Balancing Sovereignty and Party Autonomy in Private International Law: Regression at the European Court of Justice

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I. Introduction

The traditional function of private international law has been to lead us to the appropriate national legal system for determining rights and for the settlement of disputes. More-and-more, however, regional governmental bodies,1 multilateral organizations,2 and even non-governmental

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organizations are creating rules applicable to transnational transactions. This harmonization and coordination of private law rules through treaties, internal legislation of regional institutions, and trade group rules has also accelerated the trend toward respect for party autonomy in the selection of rules to govern private relationships. Through this process, what some would call the “sovereign” function of law-making is being delegated to international organizations, regional institutions, non-governmental organizations, and private parties.

This trend has implications for both private transaction planning and for the regulatory function of the state. Granting private parties greater rights to determine the contours and results of their relationships necessarily reduces the control of the state in private affairs. If the ability to regulate private transactions is an important element of state authority, then the transfer of that authority, both to private parties and to other institutions, represents an important development in

3The prototypical examples of a non-governmental organization creating rules that govern private party transactions are the Incoterms and the Uniform Customs and Practice of the International Chamber of Commerce. International Chamber of Commerce, INCOTERMS 2000, (I.C.C. Publication 560); International Chamber of Commerce, Uniform Customs and Practice for Documentary Credits (ICC Publication 500). The importance of these rules is reflected in former Section 5-102(4) of the New York version of the Uniform Commercial Code, which specifically acknowledged the UCP by stating that New York’s U.C.C. Article 5 “does not apply to a letter of credit . . . if by its terms . . . such letter of credit . . . is subject . . . to the Uniform Customs and Practice for Commercial Documentary Credits.” N.Y.U.C.C. 5-102(4) (McKinney) (1964). That provision was removed with the New York adoption of new amendments to Article 5 in 2000, but the Official Comment to Section 5-101 now states that “Article 5 is consistent with ans was influenced by the rules in the existing version of the UCP.” U.C.C. § 5-101, Official Comment (1995 revisions).

4Examples include Article 23 of the Brussels I Regulation, providing that the Member State court chosen by the parties “shall have jurisdiction,” and that “[s]uch jurisdiction shall be exclusive unless the parties have agreed otherwise,” and Article 3(1) of the Rome Convention, stating simply that “[a] contract shall be governed by the law chosen by the parties.” Brussels I Regulation, supra note 1, art. 23; 1980 Rome Convention on the law applicable to contractual obligations, art. 3(1) (consolidated version), O.J. Eur. Comm. C 27/34 (1998) [hereinafter “Rome Convention”]. The original version is found at 23 O.J. Eur. Comm. L 266/1 (1980).
the evolution of sovereign state legal regimes. In the long run, this new *lex mercatoria* process may represent a form of globalization every bit as significant as the creation of new multilateral organizations and courts.

All of this raises questions about traditional notions of what we call “sovereignty” and how those notions relate to allocations of authority for the rules governing private party relationships. It is one thing, as is done in the traditional private international law process, to seek structure in the manner in which we determine which state’s rules govern a particular relationship. It is quite another to adjust the role of the state through cooperation in multilateral bodies and in the delegation to private parties of the role of rule creators. This combined reallocation of authority to both non-state institutions and private parties justifies assessment of concepts of sovereignty and of the role of the state in private party relationships. This ultimately leads to consideration of whether granting increased legislative functions to international organizations (both governmental and non-governmental) and to private parties (in the name of party autonomy) is—as some would argue—a step that weakens the sovereign state, or a proper exercise of sovereign power.

In this chapter I begin with a brief history of the notion of sovereignty, stressing the roots of a concept that developed first to explain internal relationships within a state between the governor and the governed, but which is now routinely applied to relationships between and among states. I then turn to the evolution of private international law during the latter half of the twentieth century and the increased role played by both multilateral institutions and private
parties in choosing the law applicable to private transactions and the appropriate forum for the resolution of private disputes.

The jurisdictional subpart of private international law, in particular, raises important questions regarding the role of the state in opportunities for parallel litigation. This role is highlighted by three recent decisions of the European Court of Justice demonstrating an approach to issues of party autonomy that rewards conduct arguably inconsistent with a quest for predictable and stable private party relationships. Because these decisions also represent a type of retrenchment into potentially questionable understandings of concepts of sovereignty, they provide an opportunity to consider application of the thoughts otherwise developed in this chapter. Ultimately, I conclude that this judicial trend in the European Community risks the curtailment of otherwise positive developments in the balance of state authority, the restriction of the appropriate development of international rules applicable to private party relationships, and the imposition of limitations on the proper role of party autonomy in the evolution of private international law. It thus ultimately risks creating imbalance in the relationship between sovereign authority and proper respect for party autonomy.

