, available at <http://www.asil.org/pil1.cfm#Private%20International%20Law%20in%20the%20United%20States> (last visited Mar. 1, 2009).

6. Treaty Establishing the European Community, arts. 61–67, Dec. 24, 2002, 2002 O.J. (C325) 1 [hereinafter TEC]. See Aude Fiorini, *The Evolution of European Private International Law*, 57 INT'L COMP. L.Q. 969 (2008) ("The Treaty of Amsterdam . . . radically reformed the position and status of private international law, bringing it within the ambit of first pillar competence."). *Id.*

7. See generally Justice and Home Affairs, European Commission, *Judicial Co-Operation Between Member States in Civil and Commercial Matters is a European Community Policy Linked to the Free Circulation of People*, EUROPA, Mar., 2005, available at [http://ec.europa.eu/justice\\_home/fsj/civil/fsj\\_civil\\_intro\\_en.htm](http://ec.europa.eu/justice_home/fsj/civil/fsj_civil_intro_en.htm) (last visited Mar. 1, 2009) [hereinafter *Judicial Co-Operation*].

8. For discussion of these developments in the European Union, see Ronald A. Brand, *Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice*, in LIBER MEMORIALIS PETAR SARCEVIC: UNIVERSALISM, TRADITION AND THE INDIVIDUAL 35, 45 (2006) [hereinafter Brand]; Ronald A. Brand, *Federalism and the Allocation of Sovereignty Beyond the State in the European Union*, 44 DUQ. L. REV. 71, 76 (2005); Ronald A. Brand, *The European Union's New Role in International Private Litigation*, 2 LOY. U. CHI. INT'L L. REV. 277, 285 (2005).

In the discussion that follows, I note ten developments in private international law of the past year which I find to be worthy of interest. They reflect the heavy influence of European Community legislation and adjudication. My choices are not necessarily based on those individual events that will have the most significant impact on future legal relationships—nor is the list exhaustive of all developments during the past year. In some instances, the developments represent (I hope) possible departures from consistent future evolution. In each case, however, they are legal events worth the attention of private international lawyers. There is not space here to provide analysis of each development in full detail. My intent is rather to provide enough information that those who wish to know more may knowledgeably consult the texts that relate to each development.

My list begins with developments within the E.U., and more specifically with two regulations of the European Council and Parliament. More important than those two instruments, however, is the general leadership role the European Community has assumed in private international law. This leadership extends beyond the new Community competence in private international law. Many other nations find the roots of their private law and private international law systems in the continental civil law traditions, often as a result of transplantation of European legal codes. This means that developments in Europe are likely to have significant influence on developments throughout the world. This heightened influence of the E.U. has accompanied the recent decline in the influence of the United States in international law generally, making Europe's role even more significant. When the European Community became a member of the Hague Conference on Private International Law on March 3, 2007,<sup>9</sup> this role took on formal status in one of the three major institutions for the negotiation of multilateral legal instruments on private international law and international private law.<sup>10</sup>

### III. THE TEN DEVELOPMENTS

#### *A. The Rome II Regulation*

On January 11, 2009, Regulation (EC) No 864/2007 of the European Parliament and of the Council on the law applicable to non-contractual

---

9. See Hague Conference on Private International Law (HCCH), HCCH Members, [http://www.hcch.net/index\\_en.php?act=states.details&sid=220](http://www.hcch.net/index_en.php?act=states.details&sid=220) (last visited Jan. 29, 2009) (information on European Community membership).

10. These institutions are the Hague Conference on Private International Law available at [www.hcch.net](http://www.hcch.net), UNCITRAL available at [www.uncitral.org](http://www.uncitral.org), and the International Institute for the Unification of Private Law available at [www.unidroit.org](http://www.unidroit.org).

obligations, known as the “Rome II” Regulation, will take effect.<sup>11</sup> While it was completed and adopted on July 11, 2007, Member States were given the ability, until July 11, 2008, to list conventions and agreements with non-Member States that might have rules conflicting with the Rome II Regulation, and for which continued operation would remain important.

The Rome II Regulation provides the rules on applicable law that will govern in the courts of all Member States of the E.U. for matters dealing with obligations incurred other than by contract. This will include tort and delict actions, products liability, unfair competition, and claims for environmental damage or the infringement of intellectual property rights.

While the Brussels I Regulation,<sup>12</sup> as interpreted by the European Court of Justice (ECJ), provides that jurisdiction for matters arising in tort shall exist in both the courts of the state in which the act causing injury occurred and the state in which the injury arose,<sup>13</sup> the Rome II Regulation logically provides for a single applicable law in tort. That law is “the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.”<sup>14</sup> Articles dealing with specific types of actions provide corresponding rules, unifying the rules on applicable law throughout the E.U. on such matters.

The Rome II Regulation set the stage for the Rome I Regulation, discussed below, and follows Regulations on jurisdiction and the recognition and enforcement of judgments, service of process, taking of evidence, insolvency, small claims, and other areas of judicial cooperation.<sup>15</sup> Together, this set of instruments demonstrates substantial centralization of private international functions within the Community institutions.

### B. *The Rome I Regulation*

Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) was issued on June 17, 2008,<sup>16</sup> and will apply to contracts concluded after December 17, 2009.<sup>17</sup> This Regulation completes the package of basic private

---

11. Council Regulation 864/2007, 2007 O.J. (L 199) 40 (EC) [hereinafter Rome II Regulation].

12. For more on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, see Council Regulation 44/2001, 2000 O.J. (L 012) 1 (EC) [hereinafter Brussels I Regulation].

13. Case 21/76, *Bier v. Mines de Potasse d'Alsace*, 1976 E.C.R. 1741.

14. Rome II Regulation, *supra* note 11, art. 4(1).

15. *See generally Judicial Co-Operation*, *supra* note 7.

16. Council Regulation 593/2008, 2008 O.J. (L 177) 6 (EC) [hereinafter Rome Regulation I].

17. *Id.* at art. 28.

international law instruments through internal Community legislation, with the Brussels I and II Regulations providing rules for jurisdiction and for the recognition and enforcement of judgments, and the Rome I and II Regulations providing rules of applicable law for contractual obligations and non-contractual obligations, respectively.

The fundamental rule of Article 3 of the Rome I Regulation provides for party autonomy, stating that “[a] contract shall be governed by the law chosen by the parties.”<sup>18</sup> This rule gives way, however, to mandatory rules of a country other than the country of the chosen law, when “all other elements relevant to the situation at the time of the choice are located” in that other country.<sup>19</sup> It also is preempted by mandatory rules of Community law when the parties have chosen the law of a non-Member State and the forum is a court in a Member State.<sup>20</sup> If no law is chosen by the parties, then Article 4 provides that, in the most common situations:

- 1) A contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;<sup>21</sup> and
- 2) A contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence.<sup>22</sup>

Like the Brussels I Regulation on jurisdiction and judgments, the Rome I Regulation contains special rules for consumer, employment, and insurance contracts, designed to protect the party commonly considered to have the lesser bargaining power in the relationship. This follows the more paternalistic approach of civil law systems, generally, and departs from the more economic-oriented approach for similar rules in the United States and some other common law countries.

