European Integration and Transnational Litigation

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INTRODUCTION

The U.S. business community and public have now been thoroughly informed of the "1992 Program" (i.e. the White Paper on Completing the Internal Market\(^1\) and the Single European Act\(^2\) (SEA)) designed to achieve a Single European Market by the end of the year 1992. In most areas, the achievements of the next two and a half years are nothing more than a step towards that single market as the founders envisioned and as set forth in the original treaties.\(^3\) As the European Community progresses rapidly towards a common market, changes, some of which were not contemplated by the White Paper or the SEA, will result in significant developments in legal practice, and in a unique framework for the resolution of international disputes.

Some of the most visible innovations involve the structure of the European legal community. The merger of different legal professions, such as French avocats and conseils juridiques, and British barristers and solicitors, is considered an increasingly necessary modernization in view of competition between lawyers in

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\(^1\) Completing the Internal Market, White Paper from the Commission to the European Council, COM(85) 310 final; 2 Int'l QUARTERLY 97 (1990).


the member states. The British legal community seems unprepared and unwilling to accept such a change, but its French counterpart now appears ready for the necessary adjustments.⁴

These changes in the legal communities' structure began long before the 1992 program. Since 1977, lawyers admitted to practice in one member state have been able to appear in court and establish practices in any other member state. In that year, the European Court of Justice (Court of Justice) issued its landmark ruling that a Belgian lawyer who sought admission to the Paris bar could not be refused admission on the basis of citizenship, and his qualifications had to be recognized throughout the Community.⁵ More recently, an unprecedented number of firms have undertaken discussions with the declared intent to establish some kind of relationship among themselves, either within a member state or between different countries, in a sometimes slightly irrational attempt to deal with the emerging Single European Market.

The increased liberalization of legal practice, however, has not been extended to U.S. lawyers in the Community. U.S. lawyers practicing in Europe are not permitted to appear in most member state courts regardless of their established practice in that member state. Appearance in member state courts depends on bar membership, which remains limited to member state citizens in most member states.

In addition, Community institutions deny U.S. lawyers the equivalent of the attorney-client privilege because U.S. lawyers are generally not admitted to any member state bar. As a result, opinions given by U.S. lawyers in Europe on agreements or practices that may be in restraint of trade or otherwise unlawful, as well as communications from their clients upon which the opinions were based, may be seized by the Commission of the European Communities (Commission).⁶

⁶ The denial of the attorney-client privilege is based on the European Court of Justice's (Court of Justice) ruling in AM & S Europe Ltd. v. Commission, 1982 E. Comm. Ct. J. Rep. 1575. The Commission has disagreed with the ruling, fearing for the interests of European Community lawyers operating beyond the Community, and has called for negotiations with third countries as to reciprocal recognition of privileges. See Council Decision of 9 October 1984 Concerning the Protection of Legal Papers in Connection With the Application of Rules on Competition, COM(84) 548.
The 1992 program will represent hundreds of items of Community legislation which will generally come in the form of regulations,7 with direct effect in member states, and directives,8 with either direct or indirect effect in member states. The characterization of directives as having either direct or indirect effect will have significant impact on potential litigation surrounding the 1992 program. Besides the enforcement of new Community legislation and its interpretation, significant litigation may thus be expected with respect to its implementation.9 Because of the dissimilar nature of regulations and directives and their very diverse subject matters, the types of remedies generated by the new substantive provisions will vary as demonstrated by a few examples.

The most recent and significant development to date, Regulation 4064/8910 (Merger Control Regulation), addresses competition law, the very core of the integration process as envisioned in the original treaties. Starting September 1, 1990, the Commission must be notified of all acquisitions of shares, assets, or even contract rights which make it possible for one company to determine how another shall operate, provided they meet certain size thresholds.

The notification must be made before a merger or joint venture agreement goes into effect.11 Within four weeks of the notification, the Commission will decide whether the merger meets the size requirements12 and whether it intends to commence an investigation.13 The regulation grants the Commission four months to make its determination as to whether the merger would or

7 EEC Treaty, supra note 3, at art. 189(2). Article 189(2) states: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States."
8 Id. Article 189(3) states: "A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."
11 Merger Control Regulation, supra note 10, at art. 10.
12 Id.
13 Id.
would not have the effect of "creating or strengthening a dominant position" as a result of which competition would be significantly impeded.\footnote{Id. at arts. 10, 22.}

Undoubtedly, a number of procedural issues will arise in the very near future in connection with the Merger Control Regulation due to both the economic importance of the phenomenon and the unavoidable sophistication of the process. Litigation will most likely be initiated by companies seeking the cancellation of decisions\footnote{See EEC Treaty, supra note 3, at art. 173(2). Article 173(2) states: \textit{Any natural or legal person may [on grounds of lack of competence, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers] institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.}} or regulations\footnote{Id. at art. 184. Article 184 states: \textit{"Any party may, in proceedings in which a regulation of the Council or of the Commission is in issue, plead the grounds specified in . . . Article 173, in order to invoke before the Court of Justice the inapplicability of that regulation."}} addressed to them or having "direct and individual concern" to them. To contest such decisions and regulations, companies may rely on articles 173 and 184 of the EEC Treaty which will grant private litigants standing to challenge Community legislation on the several grounds that the Community institution lacks competence, infringed an essential procedural requirement, or misused its powers.\footnote{Proposal for a Thirteenth Council Directive of 19 January 1989 on Company Law Concerning Takeover and Other General Bids, COM(88) 823 final, 32 O.J. Eur. Comm. (No. C 64) 8 (1989) [hereinafter Proposed Takeover Directive].} In addition, as the new Merger Control Regulation was obviously unable to modify articles 85 and 86 of the EEC Treaty (the pre-existing competition law provisions), private parties will seek to use them even where the Commission rules on the basis of the merger regulation. For example, hostile takeover targets will most likely seek injunctions from member state courts on the basis of the antimonopolization provision of article 86.

In this respect, the new Proposed Takeover Directive\footnote{Id.} addresses the disparities in member state legislation pertinent to takeover strategies and defensive tactics that create distortions in competition. Once it is incorporated in the member states' legislations, it will restrict companies' ability to benefit from their home countries' favorable environments and simultaneously ac-
quire dominant power over unprotected competitors in other member states. Interested parties will then be able to seek preliminary rulings from the Court of Justice as to the proper interpretation of the directive.