II. Understanding Sovereignty

The term “sovereignty” in the international legal regime has caused no end of problems. While some have seen it as the important term in defining the independent state, others have

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6See, e.g., Jeremy Rabkin, Why Sovereignty Matters 2 (1998) ("Sovereignty denotes independence. A sovereign state is one that acknowledges no superior power over its own government.").
argued that it is a term so confused that we are better off without it. Early western political thought recognized only one sovereign and did not include the concept of equal “sovereign” states. God, through the earthly expression of the Pope, was the ultimate legal authority. This changed, however, when the Respublica Christiana gave way to the Reformation.

Jean Bodin, the “father of the modern theory of sovereignty,” described sovereignty as “the most high, absolute, and perpetual power over the citizens and subjects in a Commonweale.” Nonetheless, he continued to maintain that the king remained submissive to “the law of God and nature.” Thomas Hobbes also expressed the idea that states inherited the notion of sovereignty that existed between the divine king and his subjects. For Hobbes, as for Bodin, the starting point was the internal relationship between the king and his subjects. Thus, citizens enter a mutual covenant to confer upon the sovereign “all our power and strength,” and

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7See, e.g., Louis Henkin, Notes from the President, AM. SOC’Y INT’L L. NEWSL. (ASIL, Washington, D.C.), March 1993, at 1 (“Away with the “S” word!”); Jacques Maritain, The Concept of Sovereignty, 44 AM. POL. SCI. REV. 343 (1950) (“political philosophy must eliminate Sovereignty both as a word and as a concept”); ROLAND R. FOULKE, A TREATISE ON INTERNATIONAL LAW 69 (1920) (“The word sovereignty is ambiguous . . . . We propose to waste no time in chasing shadows, and will therefore discard the word entirely”).


9See LASKI, supra note 8, at 12.

10Maritain, supra note 7, at 344.

11JEAN BODIN, DE LA RÉPUBLIQUE Bk. 1, Ch. 8 (1583) (English translation by Richard Knolles (1606) at p. 84, quoted in Maritain, supra note 7, at 345 n.13).

12BODIN, supra note 11, at Bk. I, Ch. 8.

13THOMAS HOBBES, LEVIATHAN, Part II, Ch. xvii, ¶ [14].
“submit their wills, every one to his will and their judgments, to his judgments,” so that “he may use the strength and means of them all as he shall think expedient, for their peace and common defence.”

The sovereign’s role in international relations was a natural extension of this arrangement for peace and security at home. The sovereign must:

be judge both of the means of peace and defence, and also of the hindrances and disturbances of the same, and . . . do whatsoever he shall think necessary to be done, both before-hand (for preserving of peace and security, by prevention of discord at home and from abroad) and, when peace and security is lost, for the recovery of the same.

This idea that the sovereign’s role is to provide security through peace and common defense has important consequences for both internal and external political considerations, and is useful in understanding the proper role of the state in international relations.

The concept of sovereignty of states has become a fundamental element in the discussion of international legal relations. In this context, the word “sovereignty” continues to be grounded in the authority of the sovereign. But that authority deals not only with internal relations between the governor and the governed, but applies also to relationships with other states. The role of private international law affects both of these aspects of sovereignty, requiring consideration of the rights and authority of other states, and ultimately affecting the law applied to private parties

References:

14 Id. at Part II, Ch. xvii, ¶ [13].

15 Id. at Part II, Ch. xviii, ¶ [8].

on behalf of the state through its courts.

III. Sovereignty and Private International Law

A. The general context

Private international law, by its very nature, requires a framework for understanding relationships among states in the regulation of private party conduct. This is demonstrated by the interchangeable use of the terms “conflict of laws” and “private international law.” Whether we are discussing jurisdiction, applicable law, or recognition of judgments, we are dealing with the way in which different sets of internal legal rules, developed by different sovereign entities, should be applied to private party relationships in a judicial context.

A simple, and very nationalistic, approach to such matters is to elevate the local sovereign and its laws over the foreign sovereign and its laws. Concern for the equality of states, proper recognition of territorial authority, and the potential for the damaging effect of reciprocal treatment, however, tend to temper the temptation to move in this direction. Thus,

[private international law . . . is based on principles of territorial sovereignty and equality among sovereigns. It assumes that each state has the authority to regulate persons and activities within its borders, and that the laws and actions of one state can have no direct effect in another.]

The assumption that each state has territorial authority within its borders emanates from concepts of equality and comity, and results in respect for that authority in the courts of other states,

17 Note, for example, the titles of CHESIRE AND NORTH’S PRIVATE INTERNATIONAL LAW (13th ed., Peter North and James J. Fawcett, eds., 1999) and DICEY AND MORRIS ON THE CONFLICT OF LAWS (13th ed., Lawrence Collins ed., 2000).

especially when those courts are faced with events that occurred in other states. This in turn leads to the development of rules for determining where a case may be brought, which laws will apply to resolve the issues raised, and the effect to be given in other states to the resulting judgment.