The Rome I Regulation is particularly important because it makes clear the exercise of Community authority over questions of applicable law, and brings matters that arguably were not clearly allocated to Community competence within the realm of internal legislation of the Community.<sup>23</sup>

---

18. *Id.* at art. 3(1).

19. *Id.* at art. 3(3).

20. *Id.* at art. 3(4).

21. Rome Regulation I, *supra* note 16, at art. 4(1)(a).

22. *Id.* at art. 4(1)(b).

23. The TEC provides that:

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

- a) improving and simplifying: the system for cross-border service of

C. *The West Tankers Opinion of Advocate General Kokott*<sup>24</sup>

While the European Court of Justice had not yet rendered its opinion at the time of this writing, the Advocate General's opinion in *West Tankers* is important and raises interesting questions regarding 1) the application of the Brussels I Regulation in a manner that clearly elevates the civil law doctrine of *lis pendens* further over common law doctrines concerning parallel litigation; and 2) the future relationship between litigation and arbitration—in particular the continued application of fundamental doctrines of arbitration law.

The *West Tankers* case was generated when a vessel owned by West Tankers collided with a jetty in Syracuse, Italy.<sup>25</sup> The charter party under which the vessel was operating contained an arbitration agreement providing that all disputes arising from the contract were to be dealt with by arbitration in London, applying English law.<sup>26</sup> The owner of the jetty claimed damages against West Tankers for its uninsured losses in arbitration proceedings in London, and the insurers brought proceedings against West Tankers in Italy to recover the amounts which they had paid the jetty owners under the insurance policies.<sup>27</sup> West Tankers later instituted proceedings before the High Court in London against the insurance carrier and others, seeking both a declaration that

---

judicial and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

- b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
- c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

It was, perhaps, arguable that language of subparagraph (b) (“promoting”) was merely hortatory in comparison to the more direct “improving and simplifying” language of subparagraph (a). This distinction seems not to have made a difference in the instruments promulgated under the authority of Article 67.

TEC, *supra* note 6, at art. 67.

24. For a preliminary ruling from the House of Lords, see *Allianz SpA v. West Tankers Inc.*, Case C-185/07 (U.K.). Opinion of Advocate General Kokott, delivered on Sept. 4, 2008, in Case C-185/07, in *Allianz SpA (formerly Riunione Adriatica Di Sicurta SpA) and Others v. West Tankers Inc.* (Reference for a preliminary ruling from the House of Lords (United Kingdom)). The *West Tankers* case was decided by the European Court of Justice (subsequent to the writing of this article) on Feb. 10, 2009. The judgment is available at [http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=Rechercher\\$docrequire=alldocs&numaff=C-185/07&datefs=&datefe=&nomusuel=&domaine=&mts=&resmax=100](http://curia.europa.eu/juris/cgi-bin/form.pl?lang=EN&Submit=Rechercher$docrequire=alldocs&numaff=C-185/07&datefs=&datefe=&nomusuel=&domaine=&mts=&resmax=100) (last visited Mar. 27, 2009) [hereinafter *Allianz SpA*].

25. See *West Tankers Inc. v. RAS Riunione Adriatica di Sicurta SpA*, [2007] UKHL 4, 2 (U.K.), in which the House of Lords referred the case to the European Court of Justice for a preliminary ruling.

26. *Id.*

27. *Id.*

the Italian proceedings were properly the subject of arbitration, and an injunction in favor of arbitration restraining the insurance carrier from further litigation in Italy (on the grounds that the insurer now had succeeded to the position of the charterer and was bound by the arbitration clause as a result of having paid the obligations under the policy).<sup>28</sup>

Advocat General Kokott concluded her opinion with a recommendation that the Court of Justice answer the reference to it from the House of Lords by concluding that the Brussels I Regulation “precludes a court of a Member State from making an order restraining a person from commencing or continuing proceedings before the courts of another Member State because, in the opinion of the court, such proceedings are in breach of an arbitration agreement.”<sup>29</sup> Her analysis raises important questions both about the European Court’s jurisprudence regarding parallel proceedings and about the relationship between litigation and arbitration in the E.U..

The opinion begins with reference to two important prior ECJ cases on parallel proceedings. In *Gasser*,<sup>30</sup> the Court reviewed the Article 21 *lis pendens* rule of the Brussels Convention (now found in Article 27 of the Brussels Regulation), concluding that,

[e]ven if the proceedings to determine jurisdiction before the court first seised are very protracted and may have been brought there only in order to delay proceedings, the Court refused to make exceptions to the *lis pendens* rule. The court first seised must examine its jurisdiction itself. Only if that court declines jurisdiction may the court seised subsequently continue the proceedings pending before it.<sup>31</sup>

In *Turner*,<sup>32</sup> the Court held that the Article 21 *lis pendens* rule of the Brussels Convention requires proceedings in the court first seised and “precludes the imposition of an anti-suit injunction in connection with proceedings before the court of another Member State, even where the proceedings abroad are brought by a party in bad faith with a view to frustrating the existing proceedings.”<sup>33</sup> This combination of decisions provides the foundation for a strict preference for the civil law doctrine of *lis alibi pendens*, which favors a race to the courthouse and jurisdiction residing with the court first seised, over the common law preference for parallel proceedings and

---

28. *Id.* at 3.

29. *Allianz SpA*, *supra* note 24, ¶ 74.

30. Case C-116/02, *Gasser GmbH v. MISAT Srl*, 2003 E.C.R. I-14693.

31. *Allianz SpA*, *supra* note 24, ¶ 25.

32. Case C-159/02, *Turner v. Grovit*, 2004 E.C.R. I-3565.

33. *See Allianz SpA*, *supra* note 24, ¶ 23.



discretionary doctrines allowing deferral to a court later seised (*forum non conveniens*), or the issuance of an anti-suit injunction against parties proceeding in other courts.<sup>34</sup> Advocate General Kokott found the important question in *West Tankers* to be “whether the principles set out in *Turner* can be applied to anti-suit injunctions in support of arbitration proceedings.”<sup>35</sup> Subsidiarily, in applying the Brussels Convention’s exclusion from scope of arbitration proceedings, she determined that “the decisive question is not whether the application for an anti-suit injunction—in this case, the proceedings before the English courts—falls within the scope of application of the Regulation, but whether the proceedings against which the anti-suit injunction is directed—the proceedings before the court in [Italy]—do so.”<sup>36</sup> Thus, an agreement of the parties to decide all disputes by arbitration does not necessarily remove their later efforts at dispute resolution from the Brussels I Regulation if one of them takes a matter to the courts with a focus on substantive claims between the parties rather than on the agreement to arbitrate; and arbitration of such claims may be circumvented through such preemptory litigation.

