

THE LUGANO CASE IN THE EUROPEAN COURT OF JUSTICE: EVOLVING EUROPEAN UNION COMPETENCE IN PRIVATE INTERNATIONAL LAW

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On October 19, 2004, the European Court of Justice held its first *en banc* hearing since the 2004 enlargement to twenty-five Member States. The case was *Opinion 1/03*, involving a request by the Council of the European Union on whether the Community has exclusive or shared competence to conclude the Lugano Convention. While the case on its face deals only with a single convention, it has far broader implications and is likely to influence the development of private international law and private law on a Community level for years to come. In this brief article, I hope to trace the origins of the issues faced in the *Lugano* case and comment on some of its implications for the future.

The original Treaty of Rome creating the European Economic Community recognized that in order to have effective free movement of goods, services, capital, and persons, it was also necessary to have free movement of judgments and arbitral awards. After all, the ultimate test of the existence of a right is the ability to reduce that right, as against others, to a form that is both recognized and enforced by the legal system. Unlike the U.S. Constitution, which addresses this issue in its Full Faith and Credit Clause,¹ the original Rome Treaty provided in its Article 220 that the Member States of the Community should “enter into [further] negotiations with each other with a view to securing for the benefit of their nationals . . . [including among others] the simplification of formalities governing the reciprocal, recognition and enforcement of judgments of courts or tribunals and of arbitration awards.”²

The six original Member States carried out this dictate by negotiating the Brussels Convention,³ a treaty that was both narrower and broader than the objectives of Article 220. Due to the existence of the New York Convention

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1. U.S. CONST. art. IV.

2. Consolidated Version of the Treaty Establishing the European Community, art. 293 (ex Art. 220) Dec. 24, 2002, 2002 O.J. (C 325) 33 art. 293 [hereinafter TEC].

3. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (consolidated version), Sept. 27, 1968, 1998 O.J. (C 27) 1 [hereinafter Brussels Convention].

covering arbitration,⁴ the Brussels Convention was limited to court judgments and did not have to cover arbitration. It also was limited to “civil and commercial” matters, thus avoiding a broader scope that would have been consistent with Article 220. On the other hand, as to judgments, the Convention is not limited to recognition and enforcement. The original Member States realized the importance of jurisdiction to questions of judgment recognition. They negotiated a “double convention” that included rules of direct jurisdiction for the originating court, as well as rules of recognition and enforcement for the court addressed in the second instance, for purposes of gaining the effect of the judgment.⁵ The Brussels Convention thus did much more than provide the equivalent of a Full Faith and Credit clause for Europe; it harmonized jurisdictional rules and provided specific protection for defendants domiciled in other Member States from otherwise “exorbitant” jurisdictional bases.⁶ In this respect, it added the equivalent of the U.S. Due Process Clause as it has been applied to jurisdictional issues.⁷

As each new Member State joined the European Community, it acceded to the Brussels Convention as a part of its package of obligations.⁸ As the Community was broadened, it was also deepened, and in the area of private international law the Treaty of Amsterdam added language to the European Community Treaty that moved competence from the Member States to the Community Institutions. As part of the establishment of “an area of freedom, security and justice,” Article 61 of the Treaty now provides that “the Council shall adopt . . . measures in the field of judicial cooperation in civil matters as provided for in Article 65.”⁹ Article 65 in turn, describes the scope of such authority as follows:

4. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *entered into force* June 7, 1958, 21 U.S.T. 2517 [hereinafter *New York Convention*]. The text of the Convention, and information on its status, are available on the UNCITRAL website at <http://www.uncitral.org/en-main.htm> (last visited Feb. 1, 2005).

5. Single (sometimes referred to as “simple”) conventions on the recognition of judgments deal only with indirect jurisdiction and apply only to the decision of the court asked to enforce a foreign judgment. The recognizing court considers the jurisdiction of the court issuing a judgment in deciding whether to recognize the judgment of the originating court. Double conventions, like the Brussels and Lugano Conventions, not only deal with recognition, but also provide direct jurisdiction rules applicable in the court in which the case is first brought – thus addressing the matter from the outset and preempting the need for substantial indirect consideration of the issuing court’s jurisdiction by the court asked to recognize the resulting judgment.