The confusion that leads to fears of “giving up sovereignty” were clearly demonstrated in the debate in the United States Senate over entry into the World Trade Organization in the mid-1990s, and can be seen in a comparison of the statements of Senators Helms, Thurmond, and especially when those courts are faced with events that occurred in other states. This in turn leads to the development of rules for determining where a case may be brought, which laws will apply to resolve the issues raised, and the effect to be given in other states to the resulting judgment.

The same is true of the relationship between the state and private parties. Here again, a simple (and authoritarian) approach would be always to subjugate the will of private parties concerning their transactions to the will of the state. Nonetheless, the idea that parties can opt out of many national legal rules has become a matter of common practice at the beginning of the twenty-first century. Respect for party autonomy in private relationships has become a cornerstone of modern private international law.

The very notion of private international law connotes certain limits on the exercise of sovereign authority. Rules that allow the application of foreign law, or deference to the courts and judgments of a foreign court, operate to restrict the application of local law and the assumption of local jurisdiction. While this may indicate limitations on the exercise of authority, however, it does not necessarily indicate limitations on sovereignty. If the proper role of the sovereign is to provide peace and security for those within its territory, then the jealous retention of power to apply one’s own laws and to hear all cases is not necessarily synonymous with the proper exercise of sovereignty. Nor does the proper recognition of foreign state interests result in “giving up sovereignty.” Moreover, the very existence of rules of private international law

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19 See supra note 4 and accompanying text.

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demonstrates acknowledgment by states of the authority of other states within their own territory. The question ultimately is one of proper balance between retention of forum-state regulatory authority and acknowledgment of the equal authority of other states within their own territory. In other words, it is a question of the proper exercise of sovereignty, not a question of allocations of sovereignty. A state’s interest in applying its own law in its own courts must always be tempered by its interest in having its law applied in the courts of other states and its interest in having other states defer to it when appropriate on matters of jurisdiction. Those interests are not advanced by jealous protectionist rules.

B. The effect of legal harmonization and cooperation on private international law

The latter half of the twentieth century witnessed a trend toward cooperation in the development of both private law and private international law; a trend that has continued into the
This process is perhaps most evident in the multilateral context in the work of the Hague Conference on Private International Law, the United Nations Commission on International Trade Law (UNCITRAL), and the International Institute for the Unification of Private Law (UNIDROIT).


This is true, for example, with the rules applicable to international contracts for the sale of goods found in the U.N. Sales Convention. While it is possible that in some cases the existence of the Sales Convention may require that a court determine whether the law of the seller’s state, the buyer’s state, or the Sales Convention is the applicable law, that determination itself will most often be a matter of the substantive law of the Sales Convention, and not something for which local rules of private international law will govern. Thus, even in such cases, the existence of a treaty normally will prevent the application of local rules of private international law. The more such treaties we have, the less the role for national rules of private international law.

This is also true of treaties that create new jurisdictional rules. The most significant

21This process is perhaps most evident in the multilateral context in the work of the Hague Conference on Private International Law, the United Nations Commission on International Trade Law (UNCITRAL), and the International Institute for the Unification of Private Law (UNIDROIT).


23Id art. 1.
example in this regard has been the New York Arbitration Convention. In the United States, for example, Article 2(1) of the Convention has been interpreted to require that even issues of antitrust law, generally considered to have important regulatory significance, must be submitted to arbitration in a foreign country before foreign arbitrators, if the parties have agreed to such arbitration of their disputes. Thus, the rule for determining forum jurisdiction in such a case is found in a treaty rather than in the local rules of private international law, and courts are prevented from taking jurisdiction in violation of those rules.

In Europe, the determination of both jurisdiction and choice of law have been relegated to rules found in treaties and in the internal legislation of the European Community. Thus, the Brussels I Regulation now provides a comprehensive set of rules for jurisdiction in cases involving defendants domiciled in Member States of the European Union, and the Rome Convention on the law applicable to contractual obligations provides a comprehensive set of

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24New York Convention, supra note 2.

25“Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.” Id. art. 2(1).

26Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985). See also Richards v. Lloyd’s of London, 135 F.3d 1289 (9th Cir. 1998) (en banc decision withdrawing earlier decision at 107 F.3d 1422 (9th Cir. 1997)), in which the 9th Circuit upheld the choice of law and choice of forum clauses in the standard Lloyd’s “Name” contract—which provides for English law to be applied in English courts to any dispute arising out of membership—against allegations that it violated the anti-waiver provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934.

27Brussels I Regulation, supra note 1.

28Rome Convention, supra note 4.
rules for determining applicable law in contract cases in the courts of Member States. In each case, national rules of private international law are replaced by multilateral or regional legal instruments. While these instruments then become the source of much discussion in leading treatises on private international law, they nonetheless represent the replacement of national rules of private international law with uniform regional sources of the law applied to determine jurisdiction and choice of law.

C. Expanded recognition of party autonomy

The other trend affecting private international law has been increased recognition of party autonomy in selecting both the rules governing a transaction and the forum in which disputes arising out of that transaction are to be decided. This is demonstrated in judicial decisions, state and national legislation, treaties, and internal European Community legislation.