While Advocate General Kokott acknowledged that “the parties to the Brussels Convention . . . wished to exclude arbitration in its entirety” from the scope of the Convention,<sup>37</sup> she concluded that the decision whether the parties have decided to submit a specific matter to arbitration is for the court; the existence and applicability of the arbitration clause merely constitute a preliminary issue which the court seised must address when examining whether it has jurisdiction.<sup>38</sup>

She then provided an interesting reading of Article II (3) of the New York Arbitration Convention. The language of Article II (3) states:

The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.<sup>39</sup>

---

34. For a discussion of the European Court’s earlier decisions in this area, see Brand, *supra* note 8, at 49.

35. *Allianz SpA*, *supra* note 24, ¶ 27.

36. *Id.* ¶ 33.

37. *Id.* ¶ 47.

38. *Id.* ¶ 54.

39. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. II(3), June 10, 1959, 21 U.S.T. 2517, 330 U.N.T.S. 38.

Advocate General Kokott concluded that this provision is to be applied to allow a court *not to send the parties to arbitration unless* it first finds that the subject matter of the dispute is capable of settlement by arbitration, the parties have agreed to arbitration, and the agreement is *not* null and void.<sup>40</sup> Turning a positive statement in favor of arbitration into a negative limitation on arbitration may continue the jurisprudence on the Brussels I Regulation, but it creates difficult relationships between the Regulation and the New York Convention.

In her opinion, the Advocate General uses language now used most often to support the determination of jurisdiction by arbitration tribunals and applies it instead to courts, thus making reference to “the general principle that every court is entitled to examine its own jurisdiction (doctrine of *Kompetenz-Kompetenz*).”<sup>41</sup> While a court certainly does have jurisdiction to determine its own competence, Kokott’s opinion goes on to give it the jurisdiction to consider the competence of arbitral tribunals as well, in direct contradiction to the normal application of the competence-competence doctrine in arbitration:

That includes the right to examine the validity and scope of the agreement put forward as a preliminary issue. If the court were barred from ruling on such preliminary issues, a party could avoid proceedings merely by claiming that there was an arbitration agreement. At the same time a claimant who has brought the matter before the court because he considers that the agreement is invalid or inapplicable would be denied access to the national court. That would be contrary to the principle of effective judicial protection which, according to settled case-law, is a general principle of Community law and one of the fundamental rights protected in the Community.<sup>42</sup>

Because Advocate General Kokott does not claim to change the law of arbitration, she thus sets up a dual system of competence-competence, and a jurisdictional race to the courthouse or arbitration tribunal.<sup>43</sup> While this may be consistent with the ECJ’s jurisprudence in *Gasser* and *Turner* regarding the Brussels Convention and the Brussels I Regulation, it would extend that jurisprudence in a manner that adds new problems by creating an additional set of concerns for parties with a clear arbitration agreement. In doing so, it would allow frustration of arbitration if a party first files a case in a court where the decision on jurisdiction is likely to take substantial time (as happened in *Gasser* in regard to parallel judicial proceedings).

---

40. *Allianz SpA*, *supra* note 24, ¶ 55.

41. *Id.* ¶ 57.

42. *Id.* ¶ 58.

43. For a discussion of the doctrine of competence/competence in arbitration, see ALAN REDFERN ET. AL., *LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 5–39–5–42 (4th ed. 2004).

It may be that the *Gasser-Turner* line of cases gave Advocate General Kokott little choice on the matter of application of the *lis pendens* rule of the Brussels Regulation, and on the matter of anti-suit injunctions under the Regulation. It is difficult, however, to understand why the decision of the European Court of Justice should also set up a direct conflict with the law of arbitration, and thereby create dual competence of courts and arbitral tribunals. Her approach both raises concern with the future of respect for party autonomy and the important role of arbitration agreements in international commerce, and demonstrates the underlying fragility of the Court's jurisprudence developed in application of the *lis pendens* rule of the Brussels Convention and Regulation.

*D. Goshawk Dedicated Ltd & Ors v. Life Receivables Ireland Ltd.*

On February 27, 2008, Mr. Justice Clark of the High Commercial Court of Ireland issued his decision in *Goshawk Dedicated Ltd & Ors v. Life Receivables Ireland Ltd*,<sup>44</sup> on a motion of Life Receivables to stay proceedings in Ireland in favor of earlier proceedings involving the same parties and the same claims, but brought in the State of Georgia in the United States. In doing so, he acknowledged that the action commenced in Ireland was "a mirror image of the Georgia proceedings," except for the presence of some additional parties in Georgia, and that the Irish action was brought to seek a negative declaratory judgment of non-liability.<sup>45</sup>

The problem for the court was that Life Receivables, the plaintiff in Georgia and the defendant in Ireland, was domiciled in Ireland, thus bringing into play the jurisdictional rules of Article 2 of the Brussels I Regulation and the jurisprudence of the European Court of Justice applying that article and the Regulation's related provisions.

Without the Regulation, the common law doctrines of *forum non conveniens* and *lis alibi pendens* would normally have led the Irish court to grant the stay in favor of proceedings in Georgia. Mr. Justice Clark, however, was forced to acknowledge the implications of the ECJ holding in *Owusu v. Jackson*,<sup>46</sup> that

[t]he Brussels Convention precludes a court of a contracting state from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-contracting state

---

44. *Goshawk Dedicated Ltd. v. Life Receivables Ir. Ltd.*, [2008] I.L.Pr. 50 (Ir.), available at 2008 WL 4975527; [2008] IEHC 90. The *Goshawk* case was referred to the European Court of Justice for a preliminary ruling on interpretation of the Brussels I Regulation on January 30, 2009. *Goshawk Dedicated Ltd & Ors v. Life Receivables Irl. Ltd.*, [2009] IESC 7.

45. *Id.* at 820.