The underlying rationale for harmonizing member states' tax legislation during the first decades of the Community was also to suppress distortions in competition. Such a competition-oriented approach to the Community's tax structures is no longer sufficient in view of ambitious goals such as European Monetary Union (EMU). EMU may only be achieved by narrowing the gap between the member states' taxation of individual and business incomes. The comparatively less ambitious implementation of the VAT system has generated tremendous litigation between the Commission or private parties, on the one hand, and member states accused of not implementing the Community policy, on the other. Recurring litigation has centered around member state tax schemes which allegedly ought to have been characterized as sales taxes and abolished because the VAT preempts all such levies. It is difficult to imagine how the numerous reforms required for EMU could be achieved without comparably complex litigation.

The span of reforms undertaken in pursuit of a Single European Market is extremely broad and potentially touches upon all aspects of member state legislation affecting businesses. "Differences in national laws . . . [which] substantially adversely affect the conditions of . . . competition . . . and trade in goods between Member States" have, for instance, warranted the adoption of Directive 86/653 (Commercial Agency Directive) which coordinates member state laws relating to self-employed commercial

19 Id. at art. 1.
20 See EEC Treaty, supra note 3, at art. 177. Article 177 permits member states' courts or tribunals to bring questions regarding decisions for which "there is no judicial remedy under national law" before the Court of Justice. Member states' courts or tribunals may request preliminary rulings from the Court of Justice concerning the "interpretation" or "validity" of community legislation. Id.
21 For an overview of European Monetary Union, see Economic and Commercial Policy, 2 Common Mkt. Rep. (CCH) ¶ 3601. The Council hopes to "constitute a zone in which persons, goods, services, and capital will move freely," to "form an individual monetary unit within the international system," and to "hold the powers and responsibilities in the economic and monetary field enabling its institutions to organize the administration of the union." Id.
22 Id.
agents.\textsuperscript{23} One of its main provisions is that termination of the agent for circumstances other than those attributable to the principal, such as the agent's age, infirmity, illness, or assignment of the contract, shall entitle the latter to indemnity for either having generated new customers or a significant increase in sales.\textsuperscript{24} In light of some member state and U.S. experience,\textsuperscript{25} it is not difficult to predict a wave of litigation when the directive comes into force. Law suits similar to those brought in the United States by terminated franchises will be brought before member state courts, and interpretation of the directive's provisions will be obtainable from the Court of Justice, as in the case of the Proposed Takeover Directive.\textsuperscript{26}

A U.S. manufacturer exporting to the Community will also have to bear in mind the strict product liability system adopted by Directive 85/374 (Product Liability Directive).\textsuperscript{27} As a consequence, all member states are required to adopt statutes incorporating the new system into their national laws. When the Product Liability Directive is implemented, the manufacturer, seller, or importer of defective products within the Community may be held strictly liable for both personal (bodily injury or death) and property damage.

The Commission's Proposed Product Safety Directive\textsuperscript{28} has indirect relevance to product liability standards, yet remains of the


\textsuperscript{24} Id. at arts. 17-18.

\textsuperscript{25} France, for example, has had a regulation providing for damages in case of termination of commercial agents by their principals for many years. Commercial Agent, Decree No. 58-1345 of 23 December 1958.

\textsuperscript{26} Independent dealers and technology licensees have also sought protection against termination. Not unlike the situation in the United States, they have done so on anti-trust principles as specified in the EEC Treaty under articles 85 and 86. It is significant that provisions dealing with this issue have been incorporated into the regulations providing a block exemption from the application of article 85 to automobile distributorships and service establishments. See Regulation 123/85, Council Regulation of December 21, 1984 on the Application of Article 85(3) of the Treaty to Certain Categories of Motor Vehicle Distribution and Servicing Agreements, O.J. Eur. Comm. (No. L 15) 16 (1985); Comm. Mkt. Rep. (CCH) \textsuperscript{2751}.  


utmost importance. If adopted, the Proposed Safety Directive mandates that member states, and under certain circumstances the Commission, take all steps they deem necessary to ensure that products put in circulation in the Single European Market are safe. Some provisions of the Proposed Product Safety Directive appear quite innovative, such as that granting immunity from legal action to any person who publicly questions the safety of a product with the sole purpose of increasing public awareness.29 The Proposed Product Safety Directive also provides that mere conformity to applicable technical regulations, norms, and standards is only a rebuttable presumption of the product's safety. Likewise, the only valid legal defense is if the defect unavoidably results from conformity with mandatory technical standards.30

For a number of years, the Commission attempted to coordinate national standards only to discover that the more directives it adopted for this purpose, the more national standards were promulgated. Coordination almost seemed to impair rather than facilitate the free movement of goods as a fundamental Community goal. An example of the kind of litigation produced by the European integration is the Court of Justice's ruling in Cassis de Dijon31 that products legally produced and sold in one member state that conform to that member state's standards are to be accepted by all other member states as if in conformity with their standards. Subsequently, the Commission's task has been limited to setting mandatory but essential norms leaving the adoption of specific standards to competent bodies, such as the European Normalization Committee and the standardization organizations of the individual member states.

Although significantly less developed than in the United States, environmental liability could also become a major area of Community litigation. The Community first adopted an environmental policy in 1972, and the fourth environmental program, started in 1987, will be complete by 1992.32 The SEA inserts the title "Environment" into the EEC Treaty which did not previously

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29 Id. at art. 17(2).
30 Id. at art. 5.
contain any environmental provisions. With respect to environmental litigation after 1992, the “polluter pays” principle professed by the Community is the dominant relevant feature. This principle states that “[t]he cost of preventing and eliminating nuisances must in principle be borne by the polluter.” The principle, however, has merely been interpreted to bar member states from granting producers subsidies to allow them to comply with their environmental obligations. The “polluter pays” principle has been applied piecemeal on a directive-by-directive basis in fields such as: waste, toxic and dangerous waste, disposal of PCBs, transfrontier shipments of hazardous waste, and major accident hazards posed by certain industrial activities.

Recently, however, the Commission published a Proposed Waste Liability Directive which if adopted would impose Civil liability for environmental damage or injury caused by waste. The Proposed Waste Liability Directive is similar in approach to the 1985 Product Liability Directive. Based on article 130(R) of the EEC Treaty as amended by the SEA, it would extend the “polluter pays” principle to the arena of civil liability with respect

53 SEA, supra note 2, at art. 25, amending EEC Treaty, supra note 3, at art. 130(R).
to all types of waste produced in the course of commercial activities but not to domestic waste or waste arising from consumer use of products. The Proposed Waste Liability Directive also imposes strict liability on the producers of the waste for causing damage.