In the United States, uniform state law provides respect for private party selection of governing law. For example, the Uniform Commercial Code rule in effect in most states allows parties to choose the law applicable to their relationship whenever their “transaction bears a reasonable relation to” the state or nation whose law is chosen.29 Similar respect for party

29Uniform Commercial Code § 1-105:

Territorial Application of the Act; Parties’ Power to Choose Applicable Law

(1) Except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

Note, however, that states enacting the 2001 revisions to the Uniform Commercial Code have
tended to stay with the language of the old § 1-105, rather than adopt the new § 1-301(c) that would extend party autonomy even further by upholding party choice of law “whether or not the transaction bears a relation to the State or country designated.” U.C.C. § 1-301(c)(2) (2001 revisions).

30 Supra note 4.

31 Id. art. 3.


33 Ins. Co. v. Morse, 87 U.S. 445, 451 (1874). See also Carbon Black Export, Inc. v. The Monrosa, 254 F.2d 297, 300-301 (5th Cir. 1958), cert. dismissed, 359 U.S. 180 (1959) (“agreements in advance of controversy whose object is to oust the jurisdiction of the courts are contrary to public policy and will not be enforced.”).

34 Bremen, 407 U.S. at 9.
that parties to an international transaction often have good reason to provide for a neutral forum for the resolution of disputes.\textsuperscript{35} The statement that forum selection clauses “are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be unreasonable under the circumstances,”\textsuperscript{36} has become the foundation for subsequent common law respect for party choice of forum in the United States.

In Europe, the Brussels Convention, and now the Brussels I Regulation,\textsuperscript{37} provide clear deference to party choice of a judicial forum for dispute settlement. Article 23(1) of the Regulation provides that a Member State court selected by the parties “shall have jurisdiction” if one of the parties is domiciled in a Member State.\textsuperscript{38} While this rule is subject to exclusive rules

\textsuperscript{35}\textit{Id.} at 13. When the same dispute was litigated concurrently in the English courts, the English Court of Appeal sustained jurisdiction there under the choice of forum clause despite the fact that the transaction had no connection with England, noting that, “in the absence of strong reason to the contract,” the discretion of the English court “will be exercised in favour of holding parties to their bargain.” Unterweser Reederi GmbH v. Zapata Off-Shore Co., [1968] 2 Lloyd’s L. Rep. 158, 163 (C.A.).

\textsuperscript{36}\textit{Bremen}, 407 U.S. at 10.

\textsuperscript{37}\textit{Supra} note 1.

\textsuperscript{38}\textit{Id.} art. 23:

1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

\hspace{1cm} (a) in writing or evidenced in writing; or

\hspace{1cm} (b) in a form which accords with practices which the parties have established between themselves; or

\hspace{1cm} (c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.
of jurisdiction contained in Article 22, and certain protective rules in Articles 8 through 21 (for insurance, consumer, and employment cases), it nonetheless prevails over the general jurisdiction rule of Article 2 and the special jurisdiction rules of Articles 5 through 7.

This respect for party autonomy will be enhanced further if the Convention on Exclusive Choice of Court Agreements concluded in June 2005 by the Hague Conference on Private International Law becomes a successful and functioning treaty. That Convention will provide respect for party choice of litigation in the same way that the New York Convention provides respect for party choice of arbitration.

IV. The New World of Sovereign Authority and its Effect on Private International Law

The final decades of the twentieth century witnessed substantial movement toward market economic systems and democratic governments. Thus, the sovereign "prince" gave way to the sovereign "we," albeit in a representative fashion. Some have argued that the trend toward democratization represents a normative change sufficient to elevate democracy to a right governed by international law. While this may yet be only de lege ferenda at best, the mere

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40See supra notes 24-26 and accompanying text.

41See, e.g., Thomas M. Franck, The Emerging Right to Democratic Governance, 86 AM. J. INT’L L. 46 (1992) (“Increasingly, governments recognize that their legitimacy depends on meeting a normative expectation of the community of states. This recognition has led to the emergence of a community expectation: that those who seek the validation of their empowerment patently govern with the consent of the governed. Democracy, thus, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.”).
suggestion of its existence is significant. An international law right to democratic government could carry with it significant subsidiarization of authority in the individual, including in the choice of rules applicable to private transactions. It would, of course, be the individual, not the state, that could claim the right to a democratic form of government.

This potential evolution of democracy as an international norm has implications both for any discussion of sovereignty and for the development of rules of private international law. Like the development of private international law, it is accompanied by both internationalization and individualization of authority for private conduct. Each of these directions taken in the channeling of authority could be seen as reducing the authority of the state. If handled properly, however, allocations in both directions represent the proper exercise of sovereign function in a society that is becoming progressively more global in its relationships and more democratic in its governing norms.