46. Case C 281/02, *Owusu v. Jackson*, 2005 E.C.R. I-138.

would be a more appropriate forum for the trial of the action, even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factor to any other Contracting State.<sup>47</sup>

Even though *Owusu* had not addressed the specific question at issue in *Goshawk*, Mr. Justice Clark found that it controlled the outcome. Thus,

Given the clear statements to be found in *Owusu* to the effect that the Brussels Regulation does not permit of the exercise of broad discretionary powers for the purposes of declining a jurisdiction which would otherwise arise under Article 2, it seems unlikely that a doctrine of *lis alibi pendens* which conferred on the court the level of discretion currently available under the common law, could survive in tandem with the mandatory requirements of the Convention.<sup>48</sup>

He then specifically rejected the argument that the Brussels Regulation implied retention of a doctrine of *lis alibi pendens* for cases first initiated outside the E.U.. Life Receivables had argued that 1) “as and between Member States, a strict application of the doctrine of *lis pendens* applies;”<sup>49</sup> and 2) the Regulation specifically allows effect to be given to judgments from the courts of non-Member States by providing in Article 34(4) that a judgment from within the E.U. should not be recognized, “[i]f it is irreconcilable with an earlier judgment given in another Member State or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the Member State addressed.”<sup>50</sup> Thus, at the level of principle, “there is recognition in the Regulation of both the doctrine of *lis pendens* and the appropriateness of affording recognition, in accordance with the private international law of the relevant Member State, to third party state judgments.”<sup>51</sup> This meant that the issue for Mr. Justice Clark to decide was “whether the recognition afforded to both . . . in the Regulation is sufficient to warrant a departure from what seems to be the clear mandatory language of Article 2, as interpreted by the European Court of Justice in *Owusu*.”<sup>52</sup> The decision was in the negative because of the distinction between granting *lis pendens* effect to jurisdiction in the court of a

---

47. *Id.* ¶ 46.

48. *Goshawk*, 2008 I.L.Pr. at 828.

49. *Id.* at 830.

50. *Id.* at 831.

51. *Id.*

52. *Id.*

Member State and the differing effect of doing so for a court outside the Union. Within the Union, a Member State court is bound by the terms of the Brussels Regulation in consideration of whether it has jurisdiction. A court from outside the Union is not so bound, and may base its jurisdiction on grounds not available in the Regulation, and without the control found in the overview of the European Court of Justice.

Mr. Justice Clark noted that many commentators have challenged *Owusu* and other decisions of the ECJ interpreting the Brussels Regulation, but found it not to be his role to determine what the law should be under a perfect system. Rather, it was to determine what the law is under the clear guidance of the European Court of Justice.<sup>53</sup> The result is further demonstration of the domination of civil law concepts within the Brussels Regulation system. Mr. Justice Clark admitted (without criticism) that the Court of Justice had found civil law principles to control over common law doctrines through the interesting proposition that, had the states party to the Brussels Convention laid down a clear rule at the time of the accession of the UK and Ireland to the Convention, it would have been what the majority would have wanted. The idea that treaties (and now internal Regulations) should be interpreted to include any rule that the majority of the parties to the treaty would want (but did not include in the treaty when the consent of all parties was required), seems questionable at best, but has become part of the bedrock of the jurisprudence of the Brussels Convention and Regulation.<sup>54</sup>

The *Goshawk* decision is particularly interesting when set alongside a French decision of March 6, 2008, in which, according to one commentator, "the Paris Court of Appeal agreed to decline jurisdiction in order to enable the plaintiffs to go back to California and resume the proceedings that they had initiated there."<sup>55</sup> This apparent approval of discretionary ability to decline jurisdiction by the court of a civil law country provides interesting contrast with the direction assumed for European law by the Irish court in *Goshawk*.

### *E. Japan Accedes to the U.N. Sales Convention*

On July 1, 2008, Japan deposited its instrument of accession to the United Nations (U.N.) Convention on Contracts for the International Sale of Goods (CISG).<sup>56</sup> This means the Convention will go into effect for Japan on August

---

53. *Goshawk*, 2008 I.L.Pr. at 826.

54. For a discussion of the European Court's earlier decisions in this area, see Brand, *supra* note 8, at 47-49.

55. Posting of Gilles Cuniberti to [www.conflictoflaws.net](http://www.conflictoflaws.net), <http://conflictoflaws.net/2008/french-court-declines-jurisdiction-to-transfer-dispute-back-to-us-court/> (Mar. 27, 2008).

56. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 59 [hereinafter Sales Convention].

1, 2009.<sup>57</sup> This change in Japanese position on the CISG was explained prior to Japan's accession, by Professor Hiroo Sono as follows:

Japan has reversed its course and is now preparing to accede to the CISG. What brought about this change? The most direct reason is that the congested legislative agenda have somewhat cleared and the [Ministry of Justice] is now able to devote their manpower to this task again.<sup>58</sup>

A more indirect reason, but an equally important one, is the phenomenal success of the CISG<sup>59</sup> . . . . Further, the MOJ has now started working on the revision of the Obligations Law of the Civil Code. That decision was made in order to adapt the Code to the social and economic change that took place since its enactment more than a century ago. However, this decision was also stimulated either directly or indirectly in part by the success of the CISG. It is only natural that the CISG will have impact on this upcoming revision<sup>60</sup> .

...

The major trading companies are also beginning to change their attitude toward the CISG, now that they have discovered that the CISG is being used in a large part of the world. They are finding out that the CISG can curtail costs of dealing with diverse domestic laws, as well as transactions costs associated with negotiating choice-of-law clauses . . . .<sup>61</sup>

This brings the total of CISG contracting states to seventy-two,<sup>62</sup> and leaves the United Kingdom, Brazil, and India as the major trading nations that are not Contracting States. While this development is a matter of international private law, it clearly fits within the scope of private international law matters as more broadly defined in U.S. practice.

Japanese accession to the CISG demonstrates the success of international private law unification through treaties. U.S. participation in the Convention negotiations in Vienna in 1980, and U.S. implementation of the Convention in 1988, was accomplished entirely at the federal level, and did not involve legislation at the state level, despite the fact that sales law is otherwise a state (not a federal) matter. The success of the CISG has demonstrated how federal

---

57. *Id.*

58. Hiroo Sono, *Japan's Accession to the CISG: The Asia Factor*, 20 PACE INT'L L. REV. 105, 108 (2008).

59. *Id.*

60. *Id.* at 109.

61. *Id.*

62. Sales Convention, *supra* note 56.

implementation of treaties dealing with matters previously dealt with under state law may be accomplished to the benefit of all those who will use, and be subject to, the law.

#### F. *Medellín v. Texas*

The U.S. Supreme Court's decision in *Medellín v. Texas*,<sup>63</sup> while dealing with a matter generally covered under public international law, could have major influence on the future development of private international law in the United States. José Ernesto Medellín, a Mexican national, was convicted of capital murder and sentenced to death in Texas for the 1993 rape and murder of two teenagers.<sup>64</sup> When arrested, he was given his *Miranda* warnings and then signed a written confession.<sup>65</sup> He was not informed by the arresting officers (or by anyone else) of his rights under the Vienna Convention on Consular relations to notify the Mexican Consulate of his detention.<sup>66</sup>

Medellín did not raise any claims regarding his Convention rights at trial or on direct appeal in the state court proceedings. Subsequently, however, as a named party in the *Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.)* before the International Court of Justice,<sup>67</sup> and in habeas corpus proceedings for post conviction relief, Medellín did raise the Vienna Convention claims.<sup>68</sup> In *Avena*, the International Court of Justice determined that Article 36(b) of the Vienna Convention had been violated,<sup>69</sup> and that the United States was obligated "to provide, by means of its own choosing, review

---

63. 128 S.Ct. 1346 (2008).