These and other changes in the substantive law of the European Community and its member states will invariably invite litigation over issues of competence, implementation, and interpretation. Changes in substantive law, however, are not the only changes affecting litigation. This Article now focuses on changes in litigation structures themselves, and developments in the areas of forum selection (Part I), choice of law (Part II), and enforcement of judgments (Part III).

I. Forum Selection

The factors to be considered by parties when selecting a forum for the adjudication of private disputes, where they are at some liberty to do so, are significantly more numerous and complex in transnational disputes than in any other context. Some crucial steps of the lawsuit are supposedly facilitated by international treaties, such as the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (Hague Service Convention) and the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (Hague Convention on Evidence). While the United States and most member states are parties to both conventions, Ireland has not ratified the Hague Service Convention. Similarly, Belgium, West Germany, and Ireland have all failed to ratify the Hague Convention on Evidence. In addition, both conventions are the subject of extensive litigation and have to some extent aggravated the difficulties they were designed to remedy. Indeed, for reasons described below, a number of foreign countries even

43 Id. at art. 3.
prohibit the gathering of evidence on their territories for use in U.S. courts. None of these procedural features, however, appear to have any relation to European integration even though they will clearly affect transnational litigation with the Community. In the meantime, several significant events that are somewhat more linked to European integration have affected the jurisdictional landscape lately so as to modify the process by which parties normally select a forum for the resolution of their disputes.

A. Changes Affecting the Available Forums and their Jurisdictions

Unlike the United States, there is no independent federal authority with full jurisdiction over a matter in the Community. The Community’s prescriptive and enforcement jurisdictions are constitutionally limited to those matters delineated in the Community treaties. Therefore, member states normally retain sole jurisdiction to regulate private business relationships and their courts preside over disputes arising therefrom.

1. Community Courts: The Creation of the Court of First Instance

One of the most noteworthy recent events is the creation of the Court of First Instance of the European Communities (Court of First Instance) which has functioned since September 1, 1989. Like the Court of Justice, the Court of First Instance is modelled on the French Conseil d’Etat, the highest court with jurisdiction over relationships with administrative bodies. Like the Conseil d’Etat the Court of First Instance’s proceedings are collegial in


the sense that no dissenting opinions are issued, and deliberations are secret. The purpose of the Court of First Instance is to alleviate the Court of Justice's heavy caseload and thereby allow it to concentrate on the difficult legal issues raised by the necessity of ensuring uniform member state interpretation of Community law.

The jurisdiction of the Court of First Instance will, at least for the first two years, be limited to appeals from Commission decisions on levies, price-fixing and competition law, and other actions of the Community institutions. The Court of First Instance will also have original jurisdiction over disputes between the Community and its employees.

After two years of operation, the court's jurisdiction may be extended by the Council of the European Communities (Council) to matters such as dumping and government subsidies. Because the enforcement of Community antidumping and countervailing duty law is important to U.S. exporters, the Court of First Instance can be expected to become a major actor in trade disputes with the United States and Japan, not unlike the Court of International Trade in the United States.

The Court of Justice will retain exclusive jurisdiction over all preliminary references brought by national courts including those relating to EEC competition law. The Court of First Instance will hear appeals from Commission rulings on practical issues such as: the duty of manufacturers to provide warranty service throughout the Community for gray market goods; sanctions against price-fixing by nonmember state manufacturers whose products are imported into the Community; and the extent to which franchisers can interfere with franchisees' choices of suppliers. Rulings by the Commission pursuant to the Merger Con-
trol Regulation will likewise be appealable to the Court of First Instance. The creation of this court promises to provide a significant safeguard against erroneous Commission determinations because it will handle matters requiring close examination of complex facts.

The Court of First Instance will share the same procedural rules as those of the Court of Justice. In cases where both courts are hearing cases on the same issue of interpretation and that request the same relief, the Court of First Instance may stay the proceedings before it until the Court of Justice has delivered its judgment. When two different parties bring parallel suits for the same cause of action, the Court of First Instance may decline jurisdiction. Alternatively the Court of Justice may stay its proceedings.

Parties are granted the right to appeal to the Court of Justice within two months of the Court of First Instance's decisions. Such appeals are limited to points of law, as they are in member state courts. The grounds for appeal, which are also derived from French administrative law, include “lack of competence of the Court of First Instance, breach of procedural process adversely affecting the appellant's interest, [and] infringement of community law.”

The jurisdiction of the Court of First Instance does not exceed the Court of Justice's jurisdiction which itself extends to matters involving the interpretation and application of Community law. Because Community law only covers matters affecting European economic integration, the jurisdiction of neither court may be compared to the U.S. federal judiciary, which has a more general jurisdiction. As a result, the courts of the individual member states must resolve many disputes that fall outside the jurisdiction of the Court of Justice and the Court of First Instance.

2. Individual Member State Courts: Adoption of the Lugano Convention

Most private disputes, including actions in tort, will remain within the sole jurisdiction of the individual member state courts.

53 Id. at art. 7.
54 Id.
55 Id.
56 Id.
57 Id.
Two international conventions are changing the European landscape in this respect. After two decades, the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Brussels Convention) remains particularly significant to European practices. In force in all member states except Spain and Portugal, the Brussels Convention provides uniform rules of jurisdiction, applicable to civil and commercial disputes, for individual and corporate defendants domiciled or headquartered in a member state. The convention solves difficult issues such as joinder of related claims pending in different courts and consolidation of related actions. More importantly, the Brussels Convention, not unlike the “full faith and credit” clause of the U.S. Constitution, facilitates the recognition and enforcement of judgments throughout the Community.

The Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (Lugano Convention) marks the first opening of the Community to European nonmember states in the field of litigation. The purpose of the Lugano Convention is to extend the rules of the Brussels Convention, previously only applicable to civil and commercial matters involving parties having certain contacts with member states, to parties in countries that are members of the European Free Trade Association (EFTA). The United States, in fact, could also technically become a party to the Lugano Convention, which would ensure uniform enforcement of U.S. judgments in most

58 European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 11 O.J. EUR. COMM. (No. C 97) 2 (1969); J.L.M. 229 (1968) [hereinafter Brussels Convention]. The recognition and enforcement of judgments among the member states of the Brussels Convention differs drastically with the treatment of foreign judgments in the United States, where no federal statute, treaty or federal common law exists governing the enforcement of foreign judgments. See generally Thieffry & Lécuyer-Thieffry, Le Reglement des Litiges Civils et Commerciaux avec les Etats-Unis (1986) [hereinafter Thieffry & Lécuyer-Thieffry]. The Brussels Convention is currently in force in Belgium, the Netherlands, Luxembourg, France, the Federal Republic of Germany, Italy, Ireland (since June 1988) and Greece (since June 1989). The ratification process is still pending in Spain and Portugal, as well as Iceland, Norway, Austria, Switzerland, Finland and Sweden.