The combination of globalization of sources of law and individualization of responsibility for rules governing private relationships can be seen as a logical evolution in the development of social contract theory that bases its legitimacy on the relationship of the governed to the governor in a manner originally described under the rubric of sovereignty. If we are engaged in such an evolutionary process, then the proper allocation of authority within the new structure of relationships should lead to greater predictability in private commercial relationships, and thus to fewer economic tensions that might rise to more serious tensions at governmental levels. Thus, this proper allocation of authority, both to global players (whether intergovernmental, non-governmental, or otherwise) and to private parties in their own relationships, does not represent a diminution of sovereignty of the state, but rather the proper exercise of sovereign authority in a
modern world. If it also represents a system in which the need for national rules of private international law is diminished, that in itself should be neither a concern nor a problem.

V. Sovereignty, Party Autonomy, and Private International Law in the European Court of Justice

Three recent decisions of the European Court of Justice—each interpreting the Brussels Convention—offer an opportunity to apply some of the concepts developed above. In each case, the Court addresses issues of parallel litigation and the hierarchy of rules otherwise applicable within and without the European Union.

In one sense, the European Community demonstrates the multilateralization of private international law rules, with its conventions and regulations providing rules that remove the need for reference to national rules of private international law for purposes of determining the applicable law or the proper jurisdiction of Member State courts. This evolution is most evident in the effect over the past few years of the competence transferred to the Community institutions under Article 65 of the European Community Treaty.42 With the Treaty of Amsterdam, the Community absorbed competence for matters that had been left to treaties among Member States in the original Treaty of Rome. While Article 220 of the Treaty creating the European Economic

Community acknowledged the need for free movement of judgments,\textsuperscript{43} it did so by declaring that the Member States should “enter into [further] negotiations with each other with a view to securing for the benefit of their nationals . . . the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.”\textsuperscript{44} The 1968 Brussels Convention was negotiated based on this authority.\textsuperscript{45}

The Amsterdam Treaty, signed on October 2, 1997,\textsuperscript{46} gave new competence to the Community Institutions for the creation of internal law. Article 61 of the amended Treaty provides that “the Council shall adopt . . . measures in the field of judicial cooperation in civil matters as provided for in Article 65.”\textsuperscript{47} Article 65 then outlines that authority to include measures “insofar as necessary for the proper functioning of the internal market” for “improving and simplifying” service of documents, the taking of evidence, and the recognition and enforcement of judgments; “promoting the compatibility” of rules on the conflict of laws and


\textsuperscript{44}\textit{Id.}


\textsuperscript{46}\textit{See http://europa.eu.int/comm/justice_home/doc_centre/civil/wai/doc_civil_intro_en.htm.}

\textsuperscript{47}\textit{TEC, supra note 43, art. 61 (ex art. 73i).}
jurisdiction; and “eliminating obstacles” by “promoting the compatibility of the rules on civil procedure.”\textsuperscript{48} The Regulations promulgated under this authority include the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.\textsuperscript{49} A regulation to replace the Rome Convention on the law applicable to contractual obligations is also in the works.\textsuperscript{50} Thus, the set of rules determining both jurisdiction and applicable law in a significant number of cases within Europe will soon be governed, not by national rules of private international law, but rather by internal Community legislation. This will make the role of all Community institutions more important to those concerned with private international law issues--with the role of the European Court of Justice as final interpreter of the rules to have special significance.

Thus it is that existing decisions of the European Court of Justice, interpreting both the new Regulations and their predecessor conventions, take on particular importance. In this light, the Court’s decisions in the 2003 \textit{Gasser} case,\textsuperscript{51} the 2004 \textit{Turner} case,\textsuperscript{52} and the 2005 \textit{Owusu} case,\textsuperscript{53} raise important questions about private international law, sovereignty, and party autonomy

\textsuperscript{48} \textit{Id.} art. 65 (ex art. 73m).

\textsuperscript{49} \textit{Supra} note 1.


\textsuperscript{51} Case C-116/02, Erich Gasser GmbH v. MISAT Srl., [2003] E.C.R. ____.

\textsuperscript{52} Case C-159/02, Gregory Paul Turner v. Felix Fareed Ismail Grovit, Harada Ltd and Changepoint SA., [2004] E.C.R. ____.

in the European Union. Each of these cases came to the Court on reference for a preliminary ruling on the interpretation of the Brussels Convention.

The Gasser case involved the application of articles 17 and 21 of the Brussels Convention. When a transaction between an Austrian seller and an Italian buyer went bad, the Italian company was the first to bring suit, in an Italian court. The Austrian company then brought suit in Austria for payment on outstanding invoices. Those invoices contained clauses calling for disputes to be brought only in Austrian courts. If those clauses were part of the agreement between the parties, then Article 17 of the Brussels Convention provided for exclusive jurisdiction in Austrian courts. The Italian party argued, however, that the governing provision was Article 21, which contains the *lis pendens* rule requiring deference to the court first seised. If the Austrian party was correct in its assertions, there was a valid choice of court clause establishing jurisdiction in Austria; even if such a clause were not valid, jurisdiction over the Austrian seller existed only in Austria under Article 2 (domicile of the defendant) or Article 5(1) (place of performance of the contract); and the Italian action was brought only to frustrate proper adjudication in a system that would take years simply to decide the issue of jurisdiction. Nonetheless, the European Court of Justice ruled that the *lis pendens* rule of Article 21 trumps the choice of court rule of Article 17, and that the Austrian case must be dismissed in favor of litigation in Italy.