64. *Id.* at 1354.

65. *Id.*

66. *Id.* Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261; Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention, Apr. 24, 1963, 21 U.S.T. 325, 596 U.N.T.S. 487. Article 36 (1)(b) of the Vienna Convention includes the following language regarding the rights of such a person:

- b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph.

*Id.*

67. See 2004 I.C.J. 12 (Mar. 31).

68. *Medellín*, 128 S.Ct. at 1354.

69. *Avena*, 2004 I.C.J. at 53–55.

and reconsideration of the convictions and sentences of the [affected] Mexican nationals,"<sup>70</sup> regardless of state procedural rules.<sup>71</sup>

Subsequent to the *Avena* decision, the U.S. Supreme Court, in *Sanchez-Llamas v. Oregon*,<sup>72</sup> held that state default rules prevented such reconsideration when the Convention issues were raised only in state habeas corpus proceedings brought after conviction and direct appeal.<sup>73</sup> In doing so, the Court specifically rejected the rationale of the ICJ that the default by the defendants in raising the Convention claims in the original proceedings was "because of the failure of the American authorities to comply with their obligation under Article 36," and thus, "prevented [U.S. courts] from attaching any legal significance to the fact that foreign governments were kept from assisting their nationals in their defense."<sup>74</sup> The parties in *Sanchez-Llamas* had not been defendants specifically named in the *Avena* decision of the ICJ.

President George W. Bush issued a Memorandum to the Attorney General on February 28, 2005, in which he stated:

I have determined, pursuant to the authority vested in me as President by the Constitution and laws of the United States of America; that the United States of America will discharge its international obligations under the decision of the International Court of Justice in the Case Concerning *Avena* and Other Mexican Nationals (Mexico v. United

---

70. *Id.* at 72.

71. *Id.* at 56–57.

72. 548 U.S. 331 (2006).

73. *Id.* at 350–51:

The general rule in federal habeas cases is that a defendant who fails to raise a claim on direct appeal is barred from raising the claim on collateral review. . . . Like many States, Virginia applies a similar rule in state postconviction proceedings, and did so here to bar Bustillo's Vienna Convention claim. Normally, in our review of state-court judgments, such rules constitute an adequate and independent state-law ground preventing us from reviewing the federal claim.

*Id.*

The argument that a treaty could trump the procedural default rule had first been raised and rejected in regard to the Vienna Consular Convention in *Breard v. Greene*, 523 U.S. 371, 375 (1998) (*per curiam*). The Court there found such a treaty supremacy argument to be

‘plainly incorrect,’ for two reasons. First, we observed, ‘it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State.’ Furthermore, we reasoned that while treaty protections such as Article 36 may constitute supreme federal law, this is ‘no less true of provisions of the Constitution itself, to which rules of procedural default apply.’

*Sanchez-Llamas*, 548 U.S. at 351–52 (quoting *Breard*, 523 U.S. at 375).

74. *LaGrand Case* (F.R.G. v. U.S.), 2001 I.C.J. 466, 497, ¶ 91 (Judgment of June 27); *see Avena*, 2004 I.C.J., at 113.



States of America) (*Avena*), 2004 ICJ 128 (Mar. 31), by having State courts give effect to the decision in accordance with general principles of comity in cases filed by the 51 Mexican nationals addressed in that decision.<sup>75</sup>

When the *Medellin* case reached the U.S. Supreme Court on writ of certiorari, the Court rejected claims based both on international law represented by the decision of the International Court of Justice and on executive power to implement that international law in the domestic realm, stating, “[w]e conclude that neither *Avena* nor the President’s Memorandum constitutes directly enforceable federal law that preempts state limitations on the filing of successive habeas petitions.”<sup>76</sup>

The holding ultimately was based on the role of state criminal procedure default rules. Nonetheless, the opinion includes extended discussion of the doctrine of self-executing treaties and of the President’s authority (or lack thereof) to impose international legal principles on the states. Although the holding is more about federalism and separation of powers, the decision could have a major impact on the role of treaties in U.S. law if the dicta of Chief Justice Roberts’ majority opinion is applied in determining the outcomes in future cases. In that dicta, the opinion reviews the dualist approach to international law ensconced in U.S. jurisprudence,<sup>77</sup> acknowledging that the Vienna Convention on Consular Relations, its Optional Protocol, the U.N. Charter, and decisions of the International Court of Justice to which the United States is a party, are all binding upon the United States as a nation. Nonetheless, it determines that the latter three create no law that can be relied upon by private parties in U.S. courts.<sup>78</sup> Unlike prior cases interpreting the doctrine of self-execution, the opinion seems to require that, for treaty language to be the “Law of the Land” under Article VI of the United States Constitution,

---

75. Memorandum from George W. Bush on Compliance with the Decision of the International Court of Justice in *Avena* to the Attorney General (Feb. 28, 2005), reprinted in John R. Crook, *Contemporary Practice of the United States*, 99 AM. J. INT’L L. 489 (2005).

76. *Medellin*, 128 S.Ct. at 1353.

77. No one disputes that the *Avena* decision—a decision that flows from the treaties through which the United States submitted to ICJ jurisdiction with respect to Vienna Convention disputes—constitutes an *international* law obligation on the part of the United States. But not all international law obligations automatically constitute binding federal law enforceable in United States courts. The question we confront here is whether the *Avena* judgment has automatic *domestic* legal effect such that the judgment of its own force applies in state and federal courts.

*Id.* at 1356 (emphasis in original).

78. *Id.* at 1349.

either Congress must clearly state that result in implementing legislation, or the treaty language itself must explicitly prescribe self-executing effect.

The language of the opinion could (mistakenly, I hope) be read to reduce the treaty portion of the Supremacy Clause to a nullity. If implementing legislation is used, it is the Article I power of Congress that makes the resulting rule the “Law of the Land” as legislation, not as a treaty. On the other hand, if the only way for treaty language itself to be applicable in U.S. courts is if that language explicitly requires self-execution, the fact that other nations use different methods to make treaties applicable domestically (or may not do so at all) will make the negotiation of future treaties incredibly difficult. If the U.S. Executive Branch desires self-executing effect, its intent alone may not be enough under Chief Justice Roberts’ language, and explicit language of self-execution in the treaty is unlikely to garner the consent of our treaty partners.