60 Id. at art. 61(3). European Free Trade Association (EFTA) member states include Iceland, Norway, Austria, Switzerland, Finland and Sweden. The convention will become effective after it is ratified by at least one Community member state and one EFTA member state.
European countries. It is unlikely, however, that this will happen soon, for all parties to the Lugano Convention must consent, a step they may be reluctant to take in view of some unique features of U.S. litigation, such as pretrial discovery, jury trials, and punitive damages.

B. The Forum Selection Process

As is true in the United States, parties to a law suit in the Community do not always control the forum selection process. The single most significant example of forced forum selection is in the area of enforcement of competition rules. In this area, the Commission can initiate a case on its own motion, after a request for clearance, or upon receiving a complaint. The Commission can then impose sanctions, and appeals can be brought before the Court of First Instance and the Court of Justice.\(^61\) In the event that the involved parties are not located within the Community, the jurisdictions of the Commission and the courts will not be defeated.\(^62\)

In the bulk of disputes between private litigants, however, the forum is usually a member state's court, and its selection is of paramount importance in international disputes involving pecuniary reparation. Illustratively, damages awarded in the several member states for similar injuries are not likely to become identical merely as a result of the adoption of the Products Liability Directive. Neither will the disparities become closer between the varying periods of time that elapse between the filing of lawsuits and judgments, or the different burdens and expenses of appearing before member state courts.

In tort actions, the Brussels Convention—and, when it comes into force, the Lugano Convention—will generally cause injured persons to bring suit either in the member state where the accident took place or in the state where the product was manufac-

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\(^{61}\) Alternatively, instead of filing a complaint with the Commission, any injured party can bring a law suit in a member state's court with jurisdiction.

tured. In contract actions, the plaintiff, a former commercial agent or distributor for example, will normally sue in the member state where performance either occurred or was to take place. Although the plaintiff has the option of suing in the member state where the defendant is domiciled, this is usually an expensive and burdensome alternative.

If the defendant is not domiciled in the Community, however, as would be the case with a U.S. exporter, the member state's rules on jurisdiction are fully applicable. In most circumstances, these rules would lead to similar results. Obviously, the role of the Court of Justice in harmonizing differences in the application of the rules of the Brussels and Lugano Convention will be extremely significant. The Court of Justice's jurisdiction, however, does not extend beyond securing harmonious and consistent application of community law by member state courts and will not interfere with factual findings such as the quantum of damages.

1. Forum Shopping and the Nonmember State Defendant: The Example of Product Liability

The new product liability legislation supplies a topical example of a plaintiff's perspective on forum shopping. A party injured in the Community by a product manufactured in the United States will probably prefer to file a lawsuit in the courts of the injured party's place of residence against the importer of the defective products. Assuming that the importer has assets within

63 Brussels Convention, supra note 58, at art. 5 provides that: "A person domiciled in a Contracting State may, in another Contracting State, be sued in matters relating to tort, delict or quasi-delict, in the courts of the place where the harmful event occurred . . . ." The Court of Justice has ruled that this provision encompasses the courts of both the place where the accident occurred and that of where the event was originally caused. Bier v. Mines de Potasse d'Alsace, S.A., 1976 E. Comm. Ct. J. Rep. 1735 (1976).

64 Brussels Convention, supra note 58, at art. 5(1) provides that:

A person domiciled in a Contracting State may, in another Contracting State be sued:

. . . in matters relating to a contract, in the courts of the place of performance of the obligation in question;

(5) as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.

Id.

65 Id. at art. 2.

66 French courts, for example, would retain jurisdiction over disputes when a tort occurred or produced effects in France and when a contract's performance occurred in France. Noveau Code de Procédure Civil, 1981, at art. 46.
the Community, suing the importer rather than the actual foreign producer would be simpler, less costly, and more efficient for the plaintiff. The Product Liability Directive renders proceeding against the importer possible and states that "any person who imports into the Community a product for sale, hire, leasing or any form of distribution in the course of his business . . . shall be responsible as a producer." If the producer is not identified, a supplier will be considered a producer and can be sued as a producer, "unless he informs the injured person, within a reasonable time, of the identity of the producer or of the person who supplied him with the product." Thus, there is no incentive in the directive for the injured person to sue the foreign producer directly, even if it is possible.

Regardless of whether the plaintiff sues the importer or another supplier, the defendant may implead the actual producer under the forum's rules of jurisdiction and procedure. Such a defendant may also bring a separate claim against the actual producer after a judgment has been entered against him. A separate claim, however, depends on their contractual arrangements, assuming some kind of indemnification or "hold harmless" provision has been agreed upon between them.

The Product Liability Directive further provides that "the liability of the producer . . . may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability." It is likely that this provision shall be interpreted to allow contractual apportionment of liability between the actual producer, the importer into the Community or a particular member state, and all other distributors or dealers thereof. It should be stressed, however, that indemnification and "hold harmless" agreements are quite unusual in civil law countries and therefore should be drafted with caution so as not to endanger their effectiveness.

A less logical course of action, at least insofar as the European framework is concerned, is for the injured plaintiff to bring suit directly against a nonmember state producer in the latter's country. One must not completely rule out the possibility of lawsuits being brought in nonmember state courts where choice of law rules would direct these courts to apply a member state law and,

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67 See Product Liability Directive, supra note 27, at art. 3(2).
68 Id. at art. 3(3).
69 Id. at art. 12 (emphasis added).
therefore, a law derived from the Product Liability Directive. For example, a person injured in a member state by a product made in the United States may sue the U.S. producer in a U.S. court. In this case, the U.S. defendant may successfully plead *forum non conveniens*. In certain specific sets of instances, however, as where the plaintiff is a U.S. citizen, the defendant may not raise *forum non conveniens* successfully and the law of the place where the accident occurred might be applied.

Some U.S. producers and Anglo-American lawyers appear convinced that the doctrine of *forum non conveniens* would be an inadequate defense for U.S. defendants, because U.S. courts will recognize the hardship for the plaintiff of being deprived of specific U.S. procedural devices such as discovery.