Both Turner and Owusu involved litigation in the United Kingdom, focusing attention on differences between common law and civil law legal traditions. In Turner, a U.K. domiciliary who had worked in both London and Madrid for a group of companies, brought an employment claim before the Employment Tribunal in London on the grounds that the employer had
improperly attempted to implicate him in illegal conduct. He ultimately received an award of damages. After the employement action was first brought in London, however, the employer sued the employee in the court of first instance in Madrid. The employee then brought an action in the High Court of Justice in England and Wales for an order enjoining the employer from pursuing the action in Spain. The employee prevailed in the U.K. Court of Appeal, and an injunction was issued. On appeal to the House of Lords, the matter was referred to the European Court of Justice on the question “whether the Convention precludes the grant of an injunction by which a court of a Contracting State prohibits a party to proceedings pending before it from commencing or continuing legal proceedings before a court in another Contracting State even where that party is acting in bad faith in order to frustrate the existing proceedings.” Finding that “the Convention is necessarily based on the trust which the Contracting States accord to one another's legal systems and judicial institutions;” that “otherwise than in a small number of exceptional cases . . . the Convention does not permit the jurisdiction of a court to be reviewed by a court in another Contracting State;” and that “a prohibition imposed by a court, backed by a penalty, restraining a party from commencing or continuing proceedings before a foreign court undermines the latter court's jurisdiction to determine the dispute;” the Court held that the anti-suit injunction was prohibited by the Brussels Convention “even where that party is acting in bad


55 Id. at ¶ 24.

56 Id. at ¶ 26.

57 Id. at ¶ 27.
faith with a view to frustrating the existing proceedings."\(^{58}\)

The *Owusu* decision highlights both the contrast between common law and civil law systems in issues of parallel litigation and alternative forums and the extent to which the European Court of Justice has reached in order to impose a rigid interpretation of jurisdictional principles under the Brussels Convention (and Regulation) regime. Mr. Owusu, a British national domiciled in the United Kingdom, was injured while vacationing in Jamaica. He brought suit in the United Kingdom, naming as defendants an individual domiciled in the United Kingdom from whom he had rented the vacation home and several Jamaican companies allegedly responsible for not giving notice of the hazardous conditions that led to Mr. Owusu’s swimming accident. There was no party from another Brussels Convention State, and the only defendant from within the European Community was from the same State as was the plaintiff. Thus, the case was international only because there were parties from outside the Community.

The *Owusu* defendants sought to have the case dismissed on the grounds of *forum non conveniens*, on the argument that Jamaica was the more appropriate forum.\(^{59}\) The matter was submitted to the European Court of Justice by the Court of Appeal for a ruling on whether the Brussels Convention prohibited relief on the *forum non conveniens* motion when the alternative forum was Jamaica (a non-Contracting State for Brussels Convention purposes). The Court ultimately held that the 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 would be a more appropriate forum for the trial of the action

\(^{58}\) *Id.* at ¶ 31.

\(^{59}\) *Owusu [2005]* E.C.R. ___, at ¶ 15. [get a citation to the Advocate General opinion here]
even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State.”

For an observer from a common law system outside of Europe the *Owusu* judgment is remarkable on at least four counts. They are:

1) The Court began its analysis with Article 2 of the Brussels Regulation (the provision containing the rule of general jurisdiction in the courts of the defendant’s state of domicile), stressing the “international nature” of the case even when there was not a party from another Contracting State. In doing so, the Court explicitly noted that this was inconsistent with the position taken in the Jenard Report that was created contemporaneous with the drafting of the Brussels Convention and usually considered to be authoritative on questions of interpretation.

2) In determining that Article 2 applied, the Court found that the doctrine of *forum non conveniens* was incompatible with the Brussels Convention because the Convention rules protect the defendant by providing predictability of location of potential suit. But the Court used this argument to defeat the application of the defendant to have the case tried elsewhere. Thus, it used a protection of the defendant argument to give the case to the plaintiff; a rather ironic result.

3) By emphasizing the need for uniform application of the Brussels Convention, the Court determined that since the majority of European Community Member States do not recognize the doctrine of *forum non conveniens*, the Convention should be interpreted to prohibit its application even in cases not involving parties from two

60 *Id.* at ¶ 46.

61 *Id.* at ¶¶ 24-27. The Court did acknowledge that for Article 2 to apply, the case must be international. Thus, the Court suggested that if the only defendant had been from the United Kingdom, Article 2 would not have applied, the case would not have been within the Brussels Convention, and the application of the doctrine of *forum non conveniens* would not have been prohibited. The English court could have decided that the case would better be tried in Jamaica. For more elaborate discussion of the Jenard Report, see Opinion of Mr Advocate General Leger delivered on 14 December 2004, ¶¶ 86-95, Andrew Owusu v N. B. Jackson, [2004] E.C.R. ___, Celex No. 602C0281.