Conventions that directly create rules applicable to private-party transactions have language intended to be self-executing. Under *Medellín*, however, that language alone may not be enough to create the intended result. In stating that “[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress,”<sup>79</sup> the opinion indicates that it is for Congress to determine treaty intent, and the President cannot do so alone. The case also leaves in doubt whether any treaty ratified by the United States after the President receives the advice and consent of the Senate pursuant to Article II, section 2, will be enforceable in U.S. courts absent further Congressional language in implementing legislation. What is left of the Article VI supremacy clause for treaties is, at best, uncertain.

*G. Hall Street Associates, L.L.C. v. Mattel, Inc.*

In *Hall Street Associates, L.L.C. v. Mattel, Inc.*,<sup>80</sup> a convoluted procedural history brought a post-dispute agreement to arbitrate a lease dispute to consideration by the U.S. Supreme Court. The question before the Court was whether the Federal Arbitration Act section 10 and 11 grounds for review of arbitration awards are exclusive, or whether parties may agree to allow review on additional grounds.<sup>81</sup> The arbitration clause in question provided that,

[t]he United States District Court for the District of Oregon may enter judgment upon any award, either by confirming the award or by vacating, modifying or correcting the award. The Court shall vacate, modify or correct any award: i) where the arbitrator’s findings of facts

---

79. *Id.* at 1368 (citations omitted).

80. 128 S. Ct. 1396 (2008).

81. 9 U.S.C. §§ 10–11 (1947).

are not supported by substantial evidence; or ii) where the arbitrator's conclusions of law are erroneous.<sup>82</sup>

Justice Souter authored the opinion for a six justice majority of the Court, holding that the statutory grounds for vacatur and modification of an arbitral award are exclusive and may not be supplemented by contract. The decision resolves a conflict among the circuits,<sup>83</sup> but may not end the debate on how the Federal Arbitration Act does or should limit party autonomy.

Justice Souter began by stating that “Congress enacted the Federal Arbitration Act (FAA) to replace judicial indisposition to arbitration with a ‘national policy favoring [it] and plac[ing] arbitration agreements on equal footing with all other contracts.’”<sup>84</sup> In summarizing the effect of the FAA on judicial review of arbitration, he then stated that, “[u]nder the terms of § 9, a court ‘must’ confirm an arbitration award ‘unless’ it is vacated, modified, or corrected ‘as prescribed’ in §§ 10 and 11. Section 10 lists grounds for vacating an award, while § 11 names those for modifying or correcting one.”<sup>85</sup> Neither includes the two grounds provided in the parties’ arbitration agreement in the *Hall Street* case.

The opinion first rejects the argument that earlier decisions of the Court supported the position that the FAA grounds for vacating or modifying an award are not exclusive,<sup>86</sup> and then goes on to reject as well the argument that the FAA policy favoring enforcement of arbitration agreements and awards requires (or at least allows) parties the ability to provide additional bases for review.<sup>87</sup> While Justice Souter’s textual analysis of the FAA finds that no

---

82. *Hall Street Assoc.*, 128 S.Ct. at 1400–01.

83. The Ninth and Tenth Circuits have held that parties may not contract for expanded judicial review. See *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 1000 (C.A.9 2003); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 936 (C.A.10 2001). The First, Third, Fifth, and Sixth Circuits, meanwhile, have held that parties may so contract. See *Puerto Rico Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 31 (C.A.1 2005); *Jacada (Europe), Ltd. v. International Marketing Strategies, Inc.*, 401 F.3d 701, 710 (C.A.6 2005); *Roadway Package System, Inc. v. Kayser*, 257 F.3d 287, 288 (C.A.3 2001); *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993, 997 (C.A.5 1995). The Fourth Circuit has taken the latter side of the split in an unpublished opinion, see *Syncor Int’l Corp. v. McLeland*, 120 F.3d 262 (1997), while the Eighth Circuit has expressed agreement with the former side in dicta, see *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997–998 (1998).

*Id.* at 1403, n.5.

84. *Hall Street Assoc.*, 128 S.Ct. at 1402 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

85. *Id.* at 1402.

86. *Id.* at 1403–04.

87. *Id.* at 1404–05.

language in the statute indicates an intent to allow bases of review beyond those found in § 10 and 11, it is not likely to satisfy everyone on the question of whether parties to arbitration should have the ability to provide such flexibility.

The policy in favor of arbitration enhances party autonomy in the resolution of private disputes. If parties have the ability to choose arbitration over litigation, and to design the arbitration mechanism they so choose, it is arguable that they should also have the ability to determine the full contours of that choice, including the extent to which errors by arbitrators should be subject to judicial scrutiny. The debate about whether not having this ability will lead some parties to reject arbitration entirely because of the limits on flexibility, or to embrace it further for its finality and predictability, will not be terminated by the decision in *Hall Street*. What does seem clear, however, is that if a preference for greater party autonomy than the Court has recognized in *Hall Street* is to be the law, it will require legislative action in the form of an amendment to the Federal Arbitration Act.

Arbitration deserves attention in private international law circles because of its impact on jurisdiction and the concerns that parallel the recognition and enforcement of judgments. While *Hall Street* involved domestic, and not international, arbitration, its impact may be felt in the international realm, and its implications for concerns of party autonomy may well expand beyond the case itself. Those same concerns for party autonomy are regularly reflected in decisions on jurisdiction, applicable law, and the recognition and enforcement of judgments. Unlike most traditional private international law rules in the United States, however, the law of arbitration has been federalized through the Federal Arbitration Act<sup>88</sup> and the New York Convention.<sup>89</sup> Thus, if the holding in *Hall Street* is to be changed by legislation, that result may be accomplished through a single federal law, and it will not be necessary to change the law of all of the states.

#### *H. Alpine Atlantic Asset Management AG v. Comstock*

While a Federal District Court decision from Kansas is not likely to make many top ten lists of annual developments, *Alpine Atlantic Asset Management AG v. Comstock* makes the list here because of the way in which it so clearly illustrates the desirability of the subject of items 9 and 10 on the list: the 2005 Hague Convention on Choice of Court Agreements. In a case between a Swiss plaintiff and a Kansas defendant, the defendant sought to have the case dismissed so it could be heard in Switzerland, on the basis of a choice of court

---

88. 9 U.S.C. § 1.

89. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *supra* note 39.

agreement and the doctrine of *forum non conveniens*.<sup>90</sup> The court engaged in a full *forum non conveniens* analysis, despite the existence of an employment contract clause stating that “[t]he ordinary courts at the domicile of the Company [Switzerland] shall have exclusive jurisdiction,” and the fact that most of the causes of action arose out of the contractual relationship or directly out of Swiss law. The court thus avoided what might have been a rather simple choice of court analysis.<sup>91</sup>

In applying the *forum non conveniens* doctrine, the court followed the apparently unique approach laid out by the Tenth Circuit Court of Appeal in *Yavuz v. 61 MM, Ltd.*,<sup>92</sup> which adds a second “threshold question,” before engaging in a balancing of private and public interest factors: “the court must first answer ‘two threshold questions in the *forum non conveniens* determination: first, whether there is an adequate alternative forum in which the defendant is amenable to process, and second, whether the foreign law applies.’”<sup>93</sup> Despite this approach to the initial inquiry regarding the existing of an alternative forum, the court later revisited the application of foreign law in balancing public interest factors, finding it to be a relevant factor in favor of litigation in a Swiss forum.