6. See Brussels Convention, *supra* note 4, art. 3.

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

8. See Brussels Convention, *supra* note 4.

9. TEC, *supra* note 3, art. 61.

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

- a) Improving and simplifying: the system for cross-border service of judicial and extrajudicial documents; cooperation in the taking of evidence; the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
- b) Promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
- c) Eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.¹⁰

The Community institutions have not hesitated to exercise this authority. The Council has adopted regulations dealing with:

- a) Insolvency proceedings;¹¹
- b) Jurisdiction and the recognition and enforcement of judgments in family law matters;¹²
- c) Service of process;¹³
- d) Taking of evidence;¹⁴ and
- e) Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.¹⁵

Proposals for further instruments continue to be considered.¹⁶ Each of these instruments adds to the set of rules now applicable to internal Community

10. TEC, *supra* note 3, art. 65.

11. Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings, 2000 O.J. (L 160) 1.

12. Council Regulation (EC) No 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses, 2000 O.J. (L 160) 19 [hereinafter Brussels II].

13. Council Regulation (EC) No 1348/2000 of 29 May 2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 2000 O.J. (L 160) 37.

14. Council Regulation (EC) No 1206/2001 of 28 May 2001 on Cooperation Between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters, 2001 O.J. (L 174) 1.

15. Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 012) 1 [hereinafter Brussels I] (The Brussels Convention remains in force for relations between Denmark and the other Member States).

16. For further information on the agenda under Article 65, see http://europa.eu.int/comm/justice_home/fsj/civil/fsj_civil_intro_en.htm (visited Oct. 8, 2004).

legal matters. They combine with several treaties to provide the current private international law framework within the European Union. Those treaties include the Rome Convention on the law applicable to contractual obligations,¹⁷ and the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.¹⁸

While these instruments clearly have brought about change regarding the source of law applicable to private law and private international law issues in the courts of the Member States of the European Union, they are on their face limited for the most part to litigation that is internal to the Union. While the rules of the Brussels Regulation would apply to a case brought by a U.S. national against a French domiciliary in a French court, they would not apply in courts outside the European Union. Those rules reflect exercise of competence for matters relating, as required by Article 65, to “the proper functioning of the internal market.”¹⁹ This leaves open the question of authority for the adoption of such rules for purposes of external relations.

The question of external competence in the area of judicial cooperation has surfaced in several ways. One is at the Hague Conference on Private International Law, where since 1992 the Hague Member States have considered the possibility of a multilateral convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.²⁰ The Hague negotiations have evolved from full participation by European Union Member States to full coordination of a Community position represented in the Hague Special Commissions by the European Commission and Council on behalf of the Community. This has not occurred, however, without some tension in regard to the appropriateness of this representation. There has been no clear statement as to whether the competence for such matters now rests with the European Union Member States; with the Community institutions; or in a mixed form with Member States and Community institutions each having competence for some, but not all issues.

17. Rome Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, 1998 O.J. (C 27) 34 [hereinafter Rome I]. On July 22, 2003, the European Commission submitted its Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations. Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations, COM(03)0427 final [hereinafter Rome II]. This would effectively extend the rules of Rome II to non-contractual obligations, thus giving the package of applicable law rules coverage more consistent with the scope of the jurisdictional rules of the Brussels I Regulation. *Id.*

18. European Communities-European Free Trade Association: Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319) 9 [hereinafter Lugano Convention].

19. TEC, *supra* note 3, art. 65.

20. Information on the Hague Conference project may be found at Hague Conference on Private International Law: Works in Progress, http://hcch.e-vision.nl/index_en.php?act=progress.listing&cat=4 (last visited Mar. 15, 2005).