62 *Id.* at ¶¶ 41, 42. “[A] defendant, who is generally better placed to conduct his defence before the courts of his domicile, would not be able, in circumstances such as those of the main proceedings, reasonably to foresee before which other court he may be sued.” *Id.* at ¶ 42.
Member States.\textsuperscript{63} Such a “majority wins” approach to treaty interpretation would seem clearly inappropriate in the interpretation of other multilateral private law conventions such as the U.N. Sales Convention. While uniform interpretation is important, there seems to be no rule of international law outside the European Union that would require that uniformity be achieved by overriding the law of minority contracting states to a convention, and simply imposing the majority rule in situations where that result is not otherwise explicit in the convention’s terms.

4) The court summarily dismissed the argument that a judgment in the main action in the United Kingdom was likely not to be enforceable against the Jamaican defendants in Jamaica, stating only that such an argument was “not such as to call into question the mandatory nature of the fundamental rule of jurisdiction contained in Article 2 of the Brussels Convention.”\textsuperscript{64} This seems to be at odds with the purpose of the Brussels Convention to create judgments from Member State courts that are subject to recognition and enforcement in the courts of other states (even though the application of the Brussels Convention in this regard is limited to recognition and enforcement in other Member States). When the same convention is applied because a case is “internationalized” through the existence of defendants from a non-Member State, but such internationalization then results in the application of rules that lead to judgments not likely to be enforceable in the state in which the defendant is located, it is odd to hear the court argue that this is consistent with the policies of the Convention.

The result of the Court’s analysis, based largely on the need for “the predictability of the rules of jurisdiction laid down by the Brussels Convention,\textsuperscript{65} is a rigid adherence to the civil law preference for a doctrine of \textit{lis pendens} over the common law preference for a doctrine of \textit{forum non conveniens}. While the majority of the Judges on the Court may believe that \textit{lis pendens} is the better approach to parallel litigation and alternative forums–and it clearly is the rule applicable \textit{inside} the Brussels Convention and Regulation system–this application of that preference to a common law adjudication in a system that recognizes the doctrine of \textit{forum non

\textsuperscript{63}Id. at ¶ 43.

\textsuperscript{64}Id. at ¶ 45.

\textsuperscript{65}Id. at ¶ 41.
conveniens, when no other Community Member State is involved, seems to be a bit of a stretch.

The Owusu result is quite consistent, however, with the approach in Gasser that elevates *lis pendens* over the parties’ choice of court and thus creates potential for improper defensive litigation. Both create a preference for a rush to the courthouse in order to pre-empt litigation in the natural forum and to allow a party other than the natural plaintiff to gain an advantage by bringing the case in a defensive fashion. This is at the core of the difference between civil law and common law traditions on parallel litigation. The civil law race to the court house arguably has the benefit of predictability, but it sacrifices the opportunity for reasoned efforts to resolve disputes before the natural escalation of tensions brought about by formal litigation. It also prevents any judicial discretion designed to place the case in the most appropriate forum. It necessarily assumes that the first forum seised will always be the most appropriate forum.

The problems with this aspect of the Court’s Brussels Convention jurisprudence is revealed in the April 2005 decision of the London Commercial Court in *J.P. Morgan v. Primacom*. 66 JP Morgan was agent for a number of banks under a secured facility agreement on loans to Primacom. The agreements involved included a clause selecting English law as the governing law, and another providing for exclusive jurisdiction for any disputes in the courts of England. 67 When Primacom became delinquent on its loan payments, it initiated proceedings in Germany alleging that provisions of the loan documents violated German public policy. JP Morgan brought actions in England to enjoin Primacom from disposing of assets and for


67 *Id.* ¶ 3.
declarations of specific performance rights under the secured facility agreement.

Mr. Justice Cooke determined that

As a matter of English Law it is clear that both these proceedings were commenced in breach of the exclusive jurisdiction clause and the evidence suggests that this was done with the primary intention of frustrating any possible attempt by JP Morgan and the SSLs to seek appropriate relief in the English Courts in accordance with that jurisdiction clause. . . . It is clear that delay is advantageous to Primacom and this appears to be one of its objectives.68

Nonetheless, he considered himself bound by the terms of Article 27 of the Brussels I Regulation and the European Court of Justice decision in Gasser to stay the declaratory proceedings pending decision by the German court.69 He did, however, determine that the injunction proceedings could continue in order to protect the interests of JP Morgan,70 subject to the jurisdictional decision in the German courts.71

The Primacom case demonstrates problems with allocation of private international law authority at both the Community and Member State levels. At the Community level, it shows that the Gasser judgment actually promotes inappropriate parallel litigation by encouraging negative declaratory judgment actions intended to frustrate litigation in the forum appropriately chosen by the parties. At the Member State level, it opens the door to national laws that can be used to frustrate general rules favoring party autonomy and predictable choice of forum.72 Both

68Id. ¶ 10.
69Id. ¶ 49.
70Id. ¶ 68.
71Id. ¶ 72.
72Primacom’s argument in the German proceedings was that the loan documents constituted “a legal transaction which offends good morals and is void” under the German Civil
results are inconsistent with the positive general trends promoting multilateral uniformity and party autonomy.