The analysis in the *Comstock* case presents a clear argument for United States adoption of the 2005 Hague Convention on Choice of Court Agreements. While the Convention does not apply to employment contracts,<sup>94</sup> and thus the particular facts would not be covered under the Convention, the general analysis presented by the court demonstrates the value of the Convention in similar circumstances not excluded from Convention scope. Under Article 6 of the Convention, “[a] court of a Contracting State other than that of the chosen court shall suspend or dismiss proceedings to which an exclusive choice

---

90. *Alpine Atlantic Asset Management AG v. Comstock*, 552 F. Supp. 2d 1268, 1273 (D. Kan. 2008).

91. For reviews of U.S. cases addressing motions to dismiss based on the doctrine of *forum non conveniens* when a choice of court agreement exists, see RONALD A. BRAND AND SCOTT JABLONSKI, FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS, 191–203 (2007), and Hannah L. Buxbaum, *Forum Selection in International Contract Litigation: the Role of Judicial Discretion*, 12 WILLAMETTE J. INT’L L. & DISP. RESOL. 185, 195–55 (2004).

92. 465 F.3d 418, 426 (10th Cir. 2006).

93. *Id.* The court further broke down the “adequate alternative forum” requirement into consideration of whether the Swiss forum was “available” and whether it was “adequate.” Availability was determined to exist if the defendant is amenable to service of process in the foreign forum. Adequacy does not require that the alternative forum provide the same relief as an American court and other courts had found that Swiss courts provide an adequate alternative forum for contract and tort claims. See *id.* at 1276.

94. See Hague Convention on Choice of Court Agreements, art. 2(1)(b), June 30, 2005, 44 I.L.M. 1294, available at [http://www.hcch.net/index\\_en.php?act=conventions.pdf&cid=98](http://www.hcch.net/index_en.php?act=conventions.pdf&cid=98) (last visited Mar. 1, 2009) [hereinafter Hague Convention] for the text of the Hague Convention.

of court agreement applies” unless certain very limited exceptions exist.<sup>95</sup> Those exceptions do not allow for the application of the doctrine of *forum non conveniens*.<sup>96</sup> The Convention would thus end the unnecessary application of *forum non conveniens* analysis when an exclusive choice of court agreement exists, saving time and costs in litigation.

### *I. U.S. and European Statements and Positions on the Hague Convention on Choice of Court Agreements*

While only Mexico has so far deposited the necessary instrument to become a Contracting State to the Hague Convention on Choice of Court Agreements,<sup>97</sup> developments in the fall of 2008 bode well for the treaty’s future. First, on September 5, the European Commission presented a Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements.<sup>98</sup> This is the first step toward ratification or accession in order for the Community (and thus its 27 Member States) to become a Contracting State. The Proposal for a Council Decision on the signing by the European Community of the Convention on Choice-of-Court Agreements,<sup>99</sup> reads as follows:

#### *Article 1*

Subject to a possible conclusion at a later date, the signing of the Convention on Choice-of-Court agreements concluded at The Hague on 30 June 2005 is hereby approved on behalf of the Community. The President of the Council is hereby authorised to designate the person(s) empowered to sign, on behalf of the European Community, the Convention on Choice-of-Court Agreements concluded at the Hague on 30 June 2005, subject to the conditions set out in Article 2.

#### *Article 2*

When signing the Convention, the Community shall make the following declaration in accordance with Article 30 of the Convention:

“The European Community declares, in accordance with Article 30 of the Convention, that it exercises competence over all the matters governed by this Convention. Its Member States will not sign, ratify,

---

95. *Id.* at art. 6

96. *See id.* at art. 5(2). Article 5(2) also prevents a court from dismissing a case based on *forum non conveniens* when it is the court chosen in an exclusive choice of court agreement.

97. HCCH Status Table, [http://hcch.e-vision.nl/index\\_en.php?act=conventions.status&cid=98](http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=98) (last visited Mar. 1, 2009).

98. *Commission Proposal for a Council Decision on the Signing by the European Community of the Convention on Choice-of-Court Agreements*, COM (2008) 538 final (Sept. 5, 2008).

99. *Id.*

accept or approve the Convention, but shall be bound by the Convention by virtue of its conclusion by the European Community.

For the purpose of this declaration, the term 'European Community' does not include Denmark by virtue of Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and the Treaty establishing the European Community [and the United Kingdom and Ireland by virtue of Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community]'.<sup>100</sup>

The Proposal for a Council Decision came after unofficial approval of the Convention by the U.K. Financial Markets Committee.<sup>101</sup> The Committee stated:

Overall, the FMLC endorses [the Commercial Bar Association's] general approach and, in particular, its comment that "the general aim of the project, namely to make exclusive choice of court agreements as effective as possible, is one which is to be encouraged strenuously. . ."<sup>102</sup>

Not long after the Commission recommendation to move forward on the Convention, Secretary of State Condoleezza Rice authorized U.S. signature for the Convention.<sup>103</sup> This will clear the way for the Convention to be submitted to the United States Senate for its advice and consent so that U.S. ratification may follow. It seems unlikely that the new administration would take a contrary position on the Convention.

With both the United States and the European Community seemingly ready to move forward on the Hague Convention on Choice-of-Court Agree-

---

100. *Id.* at art. 2.

101. FINANCIAL MARKETS LAW COMMITTEE, ISSUE 107: BRUSSELS 1 REGULATION ARTICLE 23 CASES, LEGAL ASSESSMENT OF PROBLEMS ASSOCIATED WITH THE BRUSSELS I REGULATION AND SUGGESTED SOLUTIONS, (July 2008), <http://www.fmlc.org/papers/Issue107assessment.pdf> (last visited Mar. 1, 2009).

102. *Id.* at 44–45.

103. There exists no public announcement of this decision. The author received word of it through the Office of the Legal Adviser at the U.S. Department of State. State Department Legal Advisor, John Bellinger, on the last day of the Bush Administration, signed the 2005 Hague Convention on behalf of the United States, indicating the U.S. intent to move toward ratification. See Hague Conference on Private International Law, June 30, 2005, status table [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=98#legend](http://www.hcch.net/index_en.php?act=conventions.status&cid=98#legend) (last visited Mar. 27, 2009). See also Martin George, United States Signs Hague Convention on Choice of Court Agreements (Jan. 21, 2005), <http://conflictoflaws.net/2009/united-states-signs-hague-convention-on-choice-of-court-agreements/> (last visited Mar. 27, 2009).

ments, greater incentive will exist for other states to follow in order to become a part of the regime to be created by the Convention. Wide ratification and accession will give Choice-of-Court agreements and resulting judgments greater recognition and place them on a more even footing with arbitration agreements and awards under the highly successful New York Arbitration Convention.