The U.S. Supreme Court has recently ruled in *Piper Aircraft v. Reyno* that the presumption favoring plaintiff's choice of forum applies with diminished force when the plaintiff is a foreign citizen. 70 The outcome of such issues, however, turns upon a balancing of private and public interest factors which appear to favor the choice of U.S. courts where there is U.S. involvement in the alleged tortious conduct and the interests of U.S. courts in resolving the dispute are significant. 71 Furthermore, the networking of the U.S. plaintiff bar and some European equivalents, such as the British, reportedly would facilitate the filing of such cases in the United States. Meanwhile, potential defendants' counsels develop theories under which the doctrine of *forum non conveniens* should bar such attempts. 72 To a European observer, it appears that U.S. courts should be inhospitable to such actions because Community institutions never intended the Products Liability Directive to be applied under the U.S. procedural system. Application of the directive by U.S. courts carries the potential of creating further distortions between competitors. Finally, potential U.S. defendants should note that the cost of defense and the amount of damages awarded by European courts are lower than in the United States. While it may seem impractical and more costly for a non-U.S. plaintiff to sue in a U.S. court, 73 such a suit may well bring a harsh result for the U.S. producer.

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72 Id.
73 Bringing suit in the United States may appear more costly to European consumers who are not accustomed to contingent fees.
2. Are U.S. Courts an Alternative Forum in Transatlantic Disputes?

With respect to transatlantic disputes, most litigants are generally distressed by the procedures of the courts of the other country. U.S. style procedural rules, the absence of which U.S. litigants tend to criticize in European courts, are precisely those considered to be the most outrageous by European litigants in U.S. courts. The procedural conditions which led to the current liability crisis in the United States do not exist in Europe.\(^\text{74}\) Even in the two common law member states, the United Kingdom and Ireland, certain U.S. procedural and institutional devices, such as discovery, oral testimony, cross-examination, and jury trials are much less widely available than in the United States.

a. The Absence of Discovery

Not only is discovery totally unknown to most civil law systems, in a number of civil law countries, and even common law countries such as the United Kingdom, "blocking statutes" prohibit the supply of information for the purpose of participating in pretrial discovery.\(^\text{75}\) The party that alleges facts has the burden of proving them, which is normally done by producing written documents into evidence. Prior to hearings on the merits, parties must exchange the documents upon which they intend to rely so that each party has the opportunity to analyze and elaborate on the other's offers of proof.\(^\text{76}\) While parties have a legal right to request the court to order the production of a document held by a third party, this right is exercised only for particularly important documents.\(^\text{77}\)

\(^{74}\) See generally, Thieffry & Lécuyer-Thieffry, supra note 58.

\(^{75}\) E.g., French Law No. 80-538, supra note 46 at art. 1-bis. Article 1-bis of the 1980 law provides:

Subject to international treaties and agreements, all persons are prescribed from asking for, searching or communicating by writing, orally or in any other form, documents or information of an economic, commercial, industrial, financial or technical nature, meant for the establishment of evidence in a foreign jurisdictional or administrative proceeding or in relation thereof.


\(^{76}\) E.g., NOUVEAU CODE DE PROCÉDURE CIVIL, 1981, at art. 132.

\(^{77}\) Id. at art. 138.
Furthermore, depositions and interrogatories are completely unheard of in civil law countries. Even in England, no depositions are taken except in unusual circumstances. Document demands and interrogatories are possible only with leave of the court. Discovery against nonparties is not available except in personal injury actions, and the circumstances for which it is available are much narrower than in the United States. Such narrow discovery rules prevent "fishing expeditions."\(^78\)

b. Less Adversarial Hearings

Unlike U.S. procedures, civil law procedures do not allow direct or cross-examination of witnesses. Oral testimony is extremely rare—at least in civil practice—and parties cannot testify. Above all, the trial of similar cases is much shorter in civil law countries than in the United States or other common law countries. This is primarily due to the absence of oral testimony or, when oral testimony is allowed, to the absolute prohibition on lawyers from addressing witnesses at any time. It is unethical (and the evidence would be inadmissible) for a lawyer to speak with a witness, whether during a hearing or in preparation of his testimony. Thus, hearings in major civil and commercial cases can be limited to a few hours and run scarcely more than a half day. Such cases are normally limited to the lawyers' oral arguments, presented after the filing of elaborate pleadings introducing all legal and factual arguments on behalf of the parties.\(^79\)

c. The Absence of Juries

Europeans are wary of U.S. jury trials because of the wide discrepancies in awards between Community and U.S. jurisdictions. In civil law countries, juries do not participate in civil or commercial matters. Although some special courts with jurisdiction over serious criminal cases do use juries, most judgments are rendered by courts composed of three professional judges. Because there is no need to protect juries against inadmissible evidence, the rules of evidence are much less sophisticated than in the United States. Thus, even hearsay has long been admissible evidence.\(^80\)

\(^78\) Epstein, English Discovery Simpler and Cheaper, Nat'l. L.J., Nov. 28, 1988, at 17–19.
\(^79\) See Thieffry and Lécuyer-Thieffry, supra note 58, at 144.
\(^80\) Id.
Public Prosecution of Crimes of an Economic Nature

Another concept, largely foreign to European procedural systems, is that of the private attorney general. Treble damages, punitive damages, and contingent fees are unknown both in civil law countries and in the United Kingdom, and class actions are still a recent and exceptional phenomenon. The more simple European procedures are supposed to allow victims of accidents to recover without such devices. In addition, in the United Kingdom, the losing party must bear the winning party's costs. When faced with a choice between suing in a U.S. or a member state court, the European forum shopper should clearly consider these procedural and institutional differences.

II. CHOICE OF LAW

Besides the procedural features discussed above, another well-known reason for forum shopping is the fact that different jurisdictions all have their own choice of law rules that often create significant distortions. Although fewer than the changes affecting the courts' jurisdictions and procedures, some proposed and ongoing changes in choice of law rules should be noted.

A. Conventions Bearing on Choice of Law Considerations

Discrepancies between member state laws may be greater with respect to their choice of law rules than in most other areas. Even the sale of goods, the simplest and most common type of business relationship, is not the subject matter of a unified body of choice of law rules. The Convention on the Law Applicable to International Sales of Goods (Hague Conflicts Convention) was ratified by only eight European countries. Under the Hague Conflicts

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81 E.g., for judgments in France, see Thieffry and Lécuyer-Thieffry, supra note 58. For judgments in England, see Epstein, supra note 78.
82 E.g., for French procedure, see Thieffry & Lécuyer-Thieffry, supra note 58, at 198.
Convention, courts of contracting states will apply the law clearly chosen by the parties either expressly or implicitly. Where the parties have not agreed on the applicable law, the sale is governed by the law of the country where the seller had its usual place of business at the time it received the order. If the order is received by a branch, the law of the country in which the branch is located is applied. If the order has been received in the purchaser's country by its seller or agent, then the law of the purchaser's country of residence, or that of the country where the ordering branch is located, applies. Finally, the law of the country where the goods are to be examined applies to the mode of examination and time periods within which such examination and the corresponding notices must be made.