This approach taken by the European Court of Justice in its trilogy of cases also elevates a quest for efficiency over a quest for equity. Hence the stated focus on predictability in the Owusu decision. But the Gasser case demonstrates—and Primacom emphasizes—that such rigid analysis of the Brussels Convention rules will not always be efficient. If the argument of the Austrian party in Gasser was correct, then the preference for the first-seised Italian case will only delay the natural course of litigation in the court chosen by the parties, which is the court to which the Italian court ultimately would have to send the case under the Brussels Convention. The same is true in Owusu if the argument of the defendants was correct and the English judgment would not be enforceable in Jamaica, thus requiring further litigation in Jamaica on the same claims after the English litigation is complete.

While the argument for predictability and efficiency has its merits, it also has its limitations, and those limitations seem all too evident in this line of cases in the European Court of Justice. They represent a clear effort to fix rigid rules that will not always be equitable in their application, thus removing the ability of parties and courts to move toward more appropriate legal results. In its application of the Brussels Convention, the Court justifies its decisions as enhancing predictability. But predictability in the application of sovereign rules and predictability in the conduct of private transactional relationships are two different matters. It is

Code. Id. ¶ 24.

Supra note 62.
thus necessary to consider which of these types of predictability should be our goal.\textsuperscript{74}

As noted earlier in this article, predictability in the application of legal rules can easily be achieved by simple rules that are neither fair in their application nor respectful of the interests of other states.\textsuperscript{75} The evolution of private international law toward multilateral cooperation and unification, and toward greater respect for party autonomy, clearly demonstrates that in the twenty-first century states have acknowledged the inappropriateness of such an approach to issues of jurisdiction, applicable law, and recognition and enforcement of judgments. The recent approach of the European Court of Justice to the interpretation of the Brussels Convention clearly does not fit with this evolutionary trend.

The Court’s interpretation of the Brussels Convention (and by extension the Brussels I Regulation) may provide predictability in the application of the jurisdictional rules of the Convention, but the very cases in which these rules are applied demonstrate that such an interpretation serves to frustrate the goal of predictability in private party relationships. The role of the state in such matters (consistent with recent trends in private international law), should be to provide private parties with greater predictability in their relationships, not to create simplicity of analysis for courts when that analysis leads to inequitable results. Decisions that encourage defensive use of litigation and a rush to the court house operate to frustrate both the proper development of private relationships and a positive role for the judicial system in the resolution of private disputes.

\textsuperscript{74}Primacom demonstrates that even the rigid rules of Gasser do not provide predictability, when the \textit{lis pendens} process is subject to judicial determination of what may or may not violate good morals in commercial relationships. \textit{See supra} note 72 and accompanying text.

\textsuperscript{75}\textit{Supra} notes 17-19 and accompanying text.
VI. Conclusion

Private international law at the beginning of the twentieth century demonstrates two important trends: (1) a trend toward greater multilateral cooperation and unification in private law and private international law matters, and (2) a trend toward increased respect for party autonomy in determining the rules applicable to private relationships. These trends represent a rejection of simple rules of private international law that may be predictable in statement but inequitable in their application. This is a positive trend that is wholly consistent with proper notions of sovereignty in which the state may delegate authority for private commercial relationships in a manner that results in enhanced security and predictability in those relationships.

The fact that the European Court of Justice applies Community conventions and regulations seems at first glance to be consistent with the trend toward multilateralism in private international law. But if the result is simply to make the rules on a different level, but then apply them in a fashion that fails adequately to consider the interests of private parties and of states outside the Brussels system, then the process represents the elevation to a new level of the application of the type of private international law analysis that states otherwise have rejected. Modern private international law is in the process of leaving behind such bygone concepts of sovereignty. The mere fact that the sovereign may now be the European Union rather than one of its Member States does not justify this approach.

Recent cases of the European Court of Justice interpreting the Brussels Convention demonstrate a federalization of Community law, with the Court clearly trying to unify private international law principles within the Community structure. It is important, however, that this
maturation of a multilateral system into a central regime not bring with it the absolutist approach to private international law rules that has otherwise been rejected in efforts to enhance multilateral cooperation and elevate party autonomy. An absolutist rule of private international law may provide the ultimate in judicial predictability without providing either a good rule or predictability in private relationships. By focusing on the predictability of the application of rules, without concurrently recognizing the need for those rules to generate predictability in private party relationships, the European Court of Justice appears to be going in a direction that can only create anew the types of problems many had thought were being put behind us in the evolution of private international law.