#### IV. LEGAL SYSTEM MAGNETS AND CENTRIFUGES

While the United States has indicated its intent to sign the Hague Convention on Choice-of-Court Agreements, what is not clear is the method by which it will make the Convention effective in U.S. law. Such a convention clearly is designed to create a system of rights and obligations for private parties. Thus, through some Constitutional mechanism it must become law applicable in U.S. courts to disputes involving private parties. The *Medellin* decision raises doubts about whether this could be accomplished through the doctrine of self-execution in the absence of some clear Congressional statement.

During the Hague Convention negotiations, two other initiatives internal to the United States and having implications for its ultimate application were begun. The American Law Institute prepared a proposed federal statute on jurisdiction and the recognition and enforcement of judgments that would federalize the law on such matters when a party from outside the United States is involved in a suit.<sup>104</sup> The project was completed in 2005, providing a statute that could result in greater predictability and uniformity in how courts throughout the United States deal with foreign litigants and foreign judgments.<sup>105</sup>

The second parallel development was the creation in the National Conference of Commissioners on Uniform State Law (now referred to as the Uniform Law Commission, or ULC) of a new Uniform Foreign-Country Money Judgments Recognition Act.<sup>106</sup> Also completed in 2005, this Act updates and amends the 1963 Uniform Foreign Money Judgments Recognition Act, clearly staking claim to a role for the states in the law of recognition and enforcement of foreign judgments.<sup>107</sup> This process has continued with the creation of a ULC

---

104. For further discussion of this project, see Linda Silberman, *A Different Challenge for the ALI: Herein of Foreign Country Judgments, an International Treaty, and an American Statute*, 25 *IND. L. J.* 635 (2000).

105. See generally AMERICAN LAW INSTITUTE, *RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE* (2006).

106. Unif. Foreign-Country Money Judgments Recognition Act (2005), available at <http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005final.pdf> (last visited Mar. 1, 2009).

107. *Id.* at Prefatory Note, Sec. 1, cmt. See generally Unif. Foreign Money-Judgments Recognition Act of 1962, available at [http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920\\_69/ufmjra 62.pdf](http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra 62.pdf) (last visited Mar. 1, 2009).



Working Group charged with preparing a position on implementation of the 2005 Hague Convention in a manner that involves the states and retains a role for state law alongside the Convention rules. It is clear from that process that ULC representatives favor a clear role for the states in the implementation of the Hague Convention. What is not clear is the Constitutional foundation for that role. While *Erie v. Tompkins*<sup>108</sup> and *Klaxon v. Stentor*<sup>109</sup> have been applied to result in the application of state conflict of laws rules in federal district courts exercising diversity jurisdiction, those decisions do not appear to require that conflicts law be state law. Even if they were read to require that result, it would likely only be so for internal state-to-state conflicts, and not for external relations in the realm of private international law. Neither has there been a demonstration that state law would provide a better product in terms of predictability of application or uniformity of result for the end user of the legal rules contained in the Hague Convention.

It is too early at the end of 2008 to determine just what form U.S. implementation of the Hague Choice-of-Court Convention will take. What is clear, however, is that there will be substantial pressure for a state role in that implementation, and that there will be a complete draft text of a state statute designed to carry out the binding treaty obligations of the United States when private party Choice-of-Court Agreements become the subject of litigation in U.S. courts, whether state or federal.

## V. CONCLUSION

The developments listed above show that in 2008 both the centralization of private international law in Europe and the legal foundation for the dispersion of private international law in the United States gained momentum. The Rome I and II Regulations, along with ECJ and national judicial decisions applying the Brussels Regulation, demonstrate the clear migration of competence for private international law in the E.U. from Member State governments to the institutions of the European Community. They also clarify the solidification of the domination of civil law approaches to private international law within the E.U. At the same time, the *Medellin* decision of the United States Supreme Court, and the Uniform Law Commissioners' efforts to draft a uniform act by which to implement the Hague Convention on Choice-of-Court Agreements, demonstrate a parallel reduction in the ability of the U.S. Executive Branch to participate in the development of private international law on the multilateral level and to implement that law internally.

---

108. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

109. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 498 (1941).

The ULC draft uniform act for implementing the Hague Convention is indicative of the political centrifuge in play in the United States that contrasts with the political magnet effect of the E.U., and the resulting centralization of private international law competence in the institutions of the European Community. It is not hard to see which of these two processes is more likely to lead to uniformity of interpretation and the resulting predictability of results in private international law and private transnational litigation. Neither is it difficult to extrapolate from these parallel developments the resulting effect on the impact each of the United States and the European Community is likely to have in multilateral institutions when negotiating new legal instruments. The E.U. enters the competition for global legal rules with a distinct advantage resulting from the traditional influence its Member States have had in the export of civil law legal systems. The addition of a centralized program of development of both its internal and external rules of private international law, especially when faced with an apparent growing dispersal of competence for the same rules in the United States, is likely to create a new balance of influence in global relationships. In this regard, the developments of 2008, on both sides of the Atlantic, indicate that the ceding of leadership to Europe by the United States is not only continuing but gaining momentum.

The growing decentralization of treaty implementation in the United States has significance beyond just the future application of treaty rules in U.S. courts. Developments such as the Rome I and II Regulations, and the cases—in both the European Court of Justice and national courts—applying the Brussels Regulation, demonstrate the domination of civil law principles of private international law over the common law doctrines of the United Kingdom and Ireland. This is, in part, a result of the late entry of the United Kingdom and Ireland into a system of rules that was initiated by civil law countries. By the time the common law states of Europe became involved in that process, they were no longer able to prevent the instruments of the European Community from being dominated by civil law approaches.

If the development of private international law rules in and by the United States is fragmented among the states, and defined by a dispersal of authority for its development and implementation, then the harmonization of rules on a multilateral scale will leave the United States in much the same weak position vis-a-vis the rest of the world as the United Kingdom and Ireland have been vis-a-vis continental (civil law) Europe. We will have failed to stake out a clear position on rules to be advanced in the relevant forum for the negotiation of multilateral instruments, and the movement for globalized rules based on the civil law model of the E.U. will easily dominate the global private international law agenda. If you believe the civil law world “has it right” on all of its rules of private international law, then that may be a good thing, and the resulting rapid evolution to that result may be good as well. If, on the other hand, you

find problems in the absence of the application of doctrines such as due process in determining judicial jurisdiction and judicial discretion in the exercise of jurisdiction, then you might be concerned with current trends.