Other relevant conventions have attempted to unify the substantive provisions of the contracting states' laws rather than their choice of law rules. The Hague Convention on Uniform Law for the International Sale of Goods (ULIS) and the Hague Convention on the Formation of Contracts for the International Sale of Goods (ULF) are currently in force in nine countries. Of these, only Italy is a member of the United Nations Convention on Contracts for the International Sale of Goods, signed in Vienna on April 10, 1980 (CISG). The CISG is already in force in seventeen countries, including the United States, France, and Italy. At least five more countries, including West Germany,

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85 Id. at art. 2.
86 Id. at art. 3.
87 Id.
88 Id.
89 Id. at art. 4.
have deposited their instruments of ratification with the United Nations Commission on International Trade Law (UNCITRAL). The CISG should be in force in at least twenty-two countries by early 1990.93

The CISG offers uniform rules albeit at the cost of introducing new or foreign legal concepts or mechanisms into their relationships. The CISG, however, does not apply to all sales contracts. Article 2 of the CISG states that sales to consumers of commercial paper, money, ships, and vessels by auction, execution, or other authority of law are excluded from the scope of the CISG. In addition, the convention does not govern issues other than "the formation of the contract of sale and the rights and obligations of the seller and buyer arising from such a contract." Therefore, the CISG does not cover the validity of the contract, its individual provisions, or the effect of the contract upon title to goods. As a consequence, while the CISG may resolve certain ambiguities concerning individual contracts for the sale of goods, it will not rule out choice of forum and choice of law considerations during the negotiation process of such contracts.94

Due to the limited success of the Hague Conflicts Convention, ULIS, and ULF, and the substantive nature of the CISG, the broad scope of the Convention on the Law Applicable to Con-


See Editors Note, "The UN Convention Contracts for the International Sale of Goods," An Update, 23 INT'l Lw. 797–98 (1989). According to one commentator, several other countries are considering ratification or accession, i.e., Czechoslovakia, Denmark, the Federal Republic of Germany, the German Democratic Republic, the Netherlands, Poland, Spain, and Switzerland. See Winship, The International Sale of Goods Manuscript, cited in Alejandro M. Garro, Reconciliation of Legal Traditions in UN Convention for the International Sale of Goods, 23 INT'l Lw. 443, n.7 (1989).

93 CISG, supra note 91, at art. 2. All sales of goods between the United States and France or Italy, inter alia, are governed by the Convention.

94 Thieffry, supra note 91, at 1017–22.
tractual Obligations (Rome Convention), which was opened for signature by Community member states in Rome in June 1980, will be a significant complement to the present legal framework.\textsuperscript{95} Not unlike the Hague Conflicts Convention, the Rome Convention provides that any contract, not only those concerning the sale of goods, shall be governed by the law chosen by the parties.\textsuperscript{96} If no law has been chosen, the law of the country "with which the contract is most closely connected" will apply.\textsuperscript{97} The Rome Convention presumes that the contract is most likely connected to the country of the performing party's habitual residence, central administration, or principal place of business, depending on the case. The performing party is the party who effects performance characteristic of the contract.\textsuperscript{98} Thus, if the presumption is not rebutted in a dispute involving a distributorship or license agreement for a U.S. territory, the relevant U.S. law could be applied by a member state court under the Rome Convention.

Like the Brussels Convention, but unlike the Lugano Convention involving nonmember state countries, the Rome Convention will be interpreted uniformly within the Community.\textsuperscript{99} When the need for interpretation of any provision arises, the member state courts may stay their proceeding and refer questions to the Court of Justice for a preliminary ruling before making their judgments.\textsuperscript{100} Since the Rome Convention's provisions are complex, the need for interpretation will probably arise quite often. Most member state choice of law provisions give primary importance to the place of performance, place of contemplated performance, or assessment of the "localization" of the contracts.\textsuperscript{101} Therefore, for typical cases, the results achieved by application of the Rome Convention should be quite similar to those presently obtained by the member state choice of laws provisions.

\textsuperscript{95} Convention 80/934, Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, 23 O.J. EUR. COMM. (No. L 266) 1 (1980) [hereinafter Rome Convention]. It is relevant to note that the Communities' Draft Convention was originally designed to cover contractual and non-contractual [tort] obligations but was subsequently amended, dropping the provisions on non-contractual obligations.

\textsuperscript{96} Id. at art. 3(1).

\textsuperscript{97} Id. at art. 4(1).

\textsuperscript{98} Id. at art. 4(2).

\textsuperscript{99} Id. at art. 18.

\textsuperscript{100} EEC Treaty, supra note 3, at art. 177(1)(a).

\textsuperscript{101} H. Batiffol & P. Lagarde, Droit International Prive 265 (1983).
B. The Absence of Uniform Conflict of Law Rules in Non-Contractual Disputes: An Incentive to Forum Shop in Products Liability Actions

Whenever a product liability suit is filed in a court in France, Luxembourg, or the Netherlands, the applicable national law is likely to be determined by the court in accordance with the provisions of the 1973 Hague Convention on the Law Applicable to Product Liability (Hague Convention).102 The Hague Convention directs the courts of signatory countries to apply the law of the "[s]tate of the place of injury,"103 the "[s]tate of the habitual residence of the person directly suffering the damage,"104 or the "[s]tate of the principal place of business of the person claimed to be liable,"105 depending on other contacts between the parties and these countries. The scope of the Hague Convention, however, is not identical to that of the Product Liability Directive. For example, the Hague Convention is not limited to claims where the product has been supplied to the injured person by the defendant.106

Likewise, product liability actions not within the scope of the Hague Convention, like those filed in the courts of the nine member states not parties to the Hague Convention, will be settled according to the forum's own choice of law rules. In most cases, the applicable law will be that of the country where the accident took place or that of the country where the injury was sustained. In any event, it cannot be assumed that the same substantive rules of law will apply to all product liability suits filed in the Community resulting from accidents having occurred therein or filed by injured residents thereof.