Another setting in which the issue of Community competence for external relations in matters of judicial cooperation has surfaced, is found in the effort to adopt amendments to the Lugano Convention that are consistent with the changes made when the Brussels Convention was replaced with the Brussels I Regulation. In this setting, however, there has been a further step in the process with the Council having asked the European Court of Justice for an opinion under Article 300(6) of the European Community Treaty,²¹ on whether the Community “has exclusive or shared competence to conclude the new Lugano Convention.”

Citing the 1971 *ERTA* decision of the European Court of Justice,²² the Council’s Legal Service rendered an opinion on February 5, 1999, that:

once the Community has exercised its internal competences adopting positions by which common rules are fixed [pursuant to Article 65], the Community competence becomes exclusive, in the sense that the Member States lose the right to contract, individually and even collectively, obligations with third countries which affect the said rules.²³

The *ERTA* doctrine was further developed by the Court in its *Open Skies* judgment of 2002,²⁴ when it stated:

21. TEC, *supra* note 3, art. 300(6)

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

22. Case 22/70, *Commission of the European Communities v. Council of the European Communities*, 1971 E.C.R. 263 (1971) [hereinafter *ERTA*].

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

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

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

24. Case C-467-98, *Commission of the European Communities v. Kingdom of Denmark*, 2002 E.C.R. I-9519; Case C-468/98, *Commission of the European Communities v. Kingdom of Sweden*, 2002 E.C.R. I-9575; Case C-469/98, *Commission of the European Communities v. Republic of Finland*, 2002 E.C.R. I-9627; Case C-471/98, *Commission of the European Communities v. Kingdom of Belgium*, 2002 E.C.R. I-9681; Case 472/98, *Commission of the European Communities v. Grand Duchy of Luxembourg*,

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

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

83 Thus it is that, whenever the Community has included in its internal legislative acts provisions relating to the treatment of nationals of non-member countries or expressly conferred on its institutions powers to negotiate with non-member countries, it acquires an exclusive external competence in the spheres covered by those acts (Opinion 1/94, paragraph 95; Opinion 2/92, paragraph 33).

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

Commentators have argued that these decisions do not indicate clear exclusive Community competence in areas of private international law and judicial cooperation because a doctrine lay down in "purely economic areas such as external trade," may not apply evenly to private international law.²⁵

From this side of the Atlantic, the *ERTA* line of cases is particularly interesting. The idea that powers emanating from constitutional documents—in this case the treaties creating the European Community—that grant specific authority for internal matters, without granting specific authority for external matters, can be exercised internally and thus result in the capture of external authority is an intriguing one. This clearly is seen as both fundamental and

2002 E.C.R. I-9741; Case C-475/98, *Commission of the European Communities v. Republic of Austria*, 2002 E.C.R. I-9797; Case C-476/98, *Commission of the European Communities v. Federal Republic of Germany*, 2002 E.C.R. I-9855.

25. See, Borrás, *supra* note 23, at 2.

necessary to the evolution of the law of the European Community. At the same time, this concept demonstrates the tension between the Member States and the Community institutions as the deepening of the Community moves forward. In the *Lugano* case, it also demonstrates the capture by international trade lawyers within the Community institutions of authority in the realm of private international law; something the private international law experts seem never to have been consulted upon when the Treaty of Amsterdam was concluded and competence was moved to the Community institutions.

The outcome of the *Lugano* case will have significance beyond just determining who should sign the amended Lugano Convention. It is likely to suggest, as well, the answer to who represents the Community and its Member States in negotiations at the Hague Conference on Private International Law and other multilateral bodies.²⁶ Whether the European Court of Justice finds any important distinction between prior cases in the international economic law realm and these matters in the field of private international law will say a lot about the evolution of the European Community from a simple common market to the more complex type of law-making framework that makes it look more-and-more like a federal system.

26. The allocation of competence may have implications as well for negotiations in the United Nations Commission on International Trade Law (UNCITRAL) and the Institute for Unification of International Private Law (UNIDROIT).