103 Hague Convention, supra note 102, at art. 4.
104 Id. at art. 5.
105 Id. at art. 6.
106 Id. at art. 1.
Even when all member states have finally incorporated the Product Liability Directive\textsuperscript{107} into their domestic laws, their provisions will remain somewhat different owing, among other factors, to the options the directive makes available to the member states.\textsuperscript{108} If, for example, the law of West Germany is applicable, the overall liability of a producer shall be limited to DM160 million, whereas the producer's liability for identical items with similar defects will not be similarly capped in other member states. Primary agricultural products and game will apparently be subject to the directive's system in France, Luxembourg and Italy and—as far as it is possible to expect at the time of this paper—not in other member states. Manufacturers will not be exposed to a uniform regime regarding available defenses to them since member states are permitted to rule out the "state of the art" defense, which France, Luxembourg, and Spain have considered at times. In addition, the wording of the new statutes and the extent to which the directive will have led the member states to modify their existing systems will differ noticeably. In countries which are expected to modify their civil codes, such as the Netherlands and France, significant reforms to their general liability system will result from their incorporation of the directive. Another source of distortion rests in the incorporation of supplementary provisions into the directive's requirements by the

\textsuperscript{107} Product Liability Directive, \textit{supra} note 27.

\textsuperscript{108} These differences, to a great extent, will be due to the leeway the directive provides the member states. For example, if the law of the Federal Republic of Germany is applicable, the overall liability of a producer shall be limited to 160 million DM, whereas the producer's liability for identical items with similar defects will not be similarly capped in other member states. Primary agricultural products and game will apparently be subject to the directive's system only in France, Luxembourg, and Italy. Manufacturers will not be exposed to a uniform regime of available defenses since member states are permitted to eliminate the "state of the art" defense.

In addition, the wording of new domestic statutes and the extent to which Directive 85/374 will lead member states to modify their existing systems will differ noticeably. In member states which are expected to modify their civil codes, such as the Netherlands and France, significant reforms in their general liability systems will result from their incorporation of the directive.

Another source of distortion rests in the incorporation of supplementary provisions along with the directive's requirements into the implementing statutes of the member states. For example, the Italian statute and the French intermediate draft both define the "putting into circulation" of the product, while other statutes might not do so. In this respect, it is not insignificant that the incorporation of the directive into the member states' domestic law does not prevent prior legal provisions, however different, to be used as a basis for products liability action.
implementing statutes of the member states. For example, the Italian statute and the French intermediate draft both define the "putting into circulation" of the product, while other statutes might not do so. In this respect it is not insignificant that the incorporation of the directive in the member states' national laws does not prevent legal provisions to be used as a basis for products liability action, however different they are. The lack of uniformity in member states' statutes of limitations will only constitute a further incentive to forum shop, as plaintiffs will tend to circumvent the effect of statutes of limitations in some jurisdictions by bringing suit in others where the statute of limitation has not elapsed. Sensitive to this issue, the Products Liability Directive provides a uniform statute of limitation to be applied in products liability cases. The conflict of law rules commanding the application of a member state law incorporating the directive might not apply, however, to the issue of which law should determine the limitation periods. Consequently, the directive's liability rules could be applied by a nonmember state court together with the forum's longer statute of limitation. Furthermore, because the directive has not suppressed actions under preexisting member state laws, the application of these laws and their corresponding statutes of limitations will be determined by the forum's choice of law rules and will not necessarily lead to consistent results.

Indeed, European plaintiffs may attempt to bring their complaints against U.S. defendants in jurisdictions applying longer statutes of limitations. The harsher treatment of claims by the U.S. courts and the longer statutes of limitations afforded would most likely constitute a dual benefit to these plaintiffs. Recognizing the excessive harshness of the situation for U.S. producers, the Restatement (Second) of Conflict of Laws was recently amended by providing that the forum should not apply its longer

109 Art. 7 of the Italian statute and article 1387-22 of the French intermediate draft.
111 Product Liability Directive, supra note 27, at art. 10. Article 10 requires a three-year statute of limitations which runs from the time plaintiff becomes aware or reasonably should have been aware of the defect. Id.
statute of limitations if there exists a shorter one in a jurisdiction with closer contacts.\textsuperscript{112}

III. Enforcement

When one or both parties can influence forum selection, they should also consider available enforcement mechanisms. U.S. defendants will most often be indifferent to which forum renders an unfavorable judgment. When the judgment is not rendered in the U.S., the judgment's enforcement will normally be obtained in the United States.\textsuperscript{113} Experience shows, however, that procedural difficulties may arise which make transnational enforcement more burdensome than expected. Particularly surprising to U.S. parties, however, is that enforcement of a member state court judgment can also be sought throughout the Community.\textsuperscript{114} For winning U.S. plaintiffs, whether the judgment is made by a U.S. or member state court has a significant impact on the cost, burden, and likelihood of its enforcement.

A. Enforcement of Member States' Judgments in Other Member States

As discussed, the Brussels Convention facilitates recognition and enforcement of judgments throughout the Community, and the Lugano Convention will extend this system to EFTA countries. Under the Brussels Convention, a judgment rendered by any member state court will be readily enforceable in any other member state.\textsuperscript{115}

In view of the cost of enforcing a judgment in the United States, a U.S. producer could become a party to a product liability lawsuit, joined with the importer or the supplier of the product, so that enforcement could nevertheless be pursued within the

\textsuperscript{112} \textit{Restatement (Second) of Conflict of Laws} § 142 (1971), (amended 1988), abandons the traditional procedural characterization of statutes of limitation. Accordingly, courts select the law governing the statute of limitation on the same standards as are used to decide other choice of law questions. See C. Crampton, D. Currie & H. Kay, \textit{Conflicts of Law} 114 (4th ed. 1987).

\textsuperscript{113} \textit{See, e.g.}, Born & Westin, \textit{International Civil Litigation in United States Courts} 56 (1989); Thieffry & Lécuyer-Thieffry, \textit{supra} note 58.

\textsuperscript{114} \textit{Id.}

\textsuperscript{115} Although title II of the Brussels Convention on "Jurisdiction" does not in principle apply where the defendant is not domiciled in a contracting State, title III on "Recognition and Enforcement" applies to "any judgment given by a court or a tribunal of a Contracting State," irrespective of the parties. Brussels Convention, \textit{supra} note 58, at arts. 24–25.
Community. Under the Products Liability Directive, the producer and other defendants may be held jointly and severally liable for the same damage "without prejudice to the provisions of national law concerning the rights of contribution or recourse." Likewise, if the foreign producer is not joined as a defendant, its liability can nevertheless be separately pursued by a defendant against whom a judgment is entered as this would be "without prejudice to the provisions of national law concerning the rights of contribution or recourse."

The Brussels Convention provides exceptions to enforcement within the Community on the following grounds: public policy; default judgments in the absence of proper service and opportunity to defend; conflicts with earlier judgments of other contracting states; inconsistency with certain jurisdictional principles laid down in the convention; and judgments involving status, marital status, capacity, or succession.

Of particular relevance to nonmember state parties is article 28(1) of the Brussels Convention which excuses member states from enforcing other member state judgments if the judgment is based on the exercise of exorbitant personal jurisdiction. These jurisdictional restrictions, however, extend only to actions brought against member state nationals. As a result, courts will

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116 While the process may be costly, U.S. policy is favorable to enforcement of foreign judgments. Since there is no federal statute or treaty applicable to the enforcement of foreign country judgments in U.S. courts, however, the recognition and enforcement of foreign judgments is governed by the common law and statutes of the individual states. Statutes such as the Uniform Foreign Money-Judgments Recognition Act, enforced by some 16 States, are an exception to this rule. See 100 A.L.R. 3d 792 (1989) (The National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Act in 1962). Hilton v. Guyot, 159 U.S. 113 (1894) established the U.S. general rule favoring the recognition and enforcement of foreign judgments without any re-examination by a U.S. court of the merits of the parties' dispute. It further identified a number of exceptions: that the foreign judicial proceedings were either unfair or biased; the foreign court lacked personal jurisdiction over the defendant; the foreign court lacked subject matter jurisdiction over the dispute; there was a showing of fraud and other irregularities in the foreign proceedings; the foreign cause of action of judgment violated U.S. public policy; the foreign court that rendered the judgment would not be willing to enforce U.S. judgments on a reciprocal basis. Id. at 228. Courts examining these exceptions, however, have construed them in an extremely limited fashion. See generally Born & Westin, supra note 113, at 564–604.


118 Id.

119 Brussels Convention, supra note 58, at art. 27.

120 Id. at art. 28.

121 Id.
enforce judgments based on exorbitant exercise of personal jurisdiction against nationals of nonmember states. Therefore, should a judgment be entered against a U.S. individual or company in one member state, such judgment will be enforced and recognized in any other member state where the U.S. party merely possesses assets, irrespective of whether or not it has any other contact with the member state. For example, a foreign plaintiff could bring an action against the U.S. party in a member state solely based on the nationality of the plaintiff, which under article 14 of the French Civil Code is a jurisdictional basis, or on the presence of property owned by the U.S. party, regardless of whether that property was related in any way to the dispute. A judgment based on such an assertion of jurisdiction could be enforced in any member state.\textsuperscript{122}

B. Enforcement of Nonmember State Judgments in the Member States

Because the United States is not a signatory to the Brussels Convention, nor to any bilateral or multilateral treaty facilitating the enforcement of foreign judgments, an assessment of the difficulties of obtaining enforcement of U.S. judgments should be made on a country-by-country basis.

For example, the Belgian Judicial Code\textsuperscript{123} provides for court examination of the merits of the foreign judgment and allows the court to decide whether to enforce all, part, or none of the foreign judgment. Enforcement of a U.S. judgment is granted in the United Kingdom if it is final, for a definite sum of money, and rendered by a court of competent jurisdiction. This raises serious difficulty for judgments obtained through the application of broad state long-arm statutes. Enforcement of foreign judgments in France\textsuperscript{124} can be obtained if the following five conditions are satisfied: the foreign court which rendered the decision had jurisdiction; the procedure was not irregular; the applicable law was in accord with that which would have been applicable under French conflict of law rules; the decision complied with international public policy; and the decision was not tainted by fraud.

\textsuperscript{122} Born & Westin, supra note 113, at 603–604. France, for example, has more than thirty such bilateral treaties.

\textsuperscript{123} Belgian Judicial Code, at art. 570.

\textsuperscript{124} Thieffry-Lécuyer, The Enforcement of U.S. Judgments in France, reprinted in, Enforcement of U.S. Judgments Abroad (Westin ed. 1989) (Manuscript to be published by the A.B.A. Section of International Law and Practice) [hereinafter Thieffry-Lécuyer].
In following these standards, French courts have abandoned their nineteenth century practice of reviewing the merits of foreign cases.

It is clear from these limited examples that the enforcement of U.S. judgments in the Community will meet with varying degrees of resistance. In view of such a hostile panorama concerning enforceability, U.S. litigants could be tempted to consider bringing actions in member state courts where possible. By virtue of the Brussels Convention, enforcement of these judgments could be achieved in any member state with little or no trouble.

At this point, the question may be raised whether a U.S. litigant could, in fact, attain a U.S. judgment, seek its recognition in a less hostile member state (like the United Kingdom), and, thereupon, attempt to enforce the member state court’s judgment of recognition in another member state through the mechanisms offered by the Brussels Convention. It is unclear whether the Brussels Convention contemplates such usage. It is interesting to note that the Brussels Convention defines judgment as any judgment given by a court or tribunal of a contracting state, however described, including a decree, order, decision, writ of execution, or determination of costs or expenses by any officer of the court. By making explicit reference to writs of execution, the convention can be read to facilitate member state recognition and enforcement of nonmember state judgments. This issue of interpretation, however, has not been decided by the Court of Justice and, thus, remains open.

In light of these potential enforcement difficulties, private parties to contracts often consider arbitration as a consensual means of dispute settlement. The enforcement of arbitral awards is facilitated by a specific international treaty, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The New York Convention is in force in over eighty-three countries, including the United States and all twelve member states except Portugal. In addition, European countries have traditionally served as arbitration posts between nonmember states and especially U.S. busi-

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125 Such differences also exist with other member states.
126 Brussels Convention, supra note 58, at art. 25; see also Lugano Convention, supra note 59.
nesses, on the one hand, and Middle and Far Eastern businesses on the other.

It is also noteworthy that a number of member states, together with many other countries, are engaged in a worldwide contest to improve their arbitration statutes to become one of the more hospitable places for arbitration.128

CONCLUSION

Except in the more crucial areas, such as the regulation of competition, the integration-related law-making process is not one of preemption of national laws by Community law but rather one of mandatory modification of the former which remain in full force. Not all distortions can be removed, due among other things to the very roots of the member states' civil and common law systems.

European integration generally, and the 1992 program in particular, will continue to alter significantly the legal profession, the substantive areas of member state regulation, and the traditional procedural steps of litigation. In the legal profession, formal barriers to broad practices are crumbling. In several substantive areas of law, new Community and member state regulation has changed the legal landscape, and will surely give rise to litigation over issues of competence, implementation, and interpretation. The creation of the Court of First Instance and new implications for forum selection, choice of law, enforcement, and arbitration all create new considerations for the international practitioner.

Such profound developments mandate that parties involved in international business operations, and particularly in the negotiation of contracts, must be careful in their anticipation of potential disputes and their eventual resolution. The complex structure of the Community's institutional and jurisdictional framework demands it all